



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

J. D. ECKMAN, INC.,

Respondent.

OSHRC Docket No. 15-1048

Appearances: Nicholas C. Geale, Acting Solicitor of Labor
Oscar L. Hampton III, Regional Solicitor
Andrea Luby, Senior Trial Attorney
U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania
For the Secretary

Thomas M. L. Metzger, Esq.¹
Bryan Gramlich, Esq.
Littler Mendelson, P.C.,
Columbus, Ohio
For the Respondent

Before: Dennis L. Phillips
Administrative Law Judge

¹ Thomas Benjamin Huggett, Esq., Little Mendelson, P.C., Philadelphia, PA, represented Respondent at the trial.

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to sections 2-33 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act). On December 3, 2014, at approximately 11:00 p.m., a driver of a 2004 Jeep Liberty veered into Respondent's worksite in the westbound lanes of Route 422 (also known as Benjamin Franklin Highway) in Pottstown, Pennsylvania, and crashed into Respondent's superintendent, killing him.² (Tr. 56; Exs. 1 at "A", 5 at 0211, 18 (police incident report)). The next day, the Occupational Safety and Health Administration (OSHA) inspected Respondent's traffic control worksite on highway Route 422. As a result of the inspection, OSHA issued one three-item citation to J. D. Eckman, Inc. (Respondent or J. D. Eckman), alleging serious violations of the OSH Act and proposing a total penalty of \$21,000.

Respondent filed a timely notice of contest, bringing this matter before the Commission. Respondent raised the following as defenses:

- 1) The Complaint fails to state a claim upon which relief may be granted. Specifically, OSHA has not met its burden of establishing that: the cited standard applies, the employer failed to comply with the terms of the cited standard, and the employer either knew or could have known of the violative condition via reasonable diligence.
- 2) The allegations in the Complaint are barred by their isolated occurrence. The actions of the driver of the Jeep Liberty were the sole cause of the accident.
- 3) The violations for which Respondent was cited are unenforceable due to vagueness/lack of clarity.
- 4) Respondent has been denied due process, including, but not limited to, being cited for failure to comply with interpretations of which they were not given adequate notice (manuals and publications incorporated into OSHA standards do not provide the requisite clarity for enforcement purposes).

² The driver was eventually cited for his actions "under Pennsylvania Title 75 Vehicle code, Section 33-26 for duties within a construction zone, and also Title 75 ...17-46F, for insurance – not having insurance on his vehicle." (Tr. 360-61).

- 5) Respondent lacked the necessary knowledge of the alleged hazardous conditions to support a citation.

(Answer at 5; Joint Pre-Hearing Statement (Jt. Pre-Hr'g St.) at 10).

A hearing was held in Philadelphia, Pennsylvania on December 1 and 2, 2016. Both parties filed post-hearing briefs. For the reasons set forth below, the Court vacates all three of the citation items and proposed penalties.

STIPULATIONS³

The following statements were stipulated as facts by the parties before trial and entered into the record at the request of the parties at trial:

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Administration by Section 10(c) of the Occupational Safety and Health Act.
2. Respondent, J.D. Eckman, Inc., is a corporation that had employees setting up a traffic control zone at approximately 422 WB Mile 171.2 in Pottstown, Pennsylvania. Respondent is, and at all times hereinafter mentioned, was a business engaged in construction.
3. Respondent uses tools, equipment, machinery, materials, goods, and supplies which have originated in whole or in part from locations outside the state of Pennsylvania.
4. Respondent is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 652(5).
5. Respondent employs approximately 450 employees in various construction activities, including approximately 11 employees on Route 422.
6. Beginning on December 4, 2014, an authorized representative of the Secretary of Labor inspected Respondent's Worksite after Respondent notified OSHA of a fatality that occurred at the worksite the previous day.
7. On June 3, 2015, the Secretary issued to Respondent a Citation and Notification of Penalty pursuant to Sections 9 and 10 of the Act. Respondent contests the

³ The Court notes that in the Jt. Pre-Hr'g St., the stipulations are incorrectly numbered: the number 5 is repeated. Thus, there are eleven factual stipulations rather than the ten as numbered in the Jt. Pre-Hr'g St. and as discussed at the trial. (Jt. Pre-Hr'g St. at 6-8; Tr. 20). The Court has corrected the numbering here in this Decision and Order.

validity of the citations, classifications, penalties and abatement dates in that Citation.

8. Respondent filed a timely Notice of Contest with OSHA, contesting all substantive provisions of the Citations, and the proposed penalties. The notice was duly transmitted to the Occupational Safety and Health Review Commission.
9. On December 3, 2014, at Respondent's worksite, Respondent's employees were eradicating lines and painting additional lines to establish long-term traffic control patterns in preparation for upcoming work.
10. At 8:30 p.m. on December 3, 2014, east bound work had been completed and west bound work was started. In this phase, the long term traffic pattern reduced two lanes of 422 west bound into a single lane. The left lane would be closed to create a permanent work zone behind a concrete barrier. A long term traffic attenuator and concrete barrier was to be set to transition the flow of traffic. Because of this, several white dash lines needed to be eradicated and a new tapered yellow line (left side) needed to be painted before the concrete barrier was set. The location of this transition taper was to be established just west on the ramp from Route 100 south.
11. Before this long term pattern had been set up, Respondent's employee, [the decedent]⁴, was struck by a vehicle. [The decedent] died from the injuries that he suffered from this collision.

(Jt. Pre-Hr'g St. at 6-8; Tr. 20).

JURISDICTION

The record establishes that, at the time of the fatal incident, Respondent was setting up a traffic control zone in the west bound lanes of Route 422 in Pottstown, Pennsylvania in preparation for a bridge construction project. (Stipulations (Stip.) at ¶ 2; Tr. 20). The record also establishes that Respondent had eleven employees working on the Route 422 project and employs approximately 450 employees in various construction activities overall. (Stip, at ¶ 5; Tr. 20, 37). The construction industry as a whole affects commerce, and even small employers within that industry are engaged in commerce.

⁴ For personal privacy reasons, the name of the decedent has been omitted from this Decision and Order.

Slingluff v. OSHRC, 425 F.3d 861, 866-67 (10th Cir. 2005); *Clarence M. Jones, d/b/a C. Jones Co.*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). Additionally, Respondent filed a timely notice of contest and admits that, as of the date of the alleged violations, it was an employer engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act. (Answer at ¶¶ 3, 4; Stip. at ¶ 4; Tr. 20).

Based upon the record, the Court finds that at all relevant times Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act. The Court concludes that the Commission has jurisdiction over the parties and subject matter in this case, and Respondent is covered under the OSH Act.

OSHA CITATION

Citation 1, Item 1 alleges a serious violation of section (5)(a)(1), the “general duty clause,” of the OSH Act and proposes a \$7,000 penalty.⁵ The Secretary claims that Respondent violated the general duty clause because Respondent:

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 the employer failed to protect employees from vehicle strikes by not establishing a safe temporary work zone.

(Citation at 6). The Secretary further claims that at:

422 W, mile marker 171.2 – On or about 12/3/2014, the employer created a dangerous work zone by placing traffic control devices at 120 foot intervals instead of the required 40 foot intervals. The employees were not protected from vehicle strikes.

⁵ Section 5(a)(1) of the OSH Act, the “general duty clause,” requires that each employer “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).

(Citation at 6). As a means of abatement, the Secretary proposed that “[a]mong other methods, a feasible and acceptable means of abatement would be to comply with PA Pub. 213 for proper placement of traffic control devices.”⁶ (Citation at 6).

Citation 1, Item 2 alleges a serious violation of 29 C.F.R. § 1926.202/Manual of Uniform Traffic Control Devices (MUTCD) 1988 Edition, Section 6F-8(a)(2) and proposes a \$7,000 penalty.⁷ The Secretary claims that Respondent violated the cited standard because:

Barricades for protection employees did not conform to the portions of the American National Standards Institute D6.1-1971, Manual on Uniform Traffic Control Devices for Streets and Highways, relating to barricades, in that employees were not protected while placing temporary traffic control devices.

(Citation at 7). The Secretary further claims that at “422 W, mile marker 171.2 – On or about 12/3/2014, the employer did not ensure a truck mounted attenuator (TMA) was used to protect employees placing temporary traffic control devices near moving vehicles.” (Complaint at 7).

Citation 1, Item 3 alleges a serious violation of 29 C.F.R § 1926.200(g)(2)/MUTCD 1988 Edition, Section 6C-3, and proposes a \$7,000 penalty.⁸ The Secretary claims that Respondent violated the cited standard because:

Traffic control signs or devices used for protection of construction workers did not conform to Part VI of the Manual of Uniform Traffic Control Devices (MUTCD), 1988 Edition, Revision 3 in that the employer did not provide a roadway transition taper of the requisite length to ensure safe vehicle routing around the temporary work control zone.

(Citation at 8). The Secretary further claims that at:

⁶ PA Pub. 213 refers to Pennsylvania Publication 213, Temporary Traffic Control Guidelines (PA Pub. 213).

⁷ Section 1926.202, a “Signs, Signals and Barricades” standard which incorporates by reference a portion of the Federal Highway Administration MUTCD states: “Barricades for protection of employees 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 section 1926.6.” 29 C.F.R. § 1926.202. (Tr. 194; Ex. 2 at 000124).

⁸ Section 1926.200(g)(2), also incorporating by reference a portion of the MUTCD, states: “All traffic control signs or devices used for protection of construction workers shall conform to Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition, incorporated by reference in Sec. 1926.6.” 29 C.F.R. § 1926.200(g)(2).

422 W, mile marker 171.2 – On or about 12/3/2014, the employer did not establish a transition taper for the temporary traffic control zone to endure safe vehicle routing and that was in compliance with Table VI-2 of the MUTCD, 1988 Edition, Revision 3. The employer's installed taper was approximately 120 feet in length which was much shorter than the approximately 300 feet required by Table VI-2.

(Citation at 8).

INFLUENTIAL ISSUES OF FACT AND LAW

For convenience purposes, the Court states up front that the following issues of fact and issues of law are found to have the most influence on the analysis of the citation items in this case.

The most influential issues of fact include:

- 1) Did the Secretary establish the precise traffic cone spacing of the straightaway⁹ and the length of the transition taper, as alleged in Citation 1, Items 1 & 3, while Respondent was working (not after the incident)? The Court finds that he did not.
- 2) Did the Secretary establish that Respondent used a TMA on its worksite with the purpose of being a TMA at the time of the incident, as alleged in Citation 1, Item 2? The Court finds that he did not.

The most influential issues of law include:

- 1) Did the Secretary establish that the traffic cone spacing of the straightaway was part of a hazard, as defined by Commission precedent, for the alleged general duty clause violation as cited in Citation 1, Item 1? The Court finds that he did not.
- 2) Are the provisions of the MUTCD that are referenced in Citation 1, Items 2 and 3, mandatory, as defined by 29 C.F.R. § 1926.6(a)¹⁰ (which is incorporated by

⁹ To more clearly identify the cones at issue in Citation 1, Item 1, the Court uses the term "straightaway" to describe the location of the cones as they were placed on or near the dashed lines along the centerline of Route 422 west at the time of the incident. The Court acknowledges that the videos and photographs taken after the incident show that the "straightaway" was slightly curved. (Tr. 381-82; Exs. 3, 13, A, E at 4).

¹⁰ Section 1926.6(a) states in pertinent part:

The standards of agencies of the U.S. Government, and organizations which are not 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., 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.

29 C.F.R. § 1926.6(a) (emphasis added).

reference in the cited standards in Citation 1, Items 2 and 3)? The Court finds that these provisions of the MUTCD are not mandatory.

BACKGROUND

Schuylkill Project

Respondent is a bridge and highway construction company working primarily in Pennsylvania.¹¹ At the time of the incident, Respondent was under contract with the Pennsylvania Department of Transportation (PennDOT) to, among other things, repair a bridge over the Schuylkill River along Route 422 near Pottstown, Pennsylvania. (Ex. 4 at 5 (Respondent's contract with PennDOT)). The worksite at issue here was located on the west-bound lanes of Route 422 around mile marker 171 leading up to the Schuylkill River when heading west. (Tr. 36-39, 71-72; Exs. 5 at 1, 15 at 1). Before Respondent could begin working on the bridge over the Schuylkill, Respondent had to create this worksite on Route 422. To create this worksite, Respondent had to implement a long-term traffic control pattern that was developed by PennDOT and incorporated into Respondent's contract with PennDOT. This long-term traffic control pattern would allow traffic to approach the bridge over the Schuylkill and cross it, while work was being done "in a permanent work zone" on Route 422. (Respondent's Brief (Resp't Br.) at 2).

To establish the long-term traffic control pattern, however, Respondent first had to prepare Route 422 for the changes, *i.e.*, remove the existing "dash" lines on the road and paint new lines on the road to convey to another subcontractor where to place the "long-term traffic control" Jersey barriers the following day. On the night of the incident, Respondent was engaged in this work, using a "short-term" traffic control pattern. Because the "long-term" Jersey barriers were not on the road yet, Respondent's workers on Route 422 in the late-night

¹¹ Respondent's headquarters is in Atglen, Pennsylvania. (Tr. 37).

hours of December 3, 2014, relied on “temporary” traffic control measures to designate its work area in the left-hand lane from the still flowing traffic in the right-hand lane on west-bound Route 422.

The differences between the “long-term” traffic control measures and the “short-term” traffic control measures are relevant to this case. Both used the warning signage put in place well before the work zone. Both used an illuminated arrow sign in the transition taper¹² to alert travelers to the lane shift from two lanes to single lane traffic. However, the “long-term traffic control plan” would utilize concrete Jersey barriers to protect the bridge construction worksite.¹³ (Resp’t Br. at 2). The “short-term traffic control plan,” which existed on the night of the incident, utilized traffic cones that were not permanent and easily moved by a single worker. (Tr. 128-29). These traffic cones were stackable, “rubberized, bright orange with two stripes of reflectorization on them.” They were approximately 30 inches high and weighed about 12-20 pounds each. (Tr. 128-29).

The decedent, age 60, was the lead superintendent of the worksite at issue here. According to the record, the decedent had been called in from vacation on the day of the

¹² PA Pub. 213 defines “Taper” as:

A series of channelizing devices and/or paint lines installed for the purpose of moving traffic out of or into the normal path. Various taper types have differing minimum lengths, most of which are based upon an ‘L’ distance. The formula to determine distance L is shown on the corresponding PATA notes page. It should be noted that the taper length is a distance per lane; so if a single taper covers two lanes, the total taper length will be double the calculated or minimum distance.

- Merging Taper – Used when drivers in multiple lanes are required to merge into a common road space. Minimum length is L.
- Shifting Taper – Used when a lateral shift is needed. Minimum length required is distance $\frac{1}{2}$ L, unless traffic is approaching a one-lane, two-way condition; in this case the minimum length is 50’. ...

(Ex. 10 at 000310).

¹³ Superintendent Robert Schaeffer testified that the barriers to be delivered on December 4, 2014 to the worksite were to include both concrete and metal barriers. (Tr. 151).

incident to help the other Respondent superintendents at this worksite, Dave Gardner and Robert Schaeffer. Additionally, a foreman from another one of Respondent's Route 422 worksites (also contracted with PennDOT), Randy Ruof, was sent that day to help with the project at issue here.¹⁴ (Tr. 39). As a superintendent, the decedent was above foreman Ruof "in the chain of command."¹⁵ (Tr. 37-38). Juan Villasenor was driving the Ford pattern truck with a TMA attached on the night of the incident.¹⁶ (Tr. 271-72, 276). The record shows the Ford pattern truck was used to set the cones on the roadway on December 3, 2014. (Tr. 46, 77, 105-06, 367-68).

Worksite Description

The worksite at issue was located within the westbound lanes of Route 422 around mile marker 171.¹⁷ Starting at about two miles to the east of mile marker 171 were advance warning signs providing notice to travelers that the lanes of westbound Route 422 would be shifting from two lanes to one lane, with the left lane closing.¹⁸ (Tr. 44, 254-55 identifying Ex. 13¹⁹ at counter 17-19 seconds). Leading up to approximately mile marker 171, Respondent set

¹⁴ Respondent had multiple other contracts with PennDOT at the same time as the one at issue. (Tr. 39). Foreman Ruof was pulled from his other project to work on the project at issue, and at times during his testimony, Ruof expressed some unfamiliarity with specifics about the project at issue because, "like I said, this wasn't my project[.]" (Tr. 109).

¹⁵ Ruof and the decedent had known each other and previously worked together on other projects for the past three to four years. (Tr. 39; Ex. 18 at 17). Ruof said that the decedent was Respondent's traffic expert. (Tr. 121). Ruof testified that the decedent was "good to his crew, good to his men," and that Ruof never had to bring any safety issue to the decedent's attention because the decedent had always "taken care" of it. (Tr. 39).

¹⁶ Villasenor did not testify at the hearing.

¹⁷ The westbound lanes were 12 feet wide each. (Tr. 224).

¹⁸ These advance warning signs up that night included a "work area ahead" sign, a "lane closure ahead" sign, and a merge sign. (Tr. 44).

¹⁹ The Court is using the videos and testimony thereon to describe the worksite here, but the Court recognizes that the video in Exhibit 13 (and related Ex. 13 still photographs in Ex. 3) and Exhibit A show the worksite after the incident took place. The Court is mindful that the testimony regarding these videos is indicative of the worksite after the incident took place. The Court is also mindful that these videos serve as a basis of OSHA's investigation, subsequent citation and the Secretary's *prima facie* case here.

up a transition taper consisting of rubberized orange cones that had the purpose of closing off the left-hand lane. (Tr. 311-13 identifying Ex. 13 at counter 39-40 seconds, 390 identifying Ex. A at counter 2 minutes, 25 seconds). The first cone at the beginning of the taper was adjacent to the roadway's guardrail. (Ex. A, at counter 2 minutes, 27/28 seconds). There was also an arrow board owned by Respondent situated in the left-hand shoulder.²⁰ (Tr. 75, 91-92; Exs. 3 at 1 [Top Photograph at "A"], 9, 13 at counter 45 seconds). The length of this transition taper is at issue in Citation 1, Item 3.

The travelling traffic, as a result, continued along the right-hand lane of westbound Route 422. Running between this dead lane and active lane of traffic was a line of traffic cones set on or near the dashed lines of Route 422.²¹ (Tr. 97, 259; Exs. 9 at 3, 13 at counter 49 seconds). The spacing of these cones in this straightaway is at issue in Citation 1, Item 1.

With regard to Citation 1, Item 2, the focus is on the evidence surrounding TMAs. At the time of the incident, Respondent was preparing the dead lane of traffic to be permanently demarcated by Jersey barriers from the active lane up to and over the Schuylkill River, which was approximately a mile west along Route 422. It was OSHA's Compliance Officer (CO) Eduardo²² Santiago's understanding, based upon Ruof and Gardner, that Respondent had a truck with a TMA parked alongside Detective Thomas Barton of the North Coventry Township Police Department (NCTPD) away from Respondent's operations inside the pattern, while another pattern truck with a TMA was *en route*, "doing the loop around," from the west-end of

²⁰ According to Ruof, the arrow board had "flashing lights that indicate direction, or there's four corners, or just a regular bar or an arrow going one way left or right." (Tr. 44).

²¹ Ruof testified that many of these cones were moved from the middle of the roadway to the left-hand shoulder to make room for emergency vehicles to reach the decedent, and so they are not in full view in the video and pictures introduced at trial. (Tr. 97-98). Ruof testified that these cones were not moved until after the incident had taken place. (Tr. 89).

²² The Court notes that CO Santiago's first name is also spelled "Eduardo" in the Jt. Pre-Hr'g St. at 5 and the Sec'y Br. at 5.

Respondent's operations back to the east end of Respondent's operations. (Tr. 235, 371). The Court finds that the record establishes that Respondent had a Ford pattern truck with a TMA "doing the loop around," and was thus not located within the worksite cordoned off by the traffic cones at the time of the incident.

The location of a second truck with a TMA alleged by CO Santiago is, at best, not clear based on this record. With regard to this alleged second TMA, the Court first finds that there is insufficient evidence in the record to substantiate that another vehicle with a TMA (Peterbilt or otherwise), other than the Ford pattern truck with a TMA, was actually present at the worksite during the evening of December 3, 2014. Although Mr. Villasenor was identified as the driver of the Ford pattern truck with a TMA, no driver was identified as having driven a non-pattern truck with a TMA that day at the worksite. No driver of a vehicle with a TMA testified at trial. Detective Barton does not recall seeing a vehicle with a TMA other than the Ford pattern truck with its TMA at the worksite that evening. Ruof's March 2015 diagram depicting the placement of two pattern trucks at the worksite is unreliable. No pattern truck was parked alongside Detective Barton and Officer Tim Roeder at the South Keim Street ramp at the time of the incident. As to any second truck with a TMA, CO Santiago testified that "it is not certain of its location", and due to "interchangeable terms," he was "not sure on the location of the TMA." (Tr. 277, 371, 406-07). No TMA of any kind is in the pictures and videos taken at the worksite on the night of the incident. (Exs. 3, 13, A, E).

The Court further finds that CO Santiago's account that Gardner told him that a pattern truck with a TMA was located in the transition area at the time of the incident was in error, or Mr. Gardner was in error in making such an assertion to him, or CO Santiago was confusing the Ford pattern truck with a TMA with another, non-pattern truck with a TMA. Gardner

arrived at the worksite only minutes before the incident, and he did not testify at the trial. (Tr. 271-77).

It is undisputed that the Ford pattern truck with its TMA was not located where CO Santiago claims it should have been located – within the pattern zone to the east of Respondent’s operations near the arrow board to serve as protection of Respondent’s workers from errant vehicles. (Tr. 371-72; Ex. 9 at 1 at “E”). The Court finds that the Ford pattern truck with its TMA was not in the transition area at the time of incident, but was, instead, “looping around” back onto Route 422 east. (Tr. 271-77).

The existence and location of any second truck with a TMA at the worksite is a subject at issue for Citation 1, Item 2. Under these circumstances, the Court finds that the record does not support that there was a second TMA on the worksite on the night of the incident.

Events on the Evening of December 3, 2014

3:00 P.M.-8:30 P.M.

The parties stipulated that the work Respondent was performing that night was eradicating existing road lines and painting new lines, to aid the travelling public to navigate around the worksite leading up to the Schuylkill River.²³ (Stip. at ¶¶ 9-10). Ruof testified that Respondent had already performed the eradication task before he arrived at the worksite that day around 3:00 p.m. (Tr. 41, 63). Work continued late into the evening because the tasks for that day had to be completed before the following day’s scheduled delivery of concrete Jersey barriers. (Tr. 80, 151). By 8:30 p.m., Respondent had completed the east-bound work on Route 422 and started the west-bound work. (Stip. at ¶ 10).

²³ Schaeffer testified the eradication task would have been performed from within a truck, which would have been part of a “slow roll” procession. (Tr. 183-85).

8:30 P.M.-10:30 P.M.

One of the initial tasks on the west-bound lanes was to perform a “slow roll,” to establish traffic control. The “slow roll” procession had the purpose of protecting the work vehicle performing a task: the lead vehicle, typically termed a pattern truck, would be performing a task, while one or two other vehicles trailed behind it slowing down traffic behind them. Detective Barton, along with West Pottsgrove Officer Tim Roeder, would help with this travelling roadblock.²⁴ (Tr. 285-287, 307-08). During the “slow rolls,” Detective Barton helped slow or stop traffic by hitting his breaks and weaving back and forth in a zig zag pattern at a speed of about ten to fifteen miles per hour. (Tr. 296-97). Traffic would react and follow Barton into the right lane, upon which Barton would increase his speed to that of the posted speed limit. (Tr. 292, 297). Traffic would continue following Barton through the pattern at a slow pace, thus creating a time gap for the pattern to be set out. (Tr. 292, 297).

Following the “slow roll,” Detective Barton pulled into the dead lane of the pattern on the west-end of the workers and remained there awaiting receipt of his next set of directions from the decedent for providing control over the traffic that was still flowing in the right lane. (Tr. 294). After his receipt of instructions, Detective Barton would “loop around” the worksite to begin another “slow roll” at the east end of the worksite. The “loop around” was the term used at the trial to describe how workers would return to the worksite once finishing a task travelling westbound on Route 422: “Well, the traffic is running westbound. Every time we did something, whatever it may be, you set – if you set signs, you have to continue, get off the highway, turn around, come back, then do you next thing.” (Tr. 69). The record indicates the “loop around” constituted the following:

²⁴ Detective Barton testified that he arrived at Respondent’s worksite at 7:00 p.m. (Tr. 290).

- (1) Driving west on Route 422, over the Schuylkill, and exiting Route 422 at the Stowe exit,
- (2) Traveling east to one of the onramps east of the Routes 100 and 422 intersection, and then,
- (3) Re-entering Route 422 westbound east of the worksite.

(Tr. 70, 124-25, 344; Ex. 1).

According to Schaeffer, PennDOT dictated the terms of a “slow roll.” (Tr. 195). For example, Schaeffer testified, “when we do the slow roll, we’re allowed to actually stop traffic for 15 minutes, but they say you can only do the slow rolls at certain times on that side of the road,” taking into account factors such as time of day, weekends, holidays, etc. (Tr. 195). During the time gaps created by each “slow roll,” Respondent’s crew worked to quickly complete their tasks. (Tr. 292). For example, during the first “slow roll,” cones were put out to mark the road closure and the lane change from the left lane to the right lane. (Tr. 292).

Ruof testified that a second truck with a TMA that he alleges was at the worksite was “strictly a TMA”; *i.e.* a truck providing protection to workers. (Tr. 77). Ruof differentiated this alleged second truck with a TMA from the Ford “pattern truck,” that carried cones on it and also had a TMA on it. He said that the Ford pattern truck was used “to facilitate cones and signs.” (Tr. 77).

At approximately 10:00 p.m., Barton departed his parked position in the left-hand lane on Route 422 to “loop around” and perform another “slow roll.” (Tr. 358). After looping around, Barton parked eight-tenths of a mile east of the worksite on the South Keim Street onramp facing westbound with his lights activated. (Tr. 298, 307). Parked next to Barton was Officer Roeder in his marked West Pottsgrove police car. (Tr. 307-08). They waited for word

to depart this waiting spot on the South Keim ramp to perform a “slow roll” with the paint truck.²⁵ (Tr. 353).

The following was Detective Barton’s understanding of what the pattern truck with a TMA was instructed to do right before the incident occurred:

Q Did you feel that you had a clear understanding of movement of cones, while the painting activity was going on?

A Yes, generally I did.

Q Okay. And what did you understand that to be?

A That the operation between the paint truck and where the taper was to start the painting on the roadway had to be done somewhat by hand, and that required cones that were already on the skip line to be moved to allow for the size of the vehicle doing the painting to accomplish their task. I also understand from my interviews that the presence of the [Ford] attenuator truck had traveled into the pattern, far beyond where it was intended to be through the direction of what [the decedent] had indicated for the other employees at that time. So they suspended with the painting operation, to allow the [Ford] attenuator truck to again loop the pattern and come back and sit at the right point to officially stop traffic, so that the rest of the painting operation could be completed.

Q And did you understand that the [Ford] attenuator [truck] would be behind the paint truck, as it traveled through the live lane of traffic, which is when you would be also doing your slow roll?

A Correct.

(Tr. 352).

10:30 P.M.-11:00 P.M.

Cones were in place and a traffic control pattern established by about 10:30 p.m. Superintendent Schaeffer testified that he finished painting the reference lines for the “end of the traffic pattern” around 10:30 p.m. (Tr. 171-75; Ex. E at 1 at “A”, 2 at “A” and “B”). Schaffer then testified that he saw the cones “in place in perfect order before [he] left.” (Tr.

²⁵ The paint truck did not have a TMA attached to it. (Tr. 143).

176). Schaffer said he left the worksite about 45 minutes to an hour before the incident. (Tr. 201).

Between 10:00 p.m. and 11:00 p.m., the paint truck was sitting in the left lane at the end of the taper, inside the traffic pattern. (Tr. 76, 88; Ex. 9). The decedent had been speaking with the painters in that truck and gave them the go-ahead to “loop around” and prepare to paint the final striping.²⁶ (Tr. 88, 123). During this time, traffic had been moving in the right-hand lane. (Tr. 124).

Around this time, Ruof saw the decedent starting to re-position traffic cones; one at a time. (Tr. 66, 129; Ex. 9 at “B”). The decedent, who was on the west-end of Respondent’s operations, called Ruof, who was near the transition taper, using a cell phone and told Ruof to “go ahead and let the traffic through.”²⁷ (Tr. 81-82). Ruof later testified that the paint truck did not move prior to the incident, that “they didn’t get to go anywhere.” (Tr. 123-24). Ruof also then agreed to the following:

Q: The policeman and the attenuator truck had already gone around at that point in time?

A: Yes.

Q: They were just waiting for the paint truck at that point in time?

A: Yes.

(Tr. 124).

²⁶ Ruof testified that Guidemark, Inc. provided painters, including Bridget Moser and Jonathan Tracey, for the project. (Tr. 50; Ex. 4 at 201-02).

²⁷ Ruof testified that he then communicated the decedent’s instructions to the “TMA driver”, who he believed was together with the police officer [presumably Barton]. According to Ruof, the unidentified driver of the alleged second truck with a TMA conveyed the decedent’s instructions to the police officer. (Tr. 82; Ex. 9 at “D”). Barton testified that he was eight-tenths of a mile east of the traffic control pattern at the South Keim Street onramp parked along-side Officer Roeder prior to, and at, the time of the incident. The Ford truck with its TMA was performing its “looping around” and was not with Barton. There is no evidence to corroborate Ruof’s testimony that a second truck with a TMA, along with its driver, was parked together with Barton and Roeder at that time and location.

During this time, Superintendent Gardner approached Ruof. (Tr. 66). While Ruof and Gardner were conversing behind Gardner's pickup truck, Ruof heard a noise and thereafter noticed that the decedent had been struck by a moving vehicle at the west-end of the taper. (Tr. 66, 76-77; Exs. 1 at "D", 9 at "A"). Ruof estimates that the decedent had moved three or four cones before being struck. (Tr. 126). One of the two laborers who had been helping the decedent move the cones was struck by a cone that may have been initially in the decedent's hand. (Tr. 127).

According to CO Santiago, at the time of the incident the Ford pattern truck with a TMA was "looping around," "in motion" and "fluid." (Tr. 276, 368; Ex. 9 at "D"). CO Santiago also said it was his understanding that an alleged second pattern truck with a TMA (perhaps a Peterbilt truck) was parked "inside the work activity area," to the west of the workers. (Tr. 276-77, 368; Ex. 9 at "C"). Detective Barton recalled seeing the Ford TMA, but not a Peterbilt truck with a TMA, at the worksite during the night of the incident. (Tr. 300). Detective Barton also testified that he "was familiar with [] a Ford stake body truck with a crash attachment that the cones were on"; "the F-650 cone truck, pattern truck with attenuator." (Tr. 299-300; 349-50). Detective Barton did not know and could not recall if a Peterbilt truck with a TMA was "there," referring to the worksite on the night of the incident. (Tr. 348-50; Ex. 9). Detective Barton stated that he was waiting with Officer Roeder for the Ford "pattern truck" to pass him to begin another "slow roll." (Tr. 307-08). The Ford pattern truck with a TMA had not passed him yet when the incident occurred. (Tr. 307-08). At approximately 11:00 p.m., Detective Barton received a radio dispatch from Montgomery County Police Radio that there were reports coming in of a worker struck on the highway west of Route 100. (Tr. 308).

RELEVANT TESTIMONY

CO Edwardo Santiago

CO Santiago testified regarding his inspection of Respondent's worksite.²⁸ He was assigned to investigate the worksite on December 4, 2014²⁹, the day after the incident.³⁰ He was instructed to go to the jobsite and document the working conditions. (Tr. 237). CO Santiago was not "the traffic control coordinator for the Philadelphia area office," and does not have "any specialized knowledge regarding traffic control programs or requirements." (Tr. 397). He cannot say with certainty that he is "familiar with the fact that [OSHA Instruction, Directive Number: CPL 02-01-054, Subject: Inspection and Citation Guidance for Roadway and Highway Construction Work Zones] identifies that only mandatory provisions of the MUTCD are to be issued as citations." (Tr. 396-97).

When CO Santiago arrived at the worksite, the worksite had been cleared from the highway. (Tr. 243-44). He came upon Mr. Shaeffer, who was "in the vicinity." He showed him his OSHA credentials. He spoke with him "in an area inside the shoulder," where Respondent "had located their construction equipment and vehicles." (Tr. 190-91, 238-39). CO Santiago took a video from the eastbound side of Route 422, looking east. (Tr. 240; Ex. 8). The video shows free-flowing traffic on the other side of the guardrail, where the worksite had been the night before. (Ex. 8). According to CO Santiago, Mr. Schaeffer seemed "pretty

²⁸ At the time of the trial, CO Santiago had worked for OSHA for seven years. Previously, he had 10 years in the safety industry, working as a safety manager for a furniture distribution company, and as a safety coordinator for a company called Church & Dwight, and also the precast concrete company Oldcastle Precast. He has a bachelor's degree in Occupational Safety and Health. (Tr. 235-36).

²⁹ The record indicates that Respondent's Safety Director, Richard Wittlinger, called OSHA at 2:21 am on December 4, 2014 and left a voice message regarding the worksite fatality on the after-hours hotline. (Ex. 7).

³⁰ CO Santiago worked out of the Philadelphia area OSHA office. (Tr. 396-97). Fellow CO Chris Ann Nine accompanied him on this inspection. CO Nine did not testify at the trial. (Tr. 238).

shaken up,” so CO Santiago “kept [his] conversations with him brief.” (Tr. 403). Mr. Schaeffer pointed out the location where the decedent was struck and killed. There were no traffic cones or TMAs for CO Santiago to inspect.³¹ (Tr. 242-43; Ex. 8). CO Santiago did not ask Mr. Schaeffer that day why the worksite had been removed. Mr. Schaeffer did not show CO Santiago “anything that could have been measured to determine the way that the traffic control pattern was set out the night before.” (Tr. 244, 402). CO Santiago, however, testified that he had “no reason to believe that someone removed [the worksite] just so [he] couldn’t conduct an inspection.” (Tr. 402). After his interview, Schaeffer referred CO Santiago to Respondent’s Safety Director Robert Wittlinger. (Tr. 191).

CO Santiago interviewed Mr. Wittlinger by telephone on the day of the inspection, December 4, 2014. (Tr. 260). CO Santiago asked Wittlinger about Respondent’s Traffic Control Plan (TCP). He did not recall asking Wittlinger about PA Pub. 213.³² (Tr. 261; Ex. 10). Wittlinger provided CO Santiago with Respondent’s TCPs and indicated to CO Santiago that Respondent was in “stage one, phase B” of the project on the night of the incident. (Tr. 261-62; Ex. 2).

³¹ The video shows channelizing devices on the east-bound lanes, cordoning off the right-hand lane where CO Santiago and several of Respondent’s pattern trucks were parked. (Tr. 240-43; Ex. 8). This video shows the channelizing devices on December 4, not the worksite the night prior on December 3, the actual night of the incident.

³² PA Pub. 213 states that it applies to contractors performing construction or any other type of work on highways. It states it “has precedence over information found in the MUTCD.” It further states that the traffic control schemes and guidelines:

are minimum desirable applications for normal situations, and additional protection may be needed when special complexities or potential hazards prevail. The protection prescribed for each situation shall be consistent with the general provisions found in the most recent editions of Title 67 PA Code, Chapter 212, Official Traffic Control Devices and the Manual on Uniform Traffic Control Devices as issued by the Federal Highway Administration and should be based on common sense; engineering judgment; the speed and volume of traffic; the duration of the operation; the exposure to potential hazards; the physical features of the highway including horizontal alignment, vertical alignment, and the presence of intersections; and other important features.

(Ex. 10 at 000294).

To gather additional evidence, CO Santiago explained: “Being that I had nothing to work with, in that there was no worksite where the accident had occurred, I knew from my experience that the local police department would have – that was dispatched to the scene would have details on the incident.” (Tr. 243). CO Santiago contacted the NCTPD and spoke with lead investigator Sergeant Robert W. Malason. (Tr. 244; Ex. 18 at 14).

CO Santiago acquired the NCTPD investigative report. (Tr. 244; Ex. 5). He used this investigative report in the following ways: “To learn of the observations made by Sergeant Malason and the other police officers, the statements provided to them from the witnesses at the scene of the accident, including information from the driver involved in the incident.” (Tr. 245-46). CO Santiago also acquired the NCTPD Incident Report.³³ (Tr. 246; Ex. 18).

CO Santiago also acquired “dash-cam” videos from at least two police vehicles responding to the incident. (Tr. 254, 386-90; Exs. 13, A). He used these videos to ascertain what the worksite looked like on December 3 after the incident. He used the videos to show the location of Respondent’s traffic cones, which, in turn, CO Santiago attempted to use to discern the length of the transition taper, and the spacing of the cones along the straightaway at the worksite on the night of the incident.³⁴ (Tr. 255-60, 381, 386-96). The Secretary, however,

³³ Initially only pages 21 and the top of page 22 of the Police Incident Report were admitted into evidence at the trial. (Tr. 326, 328, 410; Ex. 6). Later, the entire Police Incident Report was admitted into evidence. (Tr. 340). When asked how the Police Incident Report was helpful to his investigation, CO Santiago testified that the “incident report has information in it about how the traffic control zone was haphazardly set up.” The Court sustained Respondent’s objection to CO Santiago’s testimony in this regard and accordingly disregards his response to the question. (Tr. 250-51). The Court has reviewed the interview statements, and the only interviewee who uses the word “haphazard” was the driver of the Jeep Liberty. (Ex. 18 at 15 of 27). The Secretary relies on this statement, rather heavily, in his brief to support the definition of the hazard for the alleged general duty clause violation. (Sec’y Br. at 7). Later, without objection, CO Santiago said he used the Police Incident Report to ascertain more insight into the accounts of the incident and fill in information that he did not obtain during his interviews. (Tr. 251).

³⁴ There was confusion at the hearing as to which video CO Santiago used to determine facts about the worksite that he reported back to the Philadelphia Area OSHA Office to support the citation. On direct examination, the Secretary questioned CO Santiago regarding the location of Respondent’s equipment (i.e., trucks, TMA, and traffic cones) at the worksite using Officer Igor Parfenioug’s dash-cam video at Exhibit 13. (Tr. 254-60, 309,

states the following: “Some cones dividing the right lane from the left lane had been moved after the accident to make room for first responders, [Tr. at 90, 98], and so the dash cam video does not provide reliable evidence about the spacing of those cones.” (Sec’y Br. at 7).

Regarding the length of the taper, however, the Secretary still relies on CO Santiago’s testimony regarding the Parfeniuk video at Exhibit 13.³⁵ (Sec’y Br. at 17 citing Tr. 375 (CO Santiago referring to pictures in Exhibit 3, which are stills from Exhibit 13)).

CO Santiago returned to the location of the worksite on December 8, 2014. (Tr. 264). At that time, CO Santiago took pictures of Respondent’s traffic control equipment that was at the worksite on December 8, 2014, including pattern trucks. (Tr. 264-66; Ex. 9 at 2-5). The trucks at the work site on December 8th included a Ford and a Peterbilt – both of these trucks had a TMA on them. The Ford truck is shown in photographs at Exhibit 9 at 3, 5. The Peterbilt truck is shown in the photograph at Exhibit 9 at 4. CO Santiago testified: “Without looking at the pictures I can tell you that the Peterbilt was the TMA and the Ford was the Pattern truck, based on my interviews.” (Tr. 267; Ex. 9 at 3-5). CO Santiago did not testify

311). On cross-examination, CO Santiago stated that the video he testified to on direct (Exhibit 13) was not in fact the video he used as a basis for his observations that were the basis for the citation. (Tr. 387-89). Respondent then introduced another dash-cam video as Exhibit A and continued the cross-examination of CO Santiago. (Tr. 390-96). This dash-cam video was taken from “the first officer responding, Officer [George] Hollis, of the North Coventry Police Department, who was the lead vehicle.” (Tr. 389). Officer Hollis was the shift supervisor from North Coventry Township that evening. (Tr. 308-09). At the beginning of the trial, Respondent had objected to the use of pictures in Exhibit 3, stating that they were not the best evidence to be used as the pictures were stills from the video in Exhibit 13. (Tr. 10-13). The objection was overruled on the basis that the video would be played and testified to at the trial. Respondent also objected to the introduction of Exhibit 13, but on the basis that it was unknown whether it had been edited. (Tr. 13). Exhibit 13 was admitted based on the Secretary’s assertion that it was unedited. (Tr. 14). At this point, the Court now treats the pictures in Exhibit 3 with the same level of scrutiny as that of Exhibit 13. Neither party objects to the use of Exhibits 3 or 13 on the basis that CO Santiago did not actually use them as a basis for his initial observations that served as the underlying basis for the citation. Instead, he testified that he used the Hollis dash-cam video at Exhibit A. (Tr. 385-88; Ex. A).

³⁵ CO Santiago testified that he used the visual evidence shown in the NCTPD dash-cam video and the measurements provided by Sergeant Malason to determine that the length of the taper was allegedly about 120 feet. (Tr. 375; Ex. A).

that these two trucks were used at the worksite on December 3, 2014 at the time of the incident.

That day, December 8th, CO Santiago also interviewed Superintendent Gardner. (Tr. 267). He told the CO that he saw the decedent adjusting cones just prior to the incident. He said the cones were 4 feet inside the left-hand lane from the centerline of the highway. According to CO Santiago, Gardner was a direct eye witness to the incident.³⁶ According to CO Santiago, Gardner saw a Jeep leave the right-hand travel lane and enter the left-hand working lane and strike the decedent as he was adjusting cones in the worksite straightaway. (Tr. 268-70). Regarding the location of Respondent's trucks on the worksite at that time, CO Santiago testified that Gardner told him that a "pattern truck was inside that transition area [i.e., the taper] and the TMA was looping around [i.e., leaving and returning to the jobsite]." (Tr. 270). CO Santiago testified that Gardner said that Juan Villasenor was driving the Ford truck that night and was looping around back onto 422 east at the time of the incident. (Tr. 271-72, 276-77). CO Santiago then testified:

A The two trucks that were used, one was driven by Juan Velasenor (sic), which was being looped around, which was the Ford truck. The Ford truck, as I understand, was the pattern truck, not used as a TMA. And the other truck was used as the TMA. And I can't say with certainty where that TMA was located, without referring to my notes.

Q Okay. So we're not sure on the location of --

A No, it --

Q -- the TMA at this point?

A Correct. Different personnel -- being that these trucks were identified interchangeably with pattern truck, TMA and crash truck, it made it difficult to discern that definitively.

(Tr. 277).

³⁶ Schaeffer testified that Gardner returned to the worksite around 10:30 p.m. and replaced Schaeffer at the jobsite when Schaeffer went home for the day. (Tr. 172, 174, 202). The Court finds Gardner actually arrived at the worksite at about 10:55 p.m., December 3, 2014 based upon what he told Detective Barton only three hours later. Ruof testified that he observed Gardner attempting to resuscitate the decedent directly after the incident. (Tr. 89).

In March 2015, three months after the incident, CO Santiago interviewed Foreman Ruof regarding the worksite. (Tr. 272). CO Santiago testified that Ruof told him that “the cones had been placed on every third skip once the line was straight,” and that the cones in the taper “were somewhere between 6 and 12 feet apart.”³⁷ (Tr. 259). Ruof told the CO that the length of the taper was “600 plus feet.” (Tr. 273-74). CO Santiago testified the Ruof said that Respondent had placed the cones about 1 hour and 45 minutes prior to the incident.³⁸ (Tr. 273).

CO Santiago conducted a closing conference with Mr. Wittlinger. (Tr. 365, 412). He informed Wittlinger that he had decided to cite Respondent for “[t]he failure to protect the construction workers while conducting their construction activities. The taper not set up according to the MUTCD and the spacing – the spacings of the pattern being set too wide.” (Tr. 365).

CO Santiago testified that Citation 1, Item 1, the alleged straightaway cone spacing violation, was based on “witness testimony and the North Coventry Police Department dash-cam video.” (Tr. 365-66). CO Santiago relied on Ruof telling him that the cones were placed “every third skip.” (Tr. 366). CO Santiago used Sergeant Malason’s measurements to determine the spacing between the cones in the following manner: each skip was 10 feet long, and each skip was 30 feet apart. (Tr. 256-57, 366). Using these measurements, and Ruof’s statement that each cone was placed “every third skip,” CO Santiago said he determined that each cone was placed “approximately” 120 feet apart. (Tr. 366). CO Santiago agreed that Respondent recognized “the hazard of employees being struck by oncoming traffic” and

³⁷ CO Santiago testified that he could see eight or nine cones in the diagonal part of the taper shown in the NCTPD dash-cam video at Exhibit 13, counter 43 seconds. (Tr. 259).

³⁸ Schaeffer testified that the cones were “in perfect order” before he left the worksite around 10:30 p. m. (Tr. 176).

testified that it was evident “in the manner they used their – the equipment, specifically the pattern truck, the TMA.”³⁹ (Tr. 367).

With regard to Citation 1, Item 2, CO Santiago testified that Respondent did not comply with MUTCD Section 6F-8(a)(2) Other Devices – Truck-Mounted Attenuators. (Tr. 369-70; Ex. 11 at 21). CO Santiago testified that, in order to comply with the MUTCD section, “the TMA truck would – in order to function as designed, would need to be positioned east of the workers.” (Tr. 370-72; Ex. 9 (alleged required location marked with letter “E”)). On cross examination, CO Santiago admitted that MUTCD Section 6F-8 states that “[t]rucks and trailers are often used” and does not say that they must be used. He also admitted that the section states TMAs can be attached to the rear of protective vehicles; it does not say TMAs must be used. He further admitted that the section states that if a vehicle is used as a protective truck it must be positioned sufficiently ahead so that it does not roll into employees; it does not state that protective trucks must be used. (Tr. 397-99; Ex. 11 at 20-21).

CO Santiago testified that both the Ford pattern truck and the second truck with a TMA that he alleged was at Respondent’s worksite were not functioning as TMA’s because one (the Ford) was “doing the loop around. So it was not used to protect the workers who are actively moving cones.” (Tr. 371). As to the other alleged truck with a TMA, supposedly a Peterbilt, he said “it is not certain of its location, but from information that I gathered during my interviews it was inside the pattern. And there are other indications that it was parked a distance away from the actual work zone.”⁴⁰ (Tr. 270, 371). CO Santiago testified that he did not ask why a pattern truck was not placed to the east of the employees because:

³⁹ The Court notes that CO Santiago agreed that Respondent allegedly recognized “traffic” as a hazard, not the spacing of the cones. (Tr. 367).

⁴⁰ CO Santiago testified that Gardner told him that “the pattern truck was inside that transition area and the [Ford] TMA was looping around.” He said that the transition area was “[i]nside the channelizing devices, the cones set

When I interviewed the employees, I was not at a position where I learned of the issue of the pattern truck. So that wasn't in my head to ask questions. When I was interviewing them I wanted to know what they knew of the accident and where the pattern trucks were. Their locations. Because at that point I had no idea. I was just learning information for the first time.

(Tr. 406-07).

When shown the diagram Ruof drew in March 2015, at Exhibit 9 at 1, CO Santiago admitted “[t]here is no indication here of workers conducting construction activities, but the TMA truck would – in order to function as designed, would need to be positioned east of the workers.” (Tr. 371-72; Ex. 9 at 1). CO Santiago stated that a truck with the TMA should have been positioned within the traffic control zone east of the paint truck and west of two pickup trucks “somewhere between the paint truck and the end of the taper, where the taper meets the first skip line.” (Tr. 372; Ex. 9 at 1 at “E”). It is undisputed that no TMA was positioned at that location at the time of the incident.

CO Santiago testified that the basis for the alleged TMA violation, was because Respondent did not use a truck with a TMA, which CO Santiago understood to be a Peterbilt truck, “in a way that protected the workers conducting the construction activity.” (Tr. 367-68). CO Santiago testified to the following: “We have construction activity occurring in between two vehicles with attenuating devices, both of which are not in any position to function in any protective means.” (Tr. 368). CO Santiago testified that he had “received information, during my interviews, that there was a pattern truck inside the pattern or the taper and there was another one in the process of conducting a loop from the westbound side, to the

up at an angle.” (Tr. 270). He did not further identify the pattern truck with a TMA allegedly in the transition area at the time of the incident; nor its driver or passenger(s), if any.

eastbound side, back to the westbound side.”⁴¹ (Tr. 369). CO Santiago testified that Gardner told him that the “TMA” was looping around and that the “pattern” truck was in the taper.⁴² (Tr. 270). Ruof testified that the pattern truck could have a “dual-purpose” of both “setting pattern [placing cones] and as a TMA.”⁴³ (Tr. 104). CO Santiago said that the [Ford] “pattern truck was a dual purpose vehicle ... It was equipped with the means to aid in the setting up of a pattern and to absorb the impact of errant vehicles.” (Tr. 407).

CO Santiago testified that the basis for Citation 1, Item 3, the alleged transition taper length violation, was that the length of the taper of Respondent’s worksite fell short of what should have been approximately 300 to 320 feet.⁴⁴ Based on “visual evidence provided, seen in the North Coventry Police Department dash-cam video and the measurements provided by Sergeant Malason,” CO Santiago approximated the taper length on the night of the incident as being only 120 feet. (Tr. 374-75, 389; Exs. 3 at 1, 12 at 4, 13, A). Using the dash-cam video at Exhibit A and the still photograph at Exhibit 3 at 2 [bottom photograph] taken from the video at Exhibit 13, he calculated at trial that the distance from the last cone shown at Exhibit A, counter two minutes, 27 seconds, and the first cone of two cones circled at “B” on Exhibit 3 at 2 [bottom photograph] taken from the video at Exhibit 13 to be 160 feet. He testified that he was “not positive” that the two cones shown at Ex. 3 at 2 at lower photograph at “B” were

⁴¹ Although CO Santiago testified that he received information during interviews that there was a pattern truck inside the pattern or taper, he stated earlier that he was not sure of the location of the TMA. (Tr. 277, 369-71, 406-07).

⁴² The Court has found that CO Santiago was mistaken as to receipt of any such statement from Gardner.

⁴³ Ruof testified that the photograph at Exhibit 9, at 2, showed a truck with a TMA. He said that trucks with a TMA do not usually function as a pattern truck placing cones onto a roadway as well as a protective vehicle at the same time. (Tr. 104; Ex. 9, at 2).

⁴⁴ CO Santiago used the following mathematical formula to determine this length as provided in the cited MUTCD section: $L = (w * \text{speed limit})^2 / 60$, where “L” is the taper length, and w is the lane width (both in feet). CO Santiago used 12 feet for the width of the lane, and 40 miles per hour for the speed limit. (Tr. 374; 405-06).

the first cones located at the roadway center line. The Court is also unable to discern whether or not the two cones at Exhibit 3 at 2, bottom photograph, at “B” are the first cones located at the center line; or at the end of the taper. There are gaps shown on that photograph and in the videos at Exhibits 13 and A, both before and after these two cones.⁴⁵ Both the videos at Exhibits 13 and A and the photograph at Exhibit 3 at 2 [bottom photograph] taken from the video at Exhibit 13 were taken after the incident, after cones had been thrown and removed from the taper. The Court gives little or no weight to CO Santiago’s courtroom calculation that the taper was 160 feet long. (Tr. 388-96; Exs. 3 at 2 [bottom photograph], 13, A). CO Santiago took no measurements at the worksite, including of any painted markings by Schaeffer on the roadway. (Tr. 166-75, 377).

During cross examination, CO Santiago admitted that MUTCD Section 6C-3 TAPERS states that tapers may be used in both transition and termination areas; and agreed the section does not say tapers must be used.⁴⁶ (Tr. 399; Ex. 12 at 4). He further agreed that the project’s TCP did not have any provisions that related to the temporary traffic control used to set up long term traffic control. (Tr. 401; Ex. 2).

Regarding penalty, CO Santiago testified that OSHA considered Respondent’s size (over 400 employees – medium to large), history (none), and gravity. (Tr. 377-79). He testified that the more people exposed the more likely that an injury, incident, or fatality could

⁴⁵ After passing the arrow board following the incident, Barton noticed a large gap of missing cones between the arrow board and the crash site that he later determined after interviews to have come about because one of Respondent’s workers, Ruof, was throwing them to make room for approaching first responders. (Tr. 89, 310-14, 351-53, 358). At least two gaps of an undetermined lengths within the taper are shown in the dash-cam videos at Exhibits 13 (Parfenioux video) at counter 47 seconds, and A (Hollis video) at counter 2 minutes, 34 seconds).

⁴⁶ The Court notes that MUTCD’s Section 6F-5, Channelizing Devices, states that channelizing devices include cones and that such devices “should provide for smooth and gradual traffic movement from one lane to another, onto a bypass or detour, or to reduce the width of the traveled way. They may also be used to separate traffic from the work space,” (Ex. 10 at 15).

occur. (Tr. 379). CO Santiago testified that Respondent “fully” cooperated with him during the course of his inspection. (Tr. 402). He testified that there was “no reason” he did not mention good faith during his testimony on direction examination regarding penalty, that the Area Director determines the penalty, and he did not know if good faith was considered in the penalty phase. (Tr. 403). He testified that OSHA did not issue any citations to Guidemark, Inc. (Tr. 404-05).

Foreman Randy Ruof

Randy Ruof, a foreman for J. D. Eckman, has been employed with the company for a total of 12 years. (Tr. 34-35). On the day of the incident, Ruof arrived at the worksite sometime between 3:00 p.m. and 3:30 p.m. It was his understanding that December 3, 2014 was the first day Respondent worked on the westbound site of the project to repair the bridge that crossed the Schuylkill River near Pottstown, Pennsylvania. (Tr. 39-41). Respondent was in the process of starting to work on the permanent closure (through use of Jersey barriers) of the left, westbound lane of Route 422 about a mile east of the bridge that crossed the Schuylkill River. (Tr. 72; Ex. 1). Ruof testified that he had “responsibility for employee safety at the worksite,” but later clarified that everyone is “equally responsible” for employee safety, including the employees themselves. (Tr. 35, 53-54). The decedent, as a superintendent and traffic expert, was above Ruof in the chain of command. (Tr. 37-38, 121).

Ruof was asked to come to the worksite to “help out” with the eradication and painting of lines and setting up the traffic control pattern. He was there primarily to set up the pattern to get the Jersey barriers up. (Tr. 41, 72). The Jersey barriers were due to be placed on the roadway at the worksite on December 4, 2014. (Tr. 122, 151-52). The TCP has four areas:

advance warning, transition, activity, and termination.⁴⁷ (Tr. 114, 139-40; Ex. 14). The traffic control pattern setup includes, but is not limited to, cones, temporary signage,⁴⁸ pickup trucks for arrow boards, and a TMA. (Tr. 41-43). The cones, which were rubberized and bright orange in color with two reflective stripes, were about thirty inches in height and about twelve to twenty pounds in weight. (Tr. 128-29). To create the traffic control pattern, workers use a pattern truck, which displays additional signage and carries the cones to be placed. (Tr. 46). The pattern truck used on December 3, 2014 to deploy cones was also equipped with a TMA.⁴⁹ (Tr. 46). Ruof testified that there was also a second truck “known as the TMA” and “[t]hat’s all that does” at the worksite.⁵⁰ (Tr. 46).

After a delay due to light rain, workers began setting up the traffic control pattern by posting temporary signage. (Tr. 43-44, 59-60). Examples of temporary signage are a lane closure sign, a merge sign, and a flashing arrow board. (Tr. 44). Because signage is often too large in size to be placed in the median along the left lane, signage is almost always placed on the shoulder along the right lane. (Tr. 45). Ruof testified that the first sign “would have been several thousand feet back.” (Tr. 43-44).

Once signage is posted, the next step in establishing the traffic control pattern is placing the cones. (Tr. 46-47). Ruof testified that the placement of the cones is predetermined, with two skips between each cone. (Tr. 47, 90). With about twenty feet between each skip, each

⁴⁷ Ruof testified that these four areas were in place at the worksite. He further testified that, depending on the job, a “little buffer zone” may be included as an additional area at the end of the taper which typically included a truck with a TMA, shadow vehicle, a vehicle with flashing lights, or marked police car. (Tr. 140-41; Ex. 12 at 2-3). Ruof did not look at the TCP in effect at the worksite site before the incident. (Tr. 115).

⁴⁸ Ruof testified that the signage was for a short duration of time as part of the work that he described as “temporary maintenance and protection.” (Tr. 42).

⁴⁹ The Court finds that this was the Ford truck with a TMA. (Ex. 9 at 1, at “D”; 3, 5). Ruof testified that if something hits the crash attenuator “it crumples to protect all parties involved.” (Tr. 103; Ex. 9 at 2 at “A”).

⁵⁰ The Court finds that there is insufficient evidence to support Ruof’s testimony that a second truck with a TMA was at the worksite on December 3, 2014.

cone was estimated to have been about forty feet apart. (Tr. 137-38). Ruof estimated there was a distance of ten to twelve feet between the cones that were closer to the taper, as expected due to a tighter proximity. (Tr. 130, 137).

On the day of the incident, workers on the pattern truck with a TMA placed the cones on the road, starting with the taper, moving outward, and then down the center of the road. Mr. Villasenor drove the pattern truck while a laborer got cones ready for placement onto the roadway and another laborer actually set the cones onto the roadway. (Tr. 47, 50, 126). Cones were placed after every two skips. (Tr. 90). Ruof, based on his own visual observations, estimated that the installed taper totaled to 660 feet in length.⁵¹ (Tr. 131-32). The cones were in place and a traffic control pattern established by about 10:30 p.m. The next step called for painters in a paint truck to paint a yellow line along the left side of the cones. (Tr. 65, 88). Because the paint truck was built to paint white from the right side of the vehicle and yellow from the left, it was required to drive west in the right lane in order to paint a yellow line on the left lane. (Tr. 65). However, the cones were “too close in proximity” to the area that needed to be painted and, as such, the cones needed to be moved one and a half to two feet to prevent the paint truck from hitting or striking the cones. (Tr. 65-66, 107, 128).

The paint truck was sitting in the left lane at the end of the taper, inside the traffic pattern. (Tr. 76, 88, 122; Ex.9). The decedent had been speaking with the painters for about 15 – 20 minutes and gave them the go-ahead to “loop around” and prepare to paint the final striping. (Tr. 66, 88, 123). During this time, traffic had been moving in the right-hand lane. (Tr. 124).

⁵¹ Ruof testified that he did not agree with OSHA’s allegation that the taper was about 120 feet in length. (Tr. 131-32).

Ruof saw the decedent starting to move the cones, one at a time. (Tr. 66, 129; Ex. 9 at 1 at “B”). Ruof stated that he was not surprised when he saw the decedent moving the cones because the decedent told Ruof that the cones needed to be moved one and a half to two feet south further into the left “dead lane” because “the lines had to be painted from the fast lane and [the painters] were heading around.”⁵² (Tr. 82, 87, 123, 128). The decedent then used his cell phone to call Ruof and told him to “go ahead and let the traffic through.” (Tr. 81-82). Ruof testified he then communicated the decedent’s instructions by cell phone to an unidentified TMA driver who he believed was together with the police officer.⁵³ (Tr. 81-82). Ruof said he was unaware that the cones still needed to be moved at the time that the decedent gave Ruof the direction to let the traffic through. (Tr. 82).

During this time and shortly before the incident, Superintendent Gardner approached Ruof.⁵⁴ Gardner was there to “get everything set up for that final barrier.” (Tr. 66, 78-79). While Ruof and Gardner were conversing behind Gardner’s pickup truck, Ruof heard a noise and thereafter noticed that the decedent had been struck by a moving vehicle at the west-end of the taper. (Tr. 66, 76-77; Exs. 1 at “D”, 9 at “A”). Ruof estimates that the decedent had moved three or four cones before being struck.⁵⁵ (Tr. 126). Mark S. Garber, an operator/laborer employed by Respondent, was one of the two laborers who had been helping

⁵² Ruof’s testimony that the decedent was moving cones in a southerly direction when struck by the Jeep contradicts Detective Barton’s testimony that he determined from interviews that, at the time of the incident, the decedent was taking cones from the southern left-hand lane center median “and placing them back in a northerly direction back to the skip line.” It is not necessary for the Court to resolve whether or not the decedent was moving cones in a northern or southern direction at the time of the incident. The Court finds that the decedent was moving a cone when he was struck by a Jeep Liberty.

⁵³ As previously noted, the Court has found Ruof’s understanding that a TMA driver was together with Detective Barton and Officer Roeder at this time was in error.

⁵⁴ Ruof was approaching the end of his eight-hour shift which was due to end at 11:00 p.m. The lines were going to be painted and he was going to “get on out of there.” Once the painting was completed no other workers would be working at the worksite. (Tr. 79, 122).

⁵⁵ Ruof testified that cones along a distance of about 150 feet needed to be moved. (Tr. 128). He estimated that these cones were spaced about eight to ten feet apart. (Tr. 130).

the decedent move the cones. Garber was struck by a cone that may have been initially in the decedent's hand.⁵⁶ (Tr. 127, 317; Ex. 18 at 21-22).

According to Ruof, at the time of the incident, the police vehicle was located several hundred feet east of the traffic control zone, back near the interchange. (Tr. 67-70, 274-75; Ex. 1 at "B"). Upon being shown the diagram that he drew at the request of CO Santiago, Ruof also identified a "pattern truck" and a "police car" as both being located on the right-hand shoulder of the road and stated that they had already looped around and were preparing to perform the final "slow roll" to permanently paint the yellow line.⁵⁷ (Tr. 73-74, 77; Exs. 1 at "B", 9). The paint truck had not yet moved from the end of the taper where the decedent had been speaking with the painters. (Tr. 123-24; Ex. 9). Ruof's diagram shows the decedent's truck parked to the left of the paint truck, the job truck to the left of the decedent's truck, and an alleged pattern truck with an attached TMA parked to the left of the job truck. Ruof testified that neither the police car nor the "pattern truck" allegedly positioned northeast of the "Arrow Board" shown on his drawing at exhibit 9 at 1 were placed directly east of the decedent when he was moving cones.⁵⁸ (Tr. 76-77, 143-44; Ex. 9 at 1).

Ruof testified that the decedent was close by when he was struck by a vehicle. (Tr. 78). After the incident, Ruof saw Gardner attempting to resuscitate the decedent. (Tr. 89). Traffic

⁵⁶ Villasenor and Garber helped the decedent move the cones. Villasenor then departed the pattern area and drove west in the Ford pattern truck with the TMA deployed to the Stowe exit. On his way back eastbound on Route 422 after looping around, he saw someone down in the roadway and police at the scene. (Tr. 127, 344; Ex. 18 at 21-22, 24).

⁵⁷ The Court finds Ruof's testimony to be in error. The Ford pattern truck with a TMA was being driven by Villasenor west of the traffic control zone and the site of the incident in a loop around Route 422 at the time of the incident. The Court further finds that Ruof's drawing at Exhibit 9, at 1, does not accurately depict the position of two pattern trucks at the time of the incident. The CO also testified that he did not know the location of his alleged non-Ford pattern truck with a TMA at the time of the incident. (Tr. 277).

⁵⁸ The Court has found Ruof's diagram to be unreliable to the extent that it depicts a pattern truck with a TMA parked alongside Detective Barton and Officer Roeder close to the worksite. Barton and Roeder were parked eight tenths of a mile east of the worksite at the South Keim Street onramp.

was still flowing, so Ruof pulled his truck into the right lane to block all traffic. (Tr. 89). Once traffic had been blocked, Ruof went over to assist Gardner. (Tr. 89). Shortly after, Ruof again moved his truck, as well as some cones, to free a path in the traffic pattern for first responders arriving on the scene. Ruof said he was “throwing cones everywhere to try to get the right people to him [the decedent].” (Tr. 89-90, 97-98, 101-02, 118-19; Ex. 13 at counter 56 seconds). About twenty minutes later, Ruof began moving cones back to the center skip. (Tr. 119).

Ruof testified that Respondent’s regular procedure was to move cones so that lines could be painted or protected after a pattern had been set up. (Tr. 107). He said that it was Respondent’s normal procedure to stop traffic when its employees adjusted cones. (Tr. 83). He testified that when cones were being adjusted a truck with a TMA device would normally be used to protect the workers. (Tr. 107-08). Ruof testified that he believed that the decedent should not have been moving the cones without a vehicle with a TMA or some other kind of protection positioned behind him for protection. (Tr. 144-45).

Ruof testified that Respondent’s contract required it to follow PA Pub. 213 when placing signage on the roadway as part of its safety plan. (Tr. 115; Ex. 4 at 139-43). He further said that there is nothing within the permanent or overall TCPs or PA Pub. 213 that addresses the placement of cones while painting lines and setting up for the long-term TCP. He said PA Pub. 213 deals with workers going to set up a work zone where actual highway construction is performed. (Tr. 117-18; Ex 14). Ruof testified that PA Pub. 213 called for cones along the travel lanes, and not along a taper, to be spaced no more than 40 feet apart

where the speed limit is 40 miles per hour.⁵⁹ (Tr. 136-37; Ex. 10, at 00302, 000488). He said that the cones on the skips at the worksite were “[p]robably 20 feet apart or something like that.” (Tr. 138). Ruof stated the provisions of PA Pub. 213 did not apply to the set-up work Respondent performed at the worksite on December 3, 2014 that was setting up for long-term traffic control. (Tr. 142-43).

Superintendent Robert Schaeffer

Robert Schaeffer is another superintendent for Respondent. (Tr. 149-50). He has worked road and high construction for more than 30 years and has worked for Respondent for eight years. (Tr. 149). As a superintendent, his job duties included, “to manage the crews and people that I have, work subcontractors, oversee the logistics, and the safety and progress of everybody and everything on the job.” (Tr. 150). His crews perform the following type of work: “concrete piers and columns underneath the bridge...placing the stone or excavations in the river...concrete paving up on the roadside...maintain the traffic and whatever needs to be done.” His crews also set up traffic patterns. (Tr. 150).

Regarding the Pottstown worksite, Superintendent Schaeffer had been assigned the job “probably a week or two prior to this event,” and, on the day of the incident, he was “getting familiar with the job, studying drawings that morning.” (Tr. 150-51). He said the project for December 3 was to paint the line between station numbers 215 and 220. (Tr. 189). He testified that the decedent was “coming off of vacation to come help paint the lines” that were used to indicate where the barriers were to be placed the following day. (Tr. 151-52).

⁵⁹ The PA Pub. 213 states: “C-1. Cones shall only be used during short-term operations.” Ruof understood that a “short-term operation” meant a work shift. (Tr. 141-42; Ex. 10, at 000302). PA Pub. 213 defines “Short-Term Stationary Operation” as “[a]n operation that will occupy a location for up to 24 hours. ...” (Ex. 10 at 000310).

Schaeffer was going to “supervise the subcontractors coming to deliver all the barriers” the next day. (Tr. 151).

Regarding the length of the transition taper, Schaeffer testified that he spoke with PennDOT’s representative and resident engineer Rick Allison earlier in the project regarding visibility at the beginning of the taper.⁶⁰ (Tr. 155, 158, 210-11). Due to an overpass of Route 422 over Route 100, the “over vertical” caused concerns regarding visibility: “the traffic on the far side of the [overpass] does not see what’s happening on the opposite side of the [overpass], until they’ve come over the top of the [overpass].”⁶¹ (Tr. 158).

Schaeffer testified that this overpass had an effect on the taper. (Tr. 160-61). Schaeffer testified that a surveyor, prior to Schaeffer’s work that day, had painted stations numbers “every 100 feet or 150 feet and 50 foot marks on the side of the road” for the entire mile length of the project. (Tr. 161-62; Ex. 14 *e.g.* at “H” for station numbers 215 and 220). There was a curve on the road which, over the course of “a big distance” is:

a very important thing to the traffic – PennDOT Traffic Division ... because they don’t want people going 40-50 miles around the curve and you’re going to put barrier up there, which is a tall barrier, and they can’t see. And it’s visibility and the merge at the same time. They have – they very same time they have the merge coming in there, right? So they want people to have – they’ve got some formula they use so that people have time enough to merge in and the visibility to see around the corner.

(Tr. 163-64; Ex. 2). Schaeffer testified that his discussion with Allison occurred because: “No matter what I do, PennDOT will not allow me to make that transition – that paint line transition any less than that, because it opens them up to liability. Okay?” (Tr. 162).

⁶⁰ Schaeffer identified Allison as “basically the boss on the job.” (Tr. 155).

⁶¹ Superintendent Schaeffer used the term “bridge” instead of “overpass” while testifying, and later clarified that he meant an “overpass” over Route 100. (Tr. 159). Schaeffer marked it as “G” on Exhibit 1. (Tr. 160; Ex. 1).

Schaeffer testified that the taper had to be, and was, 660 feet in length.⁶² He said he started the cone taper at station number 220.⁶³ (Tr. 157-58, 161-64, 168, 208; Ex. 14 at “G” and “H”).

During December 3, 2014, Superintendent Schaeffer marked reference locations for the arrow board, and the cone placement for the beginning and end of the taper, and the pattern. (Tr. 165, 167, 172). Schaeffer explained:

Throughout the day I laid out some of the marks. So what I would do doing -- what I did during the day was I'd go out on the shoulder of the road -- I'd drive down the shoulder of the road, see the station number and I'd paint a mark on the barrier or the guardrail off the road. This is where they're going to start their pattern. I couldn't actually go lay out the actual marks on the roadway until they put the cones up. But that gave them a reference of where to start their cones, and their arrow board and so on and so forth.

(Tr. 166; Ex. 14 – taper line).⁶⁴ Schaeffer explained that, to paint the reference lines, he drove a truck on the shoulder⁶⁵ of the median side of the road, pulled up to the location on the guardrail, opened the door, leaned out the door and painted the marks on the guardrail. (Tr. 169-75, 188).⁶⁶ During this time, someone in a “regular” pickup truck, without a TMA, would follow behind him because “the travelling public has a fear of

⁶² Schaeffer explained that he determined the length of the taper by using the station markers 220 and 215. (Tr. 168-69; Ex. 14). He explained that 220 “is actually 22,000,” and 215 “would be 21,500,” so that the distance between the two markers 22,000 and 21,500 is 500 feet. (Tr. 168-69). Schaeffer testified that he used the surveyor’s station markers as “reference” points, and that “there’s no way that that paint mark would have went out there and been very much shy of 600 and some off feet, because PennDOT inspectors are not going to allow me to do that, because of the liability and everything else.” (Tr. 200). He agreed that the marks he painted for the taper were the “full 600 and 60 some feet” because he started “between those two (the 220 and 215 markers), but you went for a full 660[.]” (Tr. 168-69, 200).

⁶³ Exhibit 14 includes notes that state “BEGIN SHOULDER TAPER 220’ IN ADVANCE OF MERGING TAPER WITH CHANNELIZING DEVICES (6 MIN.)” and “BEGIN 663’ MERGE TAPER” just east of station number 220 and “END 663’ MERGE TAPER” at “E” just west of station number 215. (Tr. 197; Ex. 14).

⁶⁴ Superintendent Schaeffer testified that the advance notice signs for the construction site were already in place “easily” two to three weeks before the day of the incident. (Tr. 167). These signs included “the two mile advance, the one mile advance, the half mile...the work areas signs.” (Tr. 167).

⁶⁵ Schaeffer testified that the shoulder was 12 feet wide “in some places.” (Tr. 174).

⁶⁶ Schaeffer later identified the taper line on the drawing at Exhibit 14 where there is an arrow pointing downward from “R 3800”. He said that his markings complied with the drawing “almost exactly to what they have here” [Ex. 14] “a foot or two one way or the other.” (Tr. 209-10; Ex. 14).

hitting peep—trucks, but they don't have no fear of hitting people.” (Tr. 173). Schaeffer testified that he finished painting the reference lines for the “end of the traffic pattern” by around 10:30 p.m., December 3, 2014.⁶⁷ (Tr. 165, 171-72). After the cones had been set, Schaeffer saw that the cones at the worksite were tight about 45 minutes before the incident. He testified: “Those cones, can I say that they're exactly 40 feet? Some of them were probably tighter than 40 feet. Some of them may be a foot or two off. But they were very tight. Those cones were very tight at that time.”⁶⁸ (Tr 201). When viewing the NCTPD Dash-Cam video from Officer Parfeniuk's patrol car at trial, Schaeffer testified that he saw five shoulder cones that were about six feet apart where the TCP called for six cones. He said the police video taken after the incident did not depict how the cone taper was when he left the worksite at about 10:30 p.m. before the incident. (Tr. 216-17, 222-23; Ex. 13). Schaeffer did not know whether the cones were placed every third skip. (Tr. 223).

Although Schaeffer testified that he was not there when the cones were placed, he stated that “they put the cones out prior to me going around.” (Tr. 172-74). Schaeffer then testified that he saw all of the cones for the TCP “in place in perfect order before [he] left.” (Tr. 176). He also testified that the decedent's crew placed the cones, so he did not instruct anybody to make sure the cones were a certain distance apart. (Tr. 207). He then testified “but if they were doing something crazy I would not hesitate to say

⁶⁷ Schaeffer also testified that during this time workers also “eradicated” the lines on the worksite, but he believes that that work did not require cones because the workers would have performed that task from a work truck, with a couple vehicles trailing behind it with flashing lights. (Tr. 184).

⁶⁸ Schaeffer testified that about an hour before the decedent was struck, he saw that the cones were so tight he “had to slow down substantially to get in the cones and pull up to the decedent, who was sitting at the end of the taper.” (Tr. 201).

something to them at all,” and did not see anything that required him to call the decedent’s attention to cones that were placed too far apart. (Tr. 207).

He testified that he called the decedent on the phone to ask him if he needed anything, and to tell him that he (Schaeffer) was leaving the worksite for the evening.⁶⁹ (Tr. 202). Schaeffer also testified that he told the decedent that he was going to call Dave Gardner to come back in.⁷⁰ (Tr. 202). Schaeffer testified that he was not aware when he left that decedent would need to adjust the cones so that the concrete Jersey barrier line could be painted on the road. (Tr. 176). He testified that he saw Detective Barton’s vehicle parked in the dead lane when he left.⁷¹

Schaffer left the worksite about 45 minutes to an hour before the incident. (Tr. 201). Upon reviewing the Parfenioug video in Exhibit 13, Schaeffer testified that the taper cones were not representative of what he saw when he left the worksite that night. (Tr. 217-18, 222). Regarding the spacing of the cones on the straightaway, Schaeffer suggested that Foreman Ruof was mistaken. “I think what Randy was saying – and I’m not going to put words in [his] mouth, but what he said was skip, space, a skip and then a cone. So if the skips are 10 feet long and then you have the space in between, so it’d be – I don’t – can’t say it’s every third skip.” (Tr. 223). Schaeffer testified that he had no reason to believe that the workers didn’t

⁶⁹ Schaeffer testified that the decedent was 400-500 feet away from him at the time; within sight distance but not easy listening distance. (Tr. 202).

⁷⁰ Schaeffer testified that he had earlier in the day asked Gardner to go home during the day while Schaeffer did the layout – the “start and stops of the tapers, of the end of the barriers, where the arrow board has to be placed. And so on and so forth.” (Tr. 152-53).

⁷¹ This testimony is consistent with Detective Barton’s testimony that he was parked in the dead lane after he did the first “slow roll,” about an hour before the incident, and before he departed the dead lane to get in position at the South Keim Street ramp to perform the “loop around” for the second “slow roll.”

use his paint marks as a guide to place the cones on the taper. (Tr. 212). He also said that a 40 mile per hour speed limit was posted at the worksite as part of the TCP. (Tr. 190; Ex. 14).

Schaeffer testified that the traffic pattern had to comply with the TCP laid out by PennDOT. (Tr. 225). He agreed that PA Pub. 213 guidelines were incorporated into the TCP as a guideline. (Tr. 193-94; Ex. 2, ¶ B. 3. at 000124). Schaeffer testified that the painting work performed on December 3, 2014 at the worksite was not within the meaning of the work zone within PA Pub. 213's TCP.⁷² (Tr. 204). He also said that the "General Notes" of the TCP required Respondent to follow the contract and the MUTCD. He further said that page 34 of 60 of the TCP did not have any provision that addressed the traffic control that Respondent used on December 3, 2014 at the worksite as a set up for the permanent traffic control to be used afterwards that page 34 actually reflects. Schaeffer also said that nothing on the drawing at page 34 of 60 at Exhibit 14 identifies where cones need to be placed. (Tr. 195; Ex. 14). He said that drawing shows where "panelizers"⁷³ were to be placed for the permanent configuration at forty feet typical from the end of merger taper 663⁷⁴ through station number 220 within a day or two after December 3, 2014. (Tr. 196-97, 205; Ex. 14).

Regarding the contract, Schaeffer testified that the provisions in it relate mainly to the "travelling public":

A ... I've got a written contract that covers its butt in so many ways it's pathetic. At the same time I got to follow what they have on number 14 and make it all work, whether the engineers got it going on, because there's sometimes discrepancies. And then sometimes when you go to lay these signs out the spacing is not quite right. So this is where I end up having the conversation with Rick Allison and he's aware of the stuff in this drawing more than I am. I have to take and blend all these

⁷² Schaeffer testified that PA Pub. 213 applied to the permanent TCP and the crosshatched work zone area that Ruof had identified with an "A" on the TCP drawing. (Tr. 204-05; Ex. 14).

⁷³ Schaeffer identified "panelizers" as delineators with slash marks. (Tr. 196).

⁷⁴ Schaeffer marked the "End 663' Merger Taper" shown on exhibit 14 with a "D" instead of an "E" as instructed by counsel. The letter "D" having already been used to identify the "40' Typical" on the same drawing, the Court will refer to the "End 663' Merger Taper" as having been marked with the letter "E" to avoid confusion. (Tr. 196-97; Ex. 14). The Court notes that the letters "B" and "F" were not used to mark any location on Exhibit 14.

things together to make it work, and function and try and make it so it makes it work safe for me, and the guys I'm working with and make it safe for the pedestrians and the travelling public. So that note is there as a guideline, but at the same time I've got to please the man from PennDOT and make a blend of all these things.

Q And in fact that notes references the specific contract and a MUTCD and other items that are required to be followed.

A Yeah.

Q And it's your understanding that there's a recognition then that all of that has to be blended together to work?

A In a traffic unit from PennDOT takes that all into account, when they start setting this up. Yeah.

Q Does exhibit 14, the single page for this particular stage, have any provision on it that addresses the traffic control that's being utilized to set up the permanent traffic control that's reflected on that page?

A Not the set up of it, no. There are guidelines in the special provisions that PennDOT provides us. And I would say that they're the only guidelines besides the Pub 213 guidelines and all these other. But the important one is what PennDOT is more -- worried about more than anything else, is the travelling public and not interfering with the traveling public. So they set time parameters. They set the amount of time, like when we do the slow roll, we're allowed to actually stop traffic for 15 minutes, but they say you can only do the slow rolls at certain times on that side of the road.

(Tr. 194-95).

Schaeffer testified that the drawing in Exhibit 14 was complied with because he:

laid it out...to comply almost exactly to that what they have here. Was I a foot or two one way or the other? Yes. I was within a foot or two. And like I said, I'm not going to get away without doing it to the T to this drawing, because PennDOT would have called me on it or held me accountable.

(Tr. 210; Ex. 14).

Detective Thomas Barton

Detective Thomas Barton is a police officer with the NCTPD located in Pottstown, Pennsylvania since May 2011. (Tr. 284). Barton previously worked for the Pennsylvania State

Police from May 1989 until his retirement in 2010. (Tr. 285). In addition to his role as a part-time police officer, Barton currently holds the rank of Detective involved in criminal investigations. On the day of the incident, he was assigned to the construction zone detail on Route 422. (Tr. 285).

Barton estimates that he has performed traffic control services on Route 422 for J. D. Eckman on at least twenty different occasions since December 2013. (Tr. 286-88). Prior to the incident on December 3, 2014, Barton's primary point of contact for J. D. Eckman was the decedent. (Tr. 289). Barton described his relationship with the decedent as an amicable work relationship. (Tr. 289). At the start of every shift, Barton would check in with the decedent to account for the work-related hours that NCTPD would later bill to J. D. Eckman, and the two men would frequently engage in small talk. (Tr. 289). On December 3, 2014, construction workers were performing line painting to prepare for the installation of a Jersey barrier, which would block off the left lane so that the flow of traffic would be restricted to the right lane while the bridge repair project was on going. (Tr. 287). Barton met with the decedent early in the morning, but because the roadways were still wet from the previous days' rain, it was decided that operations would be postponed until later that day. (Tr. 289).

Upon returning to the worksite at 7:00 p.m., Barton parked his marked patrol vehicle on the berm (the right side of the roadway on the outside of the travel lane) at the interchange of Routes 100 and 422 west. (Tr. 290, 293; Ex. 1 at "B"). Barton was wearing his full NCTPD uniform, consisting of a tan shirt and black pants, and a black patrol jacket with a yellow highway vest on top. (Tr. 290-91). At that time, traffic was flowing freely in both lanes of Route 422 west. (Tr. 291). Barton met with the decedent and the two discussed plans for

setting up the pattern in the left lane as they waited for the pattern truck and arrow board to arrive at Barton's location. (Tr. 291).

Barton described the pattern truck as a "stake body" Ford truck with a crash attenuator mounted to the rear. (Tr. 291). The pattern truck was already carrying cones by the time that Barton had arrived at the worksite. (Tr. 291). Barton testified that the Ford pattern truck's TMA was parallel to the ground. He said the Ford-650 pattern truck was the only TMA that he recalls seeing at the worksite on December 3, 2014.⁷⁵ Barton said the photograph at Exhibit 9, at page 5, shows the Ford-650 that he saw at the worksite on the evening of December 3, 2014. (Tr. 349-50). He did not see any Peterbilt truck with a TMA at the worksite. (Tr. 291, 298, 300, 350). Barton stated that he saw an arrow board being pulled by a standard style red J. D. Eckman pickup truck. (Tr. 291).

In establishing a work zone on December 3, 2014 earlier in the evening, Barton stated that his particular job was to do a "slow roll," or a rolling roadblock, to the east of where the deployment zone would be at Routes 100 and 422 westbound. (Tr. 292-95). Barton stated that once the pattern truck and arrow board had passed his parked location, he knew, based on his discussions with the decedent, that such an occurrence was his cue to begin the "slow roll," just as he had done when performing slow rolls for projects in the past. (Tr. 293-94). Barton and the decedent had exchanged cell phone numbers on the day of the incident so that the decedent could call Barton when it was time to begin the "slow roll." (Tr. 304). However, Barton did not receive a phone call from the decedent, stating that they only engaged in face-to-face verbal communication that day. (Tr. 304).

⁷⁵ This testimony contradicts Ruof's diagram to the extent it shows a pattern truck parked alongside a police car east of the traffic control zone. The evidence shows that at the time of the incident there were only two police cars parked at the South Keim Street onramp; one operated by Detective Barton and the other by Officer Roeder. (Ex. 18 at 21).

Once the pattern truck and arrow board had passed, Barton commenced his “initial slow” roll starting from the intersection of Route 100 at the overpass, approximately one tenth of a mile away from where the traffic control pattern was to be set.⁷⁶ (Tr. 292, 295). To do so, Barton activated his emergency signals on his marked police vehicle and drove into the left lane of Route 422 to slow or stop traffic while the pattern truck and arrow board advanced toward their point of deployment in the pattern. (Tr. 292). Barton’s emergency signals were equipped with an arrow stick pattern that was pointed towards the right lane. (Tr. 294).

In performing the “slow roll” for the initial cone setup, Barton parked his vehicle at a forty-five-degree angle in the left lane, exited the vehicle, and manually directed traffic into the right lane using hand signals and a flashlight. (Tr. 294). Barton estimates that he was outside of his vehicle and waving cars with his flashlight for approximately 30 seconds. He recalls seeing road signs alerting drivers that there was going to be a lane shift. (Tr. 296). Respondent’s crew worked to quickly establish the cone pattern and set the arrow board. (Tr. 292). Cones were put out to mark the road closure and the lane change from the left lane to the right lane. (Tr. 292). He testified that he saw taper cones in place, including before and after the arrow board. (Tr. 343-44).

Following the initial “slow roll,” Barton pulled into the dead lane of the pattern and remained for the next set of directions for providing control over the traffic that was still flowing in the right lane. (Tr. 294). At approximately 10:00 p.m., Barton moved his patrol car from inside the traffic control zone to the South Keim Street onramp (east of the traffic control

⁷⁶ Barton started the “slow roll” to set out the pattern for the first instance at 9:00 p.m. By then all of the signs regarding the work area, speed limit, and lane merger were installed and in place. (Tr. 341-42).

zone) facing westbound with his lights activated waiting to perform another “slow roll.”⁷⁷ (Tr. 298, 307, 358). Parked next to Barton was Officer Roeder in his marked white Ford Explorer West Pottsgrove police car. (Tr. 307-08, 315). They waited for word to depart this waiting spot on the South Keim onramp and for the Ford pattern truck with its TMA to come and meet them there and perform the second “evolution” with Respondent’s paint truck. (Tr. 307-08, 351-53). During this time, between 10:00 p.m. and 11:00 p.m., Barton agreed that he “had no knowledge of the movement or direction observation of the movement of any of those cones” on the worksite. (Tr. 358). The Ford pattern truck never came to meet them, and the second evolution never occurred. (Tr. 308, 351).

At approximately 11:00 p.m., while waiting for Respondent’s Ford pattern truck to arrive at his location, Barton received a radio dispatch from Montgomery County Police Radio that there were reports coming in of a worker struck on the highway west of Route 100. (Tr. 308). Barton estimates that it took him less than two minutes to report to the scene of the incident. (Tr. 308). As he approached the scene, Barton observed that the arrow board was illuminated, there were cones of the taper directing vehicles into the right lane, and common citizens’ vehicles were at a standstill in the right lane at the approach of the pattern. (Tr. 308). Barton did not observe the pattern truck on his way to the scene. (Tr. 309). Barton recalls passing two red J. D. Eckman pickup trucks in the dead lane of Route 422 westbound and a blue Jeep Liberty with damage to the front of the vehicle sitting in the right lane. (Tr. 309-10). He said NCTPD Police Officer Igor Parfeniouk was seconds behind him.⁷⁸ Just beyond the Jeep Liberty, Barton saw the body of a construction worker in the roadway. (Tr. 310, 316).

⁷⁷ There, Barton was about eight-tenths of a mile east and away from the traffic control pattern. (Tr. 305). He does not know where the Ford pattern truck with a TMA was located when he relocated from the traffic control zone to the South Keim Street ramp. (Tr. 307).

⁷⁸ Officer Parfeniouk’s police car was equipped with an onboard camera system. (Tr. 309; Ex. 13).

Upon reaching the other officers who were in the process of beginning cardiopulmonary resuscitation (CPR), Barton identified the decedent. (Tr. 310).

Barton said that the taper up to the arrow board appeared to be as he recalled it after the pattern was initially set. After passing the arrow board, he noticed a large gap of missing cones between the arrow board and the crash site that he later determined after interviews to have come about because one of Respondent's workers was throwing them to make room for approaching first responders. He said that when he had left the traffic control pattern at 22:00 p.m., "it appeared to be uniform and in place. Cones were evenly spaced as I left" "[T]he cones that I passed were uniform and along the skip."⁷⁹ (Tr. 310-14, 351-53, 358).

Barton said that the video from Parfeniouk's dash-camera at Exhibit 13, from 40 to 43 seconds, shows the cones beginning the taper leading up to the arrow board and then out to the skip that had been set up by Respondent's crew at 9:00 p.m. When viewing the Parfeniouk video at trial, he estimated that the length of the taper from an unidentified point before the arrow board out to the skip to be "100 feet, 150 [feet]." (Tr. 312-13; Ex. 13).

Barton interviewed Garber, age 39, between 1:02 a.m. and 1:30 a.m., December 4, 2014. Garber began working at J. D. Eckman in August 2014. He started working at the worksite on December 2, 2014. Garber told Barton he was east of the paint truck "beyond the location of [the decedent] moving cones back out to the skip line" to "allow for the painting of the skip chain line."⁸⁰ He told Barton when he saw a vehicle approaching the decedent, he

⁷⁹ Barton testified that when he first saw the cones, the cones were set up correctly "in a pattern forming a closure of the left lane and travel lane being the right lane." He did not have any safety concerns about the cones. He said at 9:15 p.m., December 3, 2014, the cones were spaced "and appeared to be along the skip line from the taper out west to the Stowe exit." (Tr. 358). He said that, after the incident, the cones from the taper to the incident were not in the same condition as he saw them at 9:15 p.m. Cones had been moved, possibly several times. (Tr. 359-60).

⁸⁰ Garber's personally hand written signed statement from the interview states: "[w]ent to help reset cones to start painting, was setting cone from 3' off skip mark to 1 ½' to 2' off skip mark on median side lane, looked to next cone + saw [decedent] setting it, saw headlights on both sides of [decedent], yelled to watch out + saw him go up

yelled to him to “watch out” but was not sure the decedent heard him. He then said he saw the decedent struck on his right side by the blue Jeep. The decedent was setting the cone with his right hand when he got hit by the vehicle. He told Barton that he thought that the cone the decedent was actually setting on the skip line at the time of the incident struck him [Garber] in the leg after the cone was hit by the vehicle and released by the decedent.⁸¹ (Tr. 322, 354; Exs. 18 at 21-22, E at 3 at “C”, E at 5 at “A”, F at 1, 5). Barton’s understanding was that the decedent was returning the cones to the general area to reset the pattern, and not putting them on skip marks. (Tr. 363; Ex. F at 1, 5).

Barton interviewed Gardner, age 44, between 1:40 a.m. and 2:00 a.m., December 4, 2014. Gardner told Barton that he arrived at the incident site at about 11:55 p.m. and saw the decedent moving cones back towards the skip line. (Tr. 324; Exs. 18 at 21-22, F at 2, 6). He told Barton that he saw a blue vehicle, driving within the left lane of the traffic control pattern, move back into the right lane and hit the decedent.⁸² (Tr. 324; Ex. 18 at 21-22).

The record further shows that Barton also interviewed Jonathan Tracey, age 18, between 2:00 a.m. and 2:30 a.m., December 4, 2014. Tracey told Barton that he left the South Keim Street onramp and moved to the traffic pattern zone. He then moved to the beginning of the traffic pattern near the arrowboard to set the chain to be pulled “and moved interfering cones. I moved 2, 1 cone out toward right 1 cone in toward left. A J. D. Eckman worker in a pickup truck ahead of me move[d] 2 cones, in left toward his truck and ran up the road.” He

on hood + fold, car carried him on hood until he stopped, [decedent] slid off hood + down roadway....” (Tr. 363; Ex. F at 1, 5). A photograph showing two short white lines in the middle of the road, spray painted by hand over the chain, to be used as a reference by the painters when later painting the paint line is at Exhibits E at 3 at “C”, E at 5 at “A”.

⁸¹ Garber sustained a significant scrape and bleed across his shin. (Tr. 322).

⁸² Gardner’s written statement from the interview states: “I looked up and saw [decedent] moving cones over with his back to traffic a dark blue SUV was coming out of our pattern while trying to exit he struck [decedent] from behind knocking him to the ground.” (Ex. F at 2).

then saw Moser continuing to place “the cones back on center skips. Then got on the truck and pulled into deadlane/workarea.” Tracy’s written statement states that when he was in the rear of the paint truck located in the dead lane/work area, he “noticed [the decedent] from Eckman placing cones to the left of the chain pull for us to paint during next traffic slowdown. I turned around to sit down and heard the accident and seen [the decedent] laying on ground.” (Ex. F at 4).

The record also shows that Barton interviewed Bridget Moser, age 29, between 2:45 a.m. and 3:15 a.m., December 4, 2014. Moser told Barton that the decedent instructed her to back the paint truck to the beginning of the pattern to do another “slowdown.” Her written statement states: “As I was backing up I look in my left meror (sic) and saw the [decedent] moving a cone closer to the skip as he did that a car hit him.” (Ex. F at 3).

Based upon the interviews he conducted after the incident, Barton’s understanding was that the pattern truck with the TMA was to complete its “loop around” the Stowe exit and follow behind the paint truck as it traveled through the right, live traffic lane to complete its painting operation, while he [Barton] performed his second evolution, “slow roll.” (Tr. 353). Barton testified that he determined from the interviews that, at the time of the incident, the decedent was taking cones from the southern left-hand lane center median “and placing them back in a northerly direction back to the skip line.” No one told him that the decedent was moving cones in a southerly direction when he was struck by the vehicle. (Tr. 361-62).

Barton testified that Newstell Marable drove the vehicle that struck the decedent. He said that Mr. Marable was cited under Pennsylvania Title 75 - Vehicle Code, Section 3326, for duties within a construction zone and also Title 75, Section 17-46F, for not having insurance. (Tr. 360-61; Ex. 5 at 0211).

Safety Director Robert Wittlinger

Wittlinger is Respondent's Safety Director. (Tr. 412). Wittlinger received a phone call from the worksite while CPR was being performed on the decedent. (Tr. 412). He arrived at the worksite sometime between 11:00 p.m. and midnight on the night of the incident and took photographs of the scene as part of Respondent's investigation. (Tr. 412-17, 420; Ex. E). He said that the photograph at Exhibit E at 4 shows the approximate area where the decedent was struck, including a tent covering the decedent and the final resting point of the Jeep. He also testified that the photograph shows that cones were placed on a curving line every other skip; 80 feet apart. (Tr. 413-16; Ex. E at 4 at "C" and "E", respectively).

He testified that Respondent does not "have a policy requiring a truck-mounted attenuator while traffic protection is used to set up long term traffic protection." (Tr. 416).

With regard to the length of the taper, he testified that he believed "it was short compared to the traffic control plan" and he did not know why. He stated that "if you use the Publication 213 document for a long term pattern," the taper for a long-term pattern should have been 320 feet.⁸³ (Tr. 420-21; Ex. 10 at 000488). Wittlinger did not know which cone allegedly struck one of the other employees, and he did not see which cone the decedent was allegedly moving when he was struck. (Tr. 422).

With regard to the spacing of the cones on the straightaway, Wittlinger had no opinion as to what the exact spacing should have been on the taper, although he said the cones are "typically closer together" in a taper than they are in a straightaway.⁸⁴ (Tr. 424-26). He

⁸³ Respondent argues that the MUTCD does not apply to its line-painting activities performed in preparation for the setup of a temporary traffic control zone. (Resp't. Br. at 22-23).

⁸⁴ Later, when being cross examined by the Secretary's counsel, Wittlinger testified that Pennsylvania Typical Application (PATA) 503 required the use of a minimum of 15 cones in the taper at the worksite. He counted at least 11 cones in the taper shown in the top photograph at Exhibit 3 at 1. He could not say whether or not there were up to four more present in the taper from this photograph. (Tr. 434; Ex. 10 at 000488-89). In any event, the Secretary has not made the spacing between the diagonal cones of the taper an issue in this case. Only the length

testified that the spacing of the cones on the straightaway on this worksite should be 80 feet based on PATA 503 [Work Space in the Left or Right Lane] in PA Pub. 213.⁸⁵ (Tr. 424-29; Ex. 10 at 000488-89). He then testified that the decedent, as the lead superintendent on this worksite, would have determined the spacing of the cones of the taper; however, Wittlinger did not know whether the decedent actually calculated that specific distance on the date of the incident. (Tr. 426-27). Wittlinger testified that the decedent would have had a copy of the PATA 503 with him. (Tr. 427).

When looking at Section C, PATA 503, PA Pub. 213 (Ex. 10 at 000302),⁸⁶ regarding the spacing of the cones on the straightaway, Wittlinger testified that, rather than a 40-foot spacing, 80 feet is okay because on the night of the incident, short term cones were being used and the “long term pattern had not been built yet.” (Tr. 429-30; Ex. 10). He stated that page 000489 of PA Pub. 213 (Ex. 10) should be “blended” with the TCP drawings that are based on the PennDOT drawings for the project. (Tr. 430-31; Ex. 2). He also agreed that 120 feet would be inappropriate for cone spacing in this situation, and that 80 feet would be maximum spacing for cone placement that would have been acceptable in this situation.⁸⁷ (Tr. 431).

of the taper is at issue. (Tr. 441). The Court notes that the “Note” below the Distance and Spacing Quick Reference Chart states that “Channelizing devices used in taper shall be equally spaced at $\frac{1}{2}$ D Max.”, where D for the 40 MPH speed is shown as 80 feet and one-half of D is 40 feet.

⁸⁵ Wittlinger testified that the distance between the two cones shown on the straightaway at “G” and “H”, Ex. E at 4, in the vicinity where the decedent was struck was 60 feet. (Tr. 423-24; Ex. E at 4).

⁸⁶ General Notes – Section C, Traffic Control Devices – Channelizing Devices (Page 1 of 1) states (in part):

C-1. Cones shall only be used during short-term operations. ...

C-3. Channelizing devices [including cones] may be substituted for temporary longitudinal edge line pavement markings shown on any PATA 200 or 500 series [Long-Term Stationary Operations] drawing. If channelizing devices are used in place of longitudinal edge lines, they shall be spaced at a distance (in feet) equal to the regulatory speed limit; for example a 45 MPH speed limit requires 45’ spacing. ...

C-5. Tapers within a lane shall utilize a minimum of 6 channelizing devices, however, more may be required based upon the regulatory speed limit and lane width. ...

(Ex. 10 at 000302).

⁸⁷ Wittlinger was also questioned regarding the spacing of the cones within the transition taper. (Tr. 419; 432-436). The Court notes that this questioning began by attempting to use the spacing of the cones as a measuring device to determine the length of the transition taper; however, the testimony attempted to decipher the exact

Respondent's Contract with the Commonwealth of Pennsylvania

Relevant portions of Respondent's 209-page contract include: In consideration of \$36,237,872.39 between the Commonwealth of Pennsylvania and Respondent:

The description and location of the project is as follows: Reconstruction of existing asphalt overlaid reinforced concrete pavement (two lanes in each direction) for approximately 1,000 ft. along SR 0422, Section M2A - Pottstown Bypass Expressway and asphalt pavement for roadway tie-ins on both approaches; reconstruction of existing 6-span steel girders/floor beams/stringers (fracture critical) Schuylkill River Bridge (S-31311) using 6-span pre-stressed concrete PA Bulb-Tee beams; construction of approximately 292 ft. long pre-fabricated retaining wall (S-33660); restoration of approximately 0.11 acres of wetlands; relocation of stream; installation of multi-duct conduit and junction boxes for future fiber optic lines/ITS equipment; stormwater management facilities/ pipes; concrete median barrier; concrete glare screen; guiderail removal and installation; signing; pavement markings; and other miscellaneous construction, all as indicated on the drawings approved by the SECRETARY OF TRANSPORTATION for STATE ROUTE 0422, SECTION M2A in MONTGOMERY AND CHESTER COUNTIES, WEST POTTS GROVE AND NORTH COVENTRY TOWNSHIPS from approximately 3,800 ft. west of the Schuylkill River Bridge between Stowe and PA 100 Interchanges at segment 0020/0021 offset 0408/0408 to approximately 3,000 ft. east of the Schuylkill River Bridge at segment 0010/0011 offset 3072/3072.

(Ex. 4 at 5).

The Secretary also introduced over 60 pages of PennDOT TCPs into evidence. (Tr. 112, 430; Exs. 2, 14). The main plan at issue at trial was of the worksite that OSHA inspected. (Exs. 2 at 34, 14 (zoom-up of Ex. 2 at 34)). Superintendent Schaeffer agreed that the TCP, under the heading "Traffic Control Plan: General Notes and Legend," incorporates PA Pub. 213. (Tr. 193; Ex. 2 at 000124). This section of the TCP also states in pertinent part:

General Notes

A. This work consists of the maintenance of traffic and the protection of the traveling public approaching the construction area and within the limits of construction.

spacing of the cones in the transition taper. The Court notes that the exact spacing of the cones in the transition taper is not at issue for the citation items in this case.

B. Furnish, erect, place, and maintain traffic control signs and devices and maintain traffic during hours of construction and at all other times in accordance with the methods indicated on these drawings and,

1. The special provisions of the contract,
2. PA Code, Title 67, Chapter 212, official Traffic Control Devices
3. PDT Publication 213, Temporary Traffic Control Guidelines,
4. PDT Publication 35, Approved Construction Materials & Bulletin 151
5. PDT Publication 408, Specifications
6. PDT Publication 111M, Traffic Control – Pavement Markings and Signing Standards
7. Manual on Uniform Traffic Control Devices (MUTCD)

(Ex. 2 at 000124) (emphasis added).

DISCUSSION

As explained below, the Court vacates the citation items based on Respondent's arguments and the Secretary's failure to meet his burden of proof to show that: 1) the cones along the straightaway were placed at 120-foot intervals, 2) a TMA was being used to protect employees placing cones near moving vehicles, and 3) the transition taper was only 120-feet in length at the time of the incident as alleged in the citation items.⁸⁸ The Court concludes that Respondent's arguments regarding the lack of evidence supporting the nature of a hazard in this case, and arguments regarding the discretionary nature of the incorporated MUTCD provisions, are dispositive to the definition of the hazard in the alleged general duty clause violation in Citation 1, Item 1, and to the applicability of the cited standards in Citation 1, Items 2 and 3.⁸⁹

⁸⁸ Conversely, the Secretary has failed to show that at the time of the incident Respondent had not: a) placed cones at 40-foot intervals along the straightaway and b) established a transition taper that was less than about 300 feet in length.

⁸⁹ Respondent devotes much of its Post-Hearing Brief to the underlying premise that the OSHA citation at issue in this case depends on how Respondent's worksite is characterized. For instance, Respondent claims that the citation items cannot be affirmed here because Respondent's worksite was "temporary" in nature, and not "permanent;" that its work on the day of the incident was "preparatory," and not "actual work." (Resp't Br. at 14-15, 23-24). The Secretary argues that the Court should reject this premise, stating simply that Respondent "was not setting up a temporary traffic control zone" because "all four elements of a temporary traffic control zone as

I. Alleged Violations

a. Serious Citation 1, Item 1 – Alleged Cone Interval Violation Along the Straightaway

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. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). The Secretary must also establish that the employer knew, or with the exercise of reasonable diligence, could have known, of the hazardous condition. *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1949 (No. 071899, 2010), *aff'd*, 413 F. App'x 222 (11th Cir. 2011) (unpublished)).

“A safety hazard at the worksite is a condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur.” *Baroid Div. of NL Indus., Inc. v. OSHRC*, 10 BNA OSHC 1001, 1003 (No. 79-1775, 1981). “A hazard must be defined 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 at 2007. (Resp't. Br. at 12). The hazard “is not defined in terms of the absence of appropriate abatement measures.” *Wheeling-Pittsburgh*

described in the MUTCD” were already in place on the night of the incident, and such traffic control zone “violated several safety requirements.” (Sec'y Br. at 16).

The Court is not persuaded by Respondent's argument regarding the “temporary” nature of its worksite. The worksite on December 3, 2014, may not have been as “permanent” as a worksite with concrete Jersey barriers and a long-term traffic flow pattern, but this does not negate Respondent's obligations under the OSH Act to provide a safe working environment. Respondent still owed its workers protection from hazards on its worksite consistent with the general duty clause and applicable OSHA standards, regardless of the worksite's “temporary” nature. The Court, however, as discussed herein, vacates these citation items because the Secretary has not shown that the alleged hazard is covered by the OSH Act, as defined by Commission precedent, and because the Secretary has not shown that the cited standards are applicable to, or not met by, Respondent.

Steel Corp., 10 BNA OSHC 1242, 1245 (No. 76-4807, 1981) (consolidated), *aff'd*, 688 F.2d 828 (3d Cir. 1982) (unpublished).

The Secretary alleges that Respondent violated the general duty clause of the OSH Act because “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 the employer failed to protect employees from vehicle strikes by not establishing a safe temporary work zone.” (Citation at 6). The Secretary claims that “on or about 12/3/2014, the employer created a dangerous work zone by placing traffic control devices at 120-foot intervals instead of the required 40-foot intervals. The employees were not protected from vehicle strikes.” (Citation at 6) (emphasis added). The Secretary proposes that “a feasible and acceptable means of abatement would be to comply with Pennsylvania PDT Publication 213 for proper placement of traffic control devices.” (Citation at 6).

Traffic Cone Spacing

In the hazard definition section of his Brief, the Secretary devotes most of his argument to establishing the precise spacing of the cones in the straightaway based on the evidence in the record. (Sec’y Br. at 7-8). The Secretary, however, does not address specifically, in his Post-Hearing Brief, how the spacing of the cones, once established, is a hazard or contributes to an increased risk of a hazardous event. *Baroid Div. of NL Indus., Inc*, 10 BNA OSHC at 1003. In his Post-Hearing Brief, the Secretary states that the traffic cone spacing was “far enough apart for a vehicle to weave in and out of the work zone without hitting a cone.” (Sec’y Br. at 7).

However, Counsel’s closing argument at the trial included the following:

And so we have a violation here that the Secretary would argue is directly related to [the decedent’s] death, in that the cones were spaced far apart enough that drivers passing through the traffic pattern could actually be

confused about whether the left lane was open or whether the left lane was closed.

(Tr. 441).

It is the Secretary's burden to "appraise" Respondent of a specific forty-foot cone spacing requirement if the Secretary chooses to pursue a general duty clause violation citation for this issue.⁹⁰ *Arcadian Corp.*, 20 BNA OSHC at 2007. Here the Court finds first that the Secretary has not established the precise cone spacing on the straightaway at the time of the incident. The Court further finds that the Secretary has not established that the spacing constitutes a hazard under the general duty clause, as defined by Commission precedent.

The Court notes that there are challenges regarding the evidence in the record with respect to whether the Secretary can establish precisely what the spacing of the traffic cones was along the straightaway at the worksite before the incident. For instance, despite devoting significant time at trial to this fact inquiry by reviewing police vehicle dash-cam videos, the Secretary concedes in his Post-Hearing Brief that the dash-cam videos (Exs. 13, A) in the record are not reliable because the videos captured what the traffic cone spacing was post-incident, and it is undisputed that many of the cones were moved post-incident to allow emergency responders through to the decedent.⁹¹ (Sec'y Br. at 7).

Instead, to attempt to establish the exact spacing of the cones, the Secretary relies solely upon one part of foreman Ruof's testimony that each cone in the straightaway was placed "every third skip" and ignores other contradictory Ruof testimony where he said the cones

⁹⁰ The Secretary has put forth no evidence attempting to show that the traffic cones in this case, weighing twelve to twenty pounds and standing thirty inches in height, could physically prevent a vehicle like a Jeep Liberty from veering into the work zone. (Tr. 128-29).

⁹¹ Messrs. Ruof, Schaeffer, and Barton testified that the cones were in a configuration after the incident that differed from their configuration before the incident. (Tr. 89-102, 118-19, 216-23, 310-14, 351-58).

were forty feet apart.⁹² Superintendent Schaeffer was present during Ruof's testimony, and later in the trial seemed to suggest that Ruof was mistaken in the "every third skip" description of the cones.⁹³ (Tr. 223). Schaeffer also testified that he saw nothing wrong with the placement of the cones when he left the worksite an hour before the incident occurred. (Tr. 176). Schaeffer testified that 45 to 60 minutes before the incident some of the cones were "probably tighter than 40 feet apart. Some of them may be a foot or two off. But they were very tight. Those cones were very tight at that time." (Tr. 201). Detective Barton testified that when he departed the traffic control pattern at 10:00 p.m. the cones were uniform and evenly spaced along the skip. Barton had no safety concerns about the cones. The Court therefore finds that the Secretary has not established the precise spacing of the cones on the straightaway and has not established that they were spaced 120 feet apart as specifically alleged in the citation.⁹⁴

⁹² Much testimony in the record attempted to calculate the spacing of the cones if they were placed "every third skip," meaning every third dash line. Synthesized, the testimony would indicate that cones placed "every third skip" would be 120 feet apart (*i.e.*, if each dashed line were 10 feet long, and each space between each dash line were 30 feet long, then a cone placed on the third dash line would be 120 feet away from the neighboring cone), according to the Secretary. (Tr. 256-57). Wittlinger testified that PA Pub. 213 indicated that the cones in the straightaway should be 80 feet apart and not 40 feet as alleged by the Secretary. He further testified that the photographs show that the cones in the straightaway were 80 feet apart. (Tr. 413-30; Exs. 10 at 000302, 000488-89, E).

⁹³ The Court notes that Ruof was recently pulled off his other project to work on this project and expressed unfamiliarity with the specifics of this project in his testimony at times. *See, e.g.*, Tr. 109. Even the Secretary concedes that Ruof's testimony regarding the distance of these cones was at times unreasonable. (Sec'y Br. at 16-17 citing Tr. 138). Ruof testified that the cones were 40 feet apart "thereabout" in the straightaway and that he did not agree with OSHA's allegation that the transition taper was only about 120 feet in length. He also said "I'm not sure what they are. [The cones in the straightaway were] "[p]robably 20 feet apart or something like that." (Tr. 131-38).

⁹⁴ Presumably, the Secretary seeks to establish that the cones were at least 120 feet apart because Safety Director Wittlinger testified that he agreed that if the cones were spaced at 120 feet apart, it would be inappropriate. (Tr. 431). The Court notes that the Secretary points out that Wittlinger testified that he thought the cones were 80 feet apart. (Sec'y Br. at 10 n.2 citing Tr. 423). For that testimony, however, Wittlinger was referring to post-accident evidence including the video in Ex. 13 and pictures that he took after the incident occurred. (Tr. 416-24 citing Ex. E).

The Secretary has also failed to show that the cones along the straightaway were not set at 40-foot intervals at the time of the incident. The videos at Exhibits 13 and A, and the photographs at Exhibit 3 taken from the video at Exhibit 13, were taken after the incident; after cones had been moved about at the worksite. Detective Barton and Superintendent Schaeffer testified that the cones on the straightaway were safe and in good order before the incident. Both Messrs. Ruof and Schaeffer testified that the cones along the straightaway were placed at 40-foot intervals before the incident. The Secretary has not presented sufficient evidence to overcome their testimony and show that the cones were placed at a distance beyond 40-foot intervals.

Notwithstanding the above, the Court now analyzes Respondent's argument regarding the existence of a hazard for this citation item with an assumption that the cones were placed more than 40 feet apart.

Alleged Traffic Cone Spacing Hazard

Even with this assumption, however, Respondent persuasively argues that the Secretary has failed to establish that placing cones at "anything other than 40-foot intervals" presented a hazard in the first place. The Secretary has provided no evidence except: (1) the PA Pub. 213, and (2) the incident itself, to establish that any spacing other than 40-foot intervals presented a hazard on this worksite.⁹⁵ The Court finds that both pieces of evidence, the PA Pub. 213 and the incident itself, present hurdles that the Secretary did not overcome to establish a general duty clause hazard, as defined by Commission precedent, in this case.

The Commission has "hesitated" and "had reservations" about holding that a breach of levels published by a third-party organization would constitute a hazard in part because such

⁹⁵ The Secretary did not offer any testimony that there has been an instance of an injury to a worker caused by an employer's failure to place cones at 40-foot intervals.

levels do “not have the force and effect of law; failure to comply with it is not, in and of itself, illegal.” *Indus. Glass*, 15 BNA OSHC 1594, 1603 n.10 (No. 88-0348, 1992) (regarding heat stress levels in publications by the American Conference of Governmental Industrial Hygienists, National Institute for Occupational Safety and Health (NIOSH) and American Industrial Hygiene Association). The issue of the existence of a hazard is separate from the issue of recognition, for which, conversely, the Commission does look to third party publications. *Id.* at 1603 n.11 (stating that precedent allows relying on NIOSH document for industry recognition of heat stress).

It is undisputed that Respondent had multiple traffic control devices in place on the worksite up until the incident. As the Secretary concedes, all four elements of a traffic control worksite were in place: signs were placed two miles ahead of the worksite to indicate the advance warning area; the taper was the transition area; the work zone (separated by spaced cones) was the activity area⁹⁶; and the taper back to the left lane was the termination area. (Sec’y Br. at 15-16). Respondent had a blinking arrow at the transition area, alerting drivers to stay in the right-hand lane for construction. Additionally, the decedent was wearing reflective clothing and PPE at the time he was hit.⁹⁷ For this citation item, the Secretary does not address any of these traffic control devices that Respondent had put in place on its worksite.

Instead, the Secretary claims that the spacing of the cones in the work area “created” a traffic hazard, pointing to the fact that they were not 40 feet apart (as “required” in PA Pub. 213), and that the driver of the Jeep Liberty veered into the work area.

⁹⁶ PA Pub. 213 defines “Activity Area” as the “Area of a temporary traffic control zone comprised of the buffer space and the work space usually separated from traffic flow by channelizing devices or barrier located parallel to the travel lanes.” (Ex. 10 at 000309).

⁹⁷ The decedent was wearing a fluorescent green jacket, in good condition, with silver reflective striping on chest, back and sleeves; a hardhat with a light was found nearby. (Ex. 18 at 17).

Regarding PA Pub. 213, the Court finds that it is a publication by a third-party organization. *Indus. Glass*, 15 BNA OSHC at 1603 n.10. This publication is not affiliated with OSHA. While the Secretary claims that a “40-foot interval” was “required,” the Secretary has proffered no support in terms of OSHA regulations or Commission precedent for this claim.⁹⁸ Indeed, Commission precedent serves to undermine the Secretary’s attempt at defining the hazard in this manner. The hazard cannot be defined in terms of the absence of appropriate abatement measures, in this case, a 40-foot cone spacing interval. *Wheeling-Pittsburgh Steel Corp.*, 10 BNA OSHC at 1245.

Additionally, the Court notes that PA Pub. 213 is over 300 pages long. (Ex. 10). Upon identification, the following exchange occurred between Counsel for the Secretary and Foreman Ruof:

Q I’m handing you a document marked Government exhibit 10. You can move binder if you need to look at it, but is this what you were just referring to as PA-213

A Yeah. Yes, ma'am.

[irrelevant material omitted]

Q Can you take a look at that and direct me to the portion that would be relevant to the way the worksite was set up on December 3rd 2014?

A Let’s see.

Q There are page number --

A Yes.

Q -- on the bottom. They’re sort of small.

A Yeah. I can’t even -- typical -- I mean I use like 18 and 21. I use those a lot. So -- but --

Q What do you mean 18, 21?

A Well, the -- there’s -- you know, a lot of these refer to just, you know, certain projects you’re on. And I -- you know, the ones I do you use the same stuff. That’s --

Q Same stuff.

⁹⁸ At trial, counsel for the Secretary seemed to suggest that the “required” provision of PA Pub. 213 was based on the clauses within Respondent’s contract with the Commonwealth of Pennsylvania requiring Respondent to follow PA Pub. 213 and the MUTCD. (Tr. 115). For this case, the Court treats Respondent’s contract as another publication by a third-party organization, with regard to defining a hazard in a general duty clauses analysis. A contract may possibly serve to support recognition of a hazard by an employer, but for the same reasons in *Indus. Glass*, 15 BNA OSHC at 1603, it cannot be used to establish a hazard here.

A -- basically your signage and distance and that's all it'll give you.

Q Okay.

A But the scenarios change. But bear with me. Good lord.

JUDGE PHILLIPS: Are you asking him to look --

THE WITNESS: Yeah. I mean --

JUDGE PHILLIPS: -- at each page of this exhibit or do you want to focus his attention on something you think is relevant?

MS. LUBY: Yeah. One second.

BY MS. LUBY:

Q May have to get back to that, but --

A Thank you.

Q -- I'll move on.

MS. LUBY: I have no further questions at this time.

JUDGE PHILLIPS: Thank you, ma'am.

(Tr. 116-17).

This exchange suggests that Foreman Ruof seemed a bit overwhelmed by the volume of this document.⁹⁹ The Court therefore relies on the testimony in the record regarding this document for guidance. This testimony is slim, and, not dispositive. Aside from Schaeffer's general testimony that PA Pub. 213 served only as a guide, the only other witnesses that testified to specific pages in this document were Foreman Ruof and Safety Director Wittlinger. (Tr. 134-41, 193-94, 425-30). Ruof testified to the "General Notes -Section C: Traffic Control Devices – Channelizing Devices." (Tr. 134-41; Ex. 10 at 000302). Wittlinger testified to "PATA 503" on pages 000488 - 89. (Tr. 425, 427, 430). Ruof testified that the cone spacing on the straightaway according to the provision at ¶ C-3 should be 40 feet on the basis that the speed limit at the worksite was 40 MPH. (Tr. 134-41; Ex. 10 at 000302). Using the "Distance and Spacing Quick Reference Chart," Wittlinger testified that the cone spacing on the straightaway according to PATA 503 [Work Space in The Left or Right Lane] should be 80

⁹⁹ This is borne out by the following testimony by Ruof:

Q Okay. So this 40 foot requirement are you saying that only applies to the diagonal cones and not the ones that are on the skips?

A That I don't know, ma'am.

(Tr. 137).

feet. CO Santiago, on the other hand, testified that he did not recall inquiring into PA Pub. 213 when interviewing Wittlinger during his investigation. (Tr. 261). This evidence is not determinative as to what PA Pub. 213 “required” the cone spacing interval to be on the straightaway at Respondent’s worksite on December 3, 2014.

The Court also notes that the “Application” section of PA Pub. 213 states the following:

The protections prescribed for each situation shall be consistent with the general provisions found in the most recent editions of Title 67 PA Code, Chapter 212, Official Traffic Control Devices and the Manual Uniform traffic Control Devices as issued by the Federal Highway Administration and should be based on common sense; engineering judgment; the speed and volume of traffic; the duration of the operation; the exposure to potential hazards; the physical features of the highway including horizontal alignment, vertical alignment, and the presence of intersections and driveways; and other important factors.

(Ex. 10 at 0294) (emphasis added). The Secretary has not addressed the emphasized portion of this section of PA Pub. 213, but the Court finds that it is broadly worded and seems discretionary. This broadly worded Application section is consistent with the testimony in the record by Respondent regarding “blending” documents to achieve its contractual work goals. Superintendent Schaeffer’s testimony regarding the generally accepted practice of “blending” of “actual stuff from that 213 into what PennDOT’s got going on.” (Tr. 181, 194-95). Wittlinger also testified that in order to “build” to the PennDOT drawings (in Respondent’s contract), Respondent had to “blend the two standards,” clarifying that Respondent has to “blend” the PennDOT’s drawings with the specifications in PA Pub. 213. (Tr. 430-31). The Secretary does not address this testimony regarding “blending” these documents in his Post-Hearing Brief.

Under these circumstances, the Court finds that PA. Pub. 213 is not supportive evidence for the Secretary’s burden of establishing a hazard in this case.

Regarding the incident itself, the record in this case shows that the driver of the Jeep Liberty was charged with failing to comply with “duties within a construction zone.” (Tr. 360-61). The Court therefore finds that the record supports a finding that the driver’s conduct at least contributed to the incident in this case. The Court also finds that this evidence undermines the Secretary’s attempt to use the incident as proof that the cone spacing along the straightaway “created” the hazard in this case. There is no evidence that establishes how much of the driver’s own conduct caused or contributed to the incident. The Secretary relies upon a statement reported by Sergeant Malason in the Police Incident Report made by the driver to Officer C. Matt Deichert to establish “haphazard” spacing of the traffic cones.¹⁰⁰ (Ex. 18 at 15-16; Jt. Pre-Hr’g St. at 5). Testimony concerning this statement attributed to Mr. Marable, the driver of the Jeep Liberty, was disregarded by the Court following Respondent’s objection made prior to Ex. 18’s ultimate admission into evidence. (Tr. 334). Also, the Court finds this statement by the driver of the Jeep Liberty has questionable reliability as it is self-serving to the driver, who was eventually charged despite this statement in the Police Incident Report. The Secretary has not supplied in any way evidence to support any claim that the spacing of the cones on this worksite actually caused this driver to veer into the workzone. The Court therefore finds that the incident itself, where a driver was eventually charged with not complying with duties in a construction zone, is not evidence that establishes a hazard in this case, in the event traffic cones were set at more than 40-foot intervals.

Finally, the Court notes that the Secretary is also not consistent in addressing the hazard in the remainder of his Post-Hearing Brief. Rather than referring to the allegedly improper

¹⁰⁰ Officer Deichert recorded Marable told him that “it seemed like someone didn’t put the cones down straight, and that caused him to really start paying attention.” Marable further told Officer Deichert “that the cones weren’t on the dotted line, as if they were haphazardly put down.” (Ex. 18 at 15). Marable said nothing about the cones being spaced too far apart.

traffic cone spacing that “created” a hazard, the Secretary later in his brief suggests that the hazard in this case is, simply, traffic. *See* Sec’y Br. at 8 (“Eckman does not dispute that it recognized the hazard that traffic posed to its employees”), 9 (“[The decedent’s] death shows the seriousness of failing to protect workers from being hit by oncoming vehicles.”). In his recognition and likelihood of death/serious harm sections, the Secretary does not address, in any way, the spacing of Respondent’s traffic cones; instead the Secretary focuses on traffic alone being a hazard: that Respondent recognized traffic being a hazard and that traffic can cause death/serious harm. The Secretary has proffered no arguments, at trial or in his Post-Hearing Brief, supporting how Respondent recognized that traffic cone spacing at more than 40-foot intervals was a hazard, and how this traffic cone interval increased the likelihood of death/serious harm in this case.

This citation item is vacated.

b. Serious Citation 1, Item 2 – Alleged Truck Mounted Attenuator Violation

To prove a violation of an OSHA standard, the Secretary must establish that: (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff’d in relevant part*, 681 F.2d 691 (D.C. Cir. 1980).

The Secretary claims that Respondent violated 29 C.F.R. § 1926.202, a “Signs, Signals and Barricades”¹⁰¹ standard which incorporates by reference a portion of the Federal Highway Administration MUTCD.¹⁰² The citation alleges that Respondent failed to ensure a TMA was

¹⁰¹ “Barricade” means “an obstruction to deter the passage of persons or vehicles.” 29 C.F.R. § 1926.203(a).

¹⁰² Although the contract states that PA Pub. 213 applies to Respondent and PA Pub. 213 states it has precedence over information found in the MUTCD, the standard at 29 C.F.R. § 1926.202 incorporates MUTCD, and not PA

used to protect employees placing temporary traffic control devices near moving vehicles.
(Citation at 7).

The cited OSHA standard states: “Barricades for protection of employees 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 Sec. 1926.6.” 29 C.F.R.

§ 1926.202. Section 1926.6(a) states:

The standards of agencies of the U.S. Government, and organizations which are not 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., 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.

29 C.F.R. § 1926.6(a) (emphasis added); *see also KS Energy Servs., Inc.*, 22 BNA OSH 1261, 1264 n. 4 (No. 06-1416, 2008) (non-mandatory MUTCD provision not incorporated into OSHA standard 29 C.F.R. § 1926.200(g)(2)); *Ruhlin Co.*, 21 BNA OSH 1779, 1785 (No. 04-2049, 2006) (finding no fair notice in part by noting that “optional” language of the MUTCD is consistent with the Secretary’s enforcement policy in the Field Inspection Reference Manual that stated “Section 5(a)(1) shall not be used to enforce ‘should’ standards.”). Therefore, to

Pub. 213. For the purpose of establishing a violation of the cited standard, the Court finds as a matter of law that the provisions of the MUTCD take precedence over PA Pub. 213. Federal regulations that call for the application of the MUTCD take precedence over any contract provision that states PA Pub. 213 takes precedence over the MUTCD. *Cent. of Ga. R.R. Co. v. OSHRC*, 576 F.2d 620, 625 (5th Cir. 1978) (“We stress that the Act, not the contract, is the source of [the employer’s] responsibilities.”) citing *Frohlick Crane Serv., Inc. v. OSHRC*, 521 F.2d 628, 631 (10th Cir. 1975); *see also Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 209 (3d Cir. 2005) (“The Commission previously had held that a company cannot evade its safety and health responsibilities to its workers simply by contracting away the responsibilities mandated under the OSH Act.”). Here, the MUTCD does not require an employer to use trucks as protective vehicles to protect workers or equipment from errant vehicles or TMAs capable of absorbing the impact of errant vehicles to reduce the severity of rear-end crashes. *See* 29 C.F.R. § 1926.6(a) (only the mandatory provisions of the MUTCD are adopted as a standard under the OSH Act); (Tr. 397-98; Ex. 11 at 21). This takes precedence over any PA Pub. 213 provision to the contrary. *See U.S. ex rel. Roby v. The Boeing Co.*, 73 F.Supp. 2d 897, 910 (S.D. Ohio, 1999) (contract clause no defense to alleged statutory violation).

establish applicability, the Secretary must show that that the cited MUTCD provision is mandatory and not discretionary.

The cited MUTCD provision is reproduced below with underline where emphasis is added. (Ex. 11 at 20-21).

6F-8. OTHER DEVICES

a. Impact Attenuators

Impact attenuators are systems that mitigate the effects of errant vehicles that strike hazards, either by smoothly decelerating the vehicle to a stop when hit head-on, or by redirecting the errant vehicle. Impact attenuators in temporary traffic control zones protect the motorists from the exposed ends of barriers, fixed objects, and other hazards. Two types of impact attenuators used in temporary traffic control zones are roadside attenuators and truck-mounted attenuators (TMA's). Specific information on the use of impact attenuators can be found in the AASHTO Roadside Design Guide, Chapter 9.

Attenuators must pass acceptable performance testing and be designed for each application to ensure performance that will safely stop or redirect errant vehicles. Periodic inspection of these devices is necessary to assure that attenuators function as intended throughout their useful life or that they undergo prompt repair/replacement if hit or damaged.

1. Roadside Attenuators

...

2. Truck-Mounted Attenuators

Trucks or trailers are often used as protective vehicles to protect workers or work equipment from errant vehicles. These protective vehicles are normally equipped with flashing arrows, changeable message signs, and/or flashers, and must be located properly in advance of the workers and/or equipment they are protecting. However, these protective vehicles may themselves cause injuries to occupants of the errant vehicles if they are not equipped with truck-mounted attenuators (TMA's).

TMA's capable of absorbing the impact of errant vehicles can be attached to the rear of these protective vehicles to reduce, the severity of rear-end crashes. There are a variety of TMA designs available.

The protective truck must be positioned a sufficient distance in front of the workers or equipment being protected to allow for appropriate vehicle roll-ahead,

but not so far that errant vehicles will travel around the vehicle and strike the workers/equipment. The attenuator should be in the full down-and-locked position. For stationary operations, the truck's parking brake should be set and, when possible, the front wheels turned away from the work site.

MUTCD, 'Standards and Guides for Traffic Controls for Street and Highway Construction, Maintenance, Utility, and Incident Management Operations,' 1988 edition, Revision 3, September 3, 1993, Section 6F-8(a)(2) (emphasis added); Ex. 11 at 20-21.

The parties argue over the meaning of the following provision:

The protective truck must be positioned a sufficient distance in front of the workers or equipment being protected to allow for appropriate vehicle roll-ahead, but not so far that errant vehicles will travel around the vehicle and strike the workers/equipment.

MUTCD, 'Standards and Guides for Traffic Controls for Street and Highway Construction, Maintenance, Utility, and Incident Management Operations,' 1988 edition, Revision 3, September 3, 1993, Section 6F-8(a)(2) (emphasis added); Ex. 11 at 21. In accordance with section 1926.6(a), for this MUTCD provision to apply in this case, the language must be mandatory; it cannot be discretionary. CO Santiago agreed that MUTCD Section 6F-8(a)(2) does not state that trucks or trailers must be used as protective vehicles to protect workers or equipment from errant vehicles. (Tr. 397-98; Ex. 11 at 21). He also agreed that the provision does not state that TMAs capable of absorbing the impact of errant vehicles must be used to reduce the severity of rear-end crashes. (Tr. 398; Ex. 11 at 21).

When looking at this provision, the Court looks to the specific language of the provision, as well as how it fits into the language of the whole part of the section. *KS Energy Servs., Inc.*, 22 BNA OSHC at 1265 n.8 citing *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 (5th 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’”).

The Court does not find that this provision is mandatory in the sense that the Secretary has attempted to prove.¹⁰³ In arguing that the provision is in fact mandatory, the Secretary relies on the word “must” appearing earliest in the phrase at Section 6F-8(a)(2), MUTCD. The Secretary argues that “the MUTCD did not require [Respondent] to use a protective truck with a TMA, but once [Respondent] decided to use one, the MUTCD required [Respondent] to use it correctly.”¹⁰⁴ (Sec’y Br. at 12-13). It is undisputed that Respondent had at least one pattern truck with a TMA at the worksite on the day of the incident. What the record is unclear of, however, was whether Respondent “was using” any truck with a TMA as protection against errant vehicles on its worksite.¹⁰⁵ The Secretary argues that a second truck with a TMA was

¹⁰³ PA Pub. 213 also does not mandate the use of TMAs when installing or removing traffic control setups. PA Pub. 213, Section F-2. Guidelines for installation and removal of traffic control setups, states: “A shadow vehicle may be placed between approaching traffic and the workers who are installing channelizing devices.” (Ex. 10 at 000306). PA Pub. 213 defines a “Shadow vehicle” as:

A vehicle positioned within the activity in advance of the work space and work vehicles. The primary purpose of the shadow vehicle is to provide advance information to approaching drivers while protecting workers and work vehicles. Any vehicle can be used as a shadow vehicle as long as it is equipped with a flashing, oscillating, or revolving yellow light which is visible from any direction (360° visibility) and is not being used as a work vehicle. The yellow light must be activated within an active work zone. (emphasis added).

(Ex. 10 at 000309).

Here, the Ford Truck with an attached TMA was being used as a “work vehicle” carrying cones.

¹⁰⁴ The Secretary admits that the MUTCD does not require an employer to use trucks with TMAs as barricades to protect from errant vehicles. Instead, he asserts that where an employer chooses to employ such barricades, the MUTCD mandates trucks with TMAs be used correctly. (Sec’y Br. at 11-12). The Secretary’s assertion is incorrect for the reasons stated above.

¹⁰⁵ As noted above, the presence of a second truck with a TMA at the worksite on December 3, 2014 was difficult to discern for even CO Santiago during his investigation. The Court has found that the Secretary has not shown that there was a second truck with a TMA at the worksite that evening. The Court has further found that the Secretary has failed to prove that any such second truck with a TMA had “no other function at the Worksite other than as a barricade” as alleged in his brief. (Sec’y Br. at 12). CO Santiago testified that the Ford pattern truck with a TMA, driven by Villasenor, was not functioning as a TMA because it was engaged in deploying cones and was “doing the loop around. So it was not used to protect the workers who are actively moving cones.” (Tr. 371).

allegedly parked west of the workers in the work zone and should instead have been parked east of the workers, so that the TMA provided protection, as a barricade, from an errant vehicle.

OSHA's citation alleges that Respondent employed the alleged second truck with an attached TMA improperly when it positioned the alleged truck on the west side of the pattern instead of between the workers and oncoming traffic.¹⁰⁶ (Sec'y Br. at 10). The Secretary's reading of this provision would not allow for an employer to have a TMA at the worksite unless it was operating as a TMA the entire time. The Court does not read the cited MUTCD provision so broadly so as to convey a sense that all TMAs must be used at all times as TMAs when on a worksite. The Court is guided by the surrounding language which indicates that the MUTCD is concerned with the TMA itself being a hazard, either to the "errant vehicle" or to the workers due to a "roll-ahead" if the TMA were hit by an "errant vehicle." When considering the entire provision as a whole, the Court finds that this section of the MUTCD suggests a concern about the worker's safety from an impact of the TMA itself, not whether an employer must use the TMA as the Secretary claims. Here, the use of the phrase, "being protected," introduces a contemporaneous time element to the interpretation of this phrase. The phrase "being protected" conveys that, if an employer is actively using a TMA on its worksite as a protective device for workers against errant vehicles, then the TMA must be positioned accordingly.

Here, the record does not show that Respondent was actively using any TMA as protection for workers from errant vehicles at the worksite on the night of the incident. The

There was no second truck with a TMA located in the pattern of the worksite at the time of the incident acting solely as a barricade, or otherwise.

¹⁰⁶ As discussed before, the Court has found no such truck with a TMA was present in the work zone pattern at the time of the incident.

record indicates that the one TMA that by all accounts was at the worksite was *en route* away from the worksite performing a “loop around” to get into position to perform another “slow roll” to assist the painters painting a yellow line. There was no other vehicle with a TMA at the worksite.¹⁰⁷ Thus, there is not enough evidence in the record to establish that any vehicle with an attached TMA was being used as a TMA to protect any worker that night working within the pattern at the worksite.¹⁰⁸ To prove applicability, the Secretary has the burden to show that the Respondent’s workers in the work zone were “being protected” by a TMA, but the record does not support such a finding. CO Santiago, during his investigation, made no attempt to discern why the Ford truck with an attached TMA was not in a position to the east of the workers in the work zone on the night of the incident. Under these circumstances, the Court finds that the Secretary has not established that the cited OSHA standard is applicable to the worksite here.

This citation item is vacated.

c. Serious Citation 1, Item 3 – Alleged Taper Length Violation

The Secretary claims that Respondent violated 29 C.F.R. § 1926.200(g)(2), incorporating MUTCD 1988 Edition Section 6C-3 because Respondent “did not provide a roadway transition taper of the requisite length to ensure safe vehicle routing around the temporary work control zone.” (Citation at 8). The Secretary claims that “on or about 12/3/2014, the employer did not establish a transition taper for the temporary traffic control zone to ensure safe vehicle routing and that was in compliance with Table VI-2 of the MUTCD, 1988 Edition, Revision 3. The employer’s installed taper was approximately 120 feet in length

¹⁰⁷ Even if there was a second truck with an attached TMA at the worksite that evening, there is no evidence that any such truck was being used as a TMA.

¹⁰⁸ This excludes any protection that may have been afforded to any occupant of the Ford pattern truck with its attached TMA that may have been deployed when the Ford truck was doing a “loop around” or “slow roll.”

which was much shorter than the approximately 300 feet required by Table VI-2.” (Citation at 8).

Section 1926.200(g)(2) states: “All traffic control signs or devices used for protection of construction workers shall conform to Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition, incorporated by reference in Sec. 1926.6.” 29 C.F.R. § 1926.200(g)(2). As noted above, section 1926.6(a) provides that only the mandatory provisions of the cited MUTCD apply. Here, the Secretary states that the MUTCD “requires” a taper that is “approximately” 300 feet long in this case. (Citation at 8). However, the Court finds that the cited MUTCD provisions do not impose a mandatory taper length as the Secretary claims.

As with the previous citation item, the Court looks to the provision in question, as well to how that provision fits into the language of the whole part of the section. *KS Energy Servs., Inc.*, 22 BNA OSHC at 1265 n.8 citing *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1077 (“stating that when interpreting disputed terms, Commission looks to ‘the provisions of the whole law, and to its object and policy’”), *aff’d*, 79 F.3d 1146 (5th Cir. 1996); *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC at 1108 (“explaining Commission construes ‘each part or section... in connection with every other part or section so as to produce a harmonious whole’”).

Below is the relevant portion of the MUTCD for this citation item. (Ex. 12 at 4-5). Throughout this provision, the Court emphasizes (by an underline) the discretionary language that is used and notes that there is no mandatory language in the accompanying paragraphs to Table VI-2. The Court, however, also notes the use of the words “minimum” and “maximum” in Table VI-2.

6C-3. TAPERS

A common important element of a temporary traffic control zone is a roadway taper. Tapers may be used in both the transition and termination areas. Tapers are created using a series of channelizing devices or pavement markings placed to move traffic out of or into its normal path. Whenever tapers are to be used near interchange ramps, crossroads, curves, or other influencing factors, it may be desirable to adjust the length of tapers. Longer tapers are not necessarily better than shorter tapers (particularly in urban areas characterized by short block lengths, driveways, etc.), because extended tapers tend to encourage sluggish operation and to encourage drivers to delay lane changes unnecessarily. The real test of taper length involves observation of driver performance after traffic control plans are put into effect. Types of taper lengths are presented in table VI-2. The maximum space between devices in a taper normally approximates the distance in feet of the speed in miles per hour (i.e.: a 55 mph speed road should normally have devices spaced about 55 feet apart). Types of tapers are shown in figure VI-2 and the two-way traffic taper is shown in figure VI-3:

Table VI-2. Taper length criteria for temporary traffic control zones	
Type of taper	Taper length
Upstream tapers	
Merging taper	L <u>minimum</u>
Shifting taper	½ L minimum
Shoulder taper	⅓ L minimum
Two-way traffic taper	100 feet maximum
Downstream tapers	100 feet minimum
(use is optional)	
Formulas for L**	
Speed	Formula
40 mph or less	$L = \frac{WS^2}{60}$

Table VI-2. Taper length criteria for temporary traffic control zones	
Type of taper	Taper length
45 mph or greater	$L = W \times S$

** L = Taper length in feet.

W = Width of offset in feet.

S = Posted speed, off-peak 85th percentile speed prior to work starting, or the anticipated operating speed in mph.

a. Merging Taper

A merging taper requires the longest distances because drivers are required to merge with an adjacent lane of traffic at the prevailing speed. The taper should be long enough to enable merging drivers to adjust their speeds and merge into a single lane before the end of the transition. For freeways, expressways, and other roadways having a speed of 45 mph or greater, the minimum length for merging tapers should be computed by a formula $L = W \times S$. For residential, urban, and other streets with speeds less than 45 mph, the formula $L = (W \times S^2)/60$ should be used. Under either formula, L is the taper length in feet, W is the lateral shift of traffic due to the partially or fully closed lane (in feet), and S is the posted speed, the off-peak 85th percentile speed prior to work starting or the anticipated operating speed. The formula $L = (W \times S^2)/60$ is used for speeds less than 45 mph because slower traffic can merge safely in a shorter distance.

(MUTCD, Temporary Traffic Control Elements, Section 6C-3 at Ex. 12 at 3-4). (emphasis added).

Using the formula in Table VI-2, the Secretary claims that the MUTCD “required” the taper in this case to be at least 320 feet long. (Sec’y Br. at 16). The Secretary then relies on CO Santiago, who initially testified that he estimated the taper length to be 120 feet long based on video and stills from Officer Parfenioux’s dash-cam video taken after the incident took place.¹⁰⁹ (Sec’y Br. at 17 citing Tr. 375-76; Exs. 3 at 1, 13). Later, when viewing the video

¹⁰⁹ When attempting to ascertain distances between cones in the taper, CO Santiago testified that he “felt more comfortable” using the video from Officer Hollis’s patrol car at Exhibit A rather than using the video from

taken in Officer Hollis' patrol car and using the still photograph taken from the Parfeniouk video at Ex. 3 at 2 [bottom photograph] in the courtroom, CO Santiago increased his estimated taper length from 120 feet to 160 feet. (Exs. 3 at 2 [bottom photograph], 13, A). Citing to this later testimony at "[Tr. at 396]" presented by CO Santiago in the Secretary's Post-Hearing Brief in support of an assertion the Secretary attributes to Wittlinger, the Secretary asserts that Wittlinger estimated the taper length on this worksite to be 160 feet long.¹¹⁰ (Sec'y Br. at 17 citing Tr. 396). In this way, the Secretary alleges that Respondent violated the cited standard. (Sec'y Br. at 16).

Schaeffer, on the other hand, testified that the taper was 660 feet in length. He said he started the cone taper at station number 220.¹¹¹ (Tr. 157-58, 161-64, 168, 208; Ex. 14 at "G" and "H"). As previously stated in fn. 62, Schaeffer determined the length of the taper by using the station markers 220 and 215. (Tr. 168-69; Ex. 14). He stated that there was no way PennDOT inspectors would have allowed him to be shy of 600 feet because of the liability and everything else. (Tr. 200). He testified that he went for a full 660 feet. (Tr. 168-69, 200). Schaeffer testified that he had no reason to believe that the workers didn't use his paint marks as a guide to place the cones on the taper. (Tr. 212).

Ruof, too, estimated that the installed taper was 660 feet in length. (Tr. 131-32).

The Secretary did not call Villasenor, Garber, Moser or Tracy, or any worker who set the cones in place at the worksite to testify about the length of the taper. CO Santiago took no

Officer's Parfeniouk patrol car (Ex. 13) because a vehicle in Officer Parfeniouk's video was "sort of obstructing the view." (Tr. 388).

¹¹⁰ Wittlinger actually said that he did not know why the taper was only 160 feet long. (Tr. 421). As previously explained, the Court gives little or no weight to CO Santiago's courtroom calculation that the taper was 160 feet long. (Tr. 388-96; Exs. 3 at 2 [bottom photograph], 13, A).

¹¹¹ Exhibit 14 includes notes that state "BEGIN SHOULDER TAPER 220' IN ADVANCE OF MERGING TAPER WITH CHANNELIZING DEVICES (6 MIN.)" and "BEGIN 663' MERGE TAPER" just east of station number 220 and "END 663' MERGE TAPER" at "E" just west of station number 215. (Tr. 197; Ex. 14).

measurements at the worksite, including the skip lines or Schaeffer's paint markings for the taper. Cones had been moved from the taper following the incident before the videos and photographs were taken. As previously stated, the Court is also unable to discern whether or not the two cones at Exhibit 3 at 2, bottom photograph, at "B", are the first cones located at the center line; or at the end of the taper. There are at least two gaps of undetermined lengths shown on that photograph and in the videos at Exhibits 13 and A, both before and after these two cones. Both the videos at Exhibits 13 and A and the photograph at Exhibit 3 at 2 [bottom photograph] taken from the video at Exhibit 13 were taken after the incident, after cones had been thrown and removed from the taper. Based upon the contradictory evidence before it, the Court is unable to make a finding as to the precise length of the taper; including whether the taper was less than the "required" approximately 300 feet as alleged by the Secretary. (Citation at 8). The Secretary carries the burden to prove the length of the taper; something he has failed to do. He has failed to show that the taper was only 120-feet in length. He has also failed to overcome the direct testimony by Messrs. Ruof and Schaeffer that the taper was about 660 feet in length at the time of the incident.

Notwithstanding the above, the Court also analyzes Respondent's argument that the cited MUTCD provisions do not apply because they are discretionary. (Resp't Br. at 26-27). Respondent argues that "through use of the word 'should' in the cited MUTCD provision, the definitions in Section IA.13 of the MUTCD identifies Section 6C-3 as only Guidance, which is defined as a 'recommended, but not mandatory, practice in typical situations.' MUTCD, Section IA.13." (Resp't Br. at 24). Section IA.13 of the MUTCD is not included in the record as an exhibit. *KS Energy Serv., Inc.*, 22 BNA OSHC at 1265 n.8 (noting that it is consistent with Commission precedent to refer to other provisions of the MUTCD when interpreting a

disputed term of a provision of the MUTCD) (citations omitted). This citation item, however, can be disposed of by weighing the arguments and placing the burden appropriately on the Secretary.

The Secretary does not address, in any way, the discretionary language of these provisions with respect to the applicability of the cited standard, stating simply that the cited MUTCD provision “requires” a certain transition taper length. (Sec’y Br. at 14-16). The Secretary looks only to the language within Table VI-2, which the Court notes does use the word “minimum.” (Ex. 12 at 4). However, as Respondent points out, the accompanying language to this table is discretionary: “For residential, urban, and other streets with speeds less than 45 mph, the formula $L = (W \times S^2)/60$ should be used.” (Ex. 12 at 4). Indeed, all of the language in the paragraphs surrounding Table VI-2 is discretionary, using words such as: “may,” normally,” and “should.” There are no instances of the words, “shall” or “must,” which would indicate a mandatory provision that would be incorporated to the cited OSHA standard pursuant to 29 C.F.R. 1926.6(a). *Ruhlin Co.*, 21 BNA OSHC at 1784 (only mandatory provisions of the MUTCD are incorporated as standards by § 1926.200(g)(2)).

The Secretary does not address any of this accompanying language to Table VI-2 in his argument, not even to explain how to reconcile the use of the word “minimum” buried, contextually, within the overwhelmingly discretionary language surrounding it. But Respondent does address this discretionary language in its counter-argument, claiming that the discretionary language renders this cited MUTCD provision inapplicable. The Court agrees with Respondent, as the Secretary has set forth nothing to support his argument. As such, the Secretary leaves Respondent’s counter-argument unrebutted. The Secretary therefore has not carried his burden in establishing the mandatory nature of the cited MUTCD provision.

The Court finds that the MUTCD does not “require” a certain taper length in this case. The Court is persuaded by Respondent’s argument regarding the discretionary nature of the length of the transition taper in the cited MUTCD provision. There is no such mandatory language, and so the Court finds that this particular provision is not incorporated by reference into the cited OSHA standard. 29 C.F.R. § 1926.6(a).

For the reasons stated above, the cited standard is inapplicable in this case. This citation item is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based on these findings of fact and conclusions of law, it is **ORDERED** that:

- 1) Item 1 of Citation 1, alleging a serious violation of section 5(a)(1) of the OSH Act, 29 U.S.C. § 654(a)(1), is **VACATED**.
- 2) Item 2 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.202, is **VACATED**.
- 3) Item 3 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.200(g)(2), is **VACATED**.

SO ORDERED.

/s/Dennis L. Phillips
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: October 30, 2018
Washington, D.C.