



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

SECRETARY OF LABOR,

Complainant,

v.

BRUBACHER EXCAVATING, INC., and its
successors,

Respondent.

OSHRC DOCKET NO. 18-0033

SECRETARY OF LABOR,

Complainant,

v.

TRAFFIC CONTROL SERVICES LLC,
d/b/a FLAGGER FORCE, and its successors,

Respondent.

OSHRC DOCKET NO. 18-0019

Appearances:

Kate O'Scannilain, Solicitor of Labor
Oscar L. Hampton, III, Regional Solicitor
Brittany M. Williams, Attorney
U.S. Department of Labor, Office of the Regional Solicitor, Philadelphia, PA
For the Complainant

Kenneth D. Kleinman
Brad M. Kushner
Stevens & Lee, Philadelphia, PA
For Brubacher Excavating, Inc.

Brandon J. Brigham
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For Traffic Control Services LLC, d/b/a Flagger Force

Before: Covette Rooney, Chief Administrative Law Judge

DECISION AND ORDER

Following a worker injury, the Occupational Safety and Health Administration (OSHA), commenced investigations of two employers who had been working at a construction site located along Pottstown Pike in West Chester, Pennsylvania. The investigation led to citations being issued to Brubacher Excavating, Inc. (Brubacher) and Traffic Control Services, LLC, which does business as Flagger Force (Flagger Force).¹ (Stip. 6.)

Brubacher and Flagger Force both filed timely challenges to the citations with the Occupational Safety and Health Review Commission (Commission). Brubacher's challenge was assigned docket No. 18-0033 and Flagger Force's challenge was docketed as No. 18-0019. Because of the similarity of the underlying facts, Brubacher and Flagger Force's cases were consolidated for review.

Prior to the hearing, the Secretary vacated certain citation items for each party. From the citation issued to Brubacher, the Secretary vacated Items 1b and 2 of Citation 1. Likewise, Citation 1, Items 1b and 2 were vacated from the citation issued to Flagger Force. For both parties, there is only one remaining citation item at issue, an alleged violation of 29 C.F.R. § 1926.200(g)(1).² A hearing on the consolidated matters was held on February 26-28, 2019, in Philadelphia, Pennsylvania.

For the reasons that follow, the citation issued to Brubacher as a result of OSHA Inspection No. 1280576 is VACATED, and no penalty is assessed; and the citation issued to Flagger Force as a result of OSHA Inspection No. 1263466 is VACATED, and no penalty is assessed.

¹ Stipulation 6 provides: "OSHA conducted an inspection at the worksite on June 6, 2017, and subsequently issued a Citation and Notification of Penalty to both Brubacher and Traffic Control."

² For each party, the only citation item remaining was designated Citation 1, Item 1a.

I. Jurisdiction

The Commission has jurisdiction over this contest, pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act). (Stip. 7.) Brubacher is an employer within the meaning of section 3(5) of the OSH Act, as it is engaged in a business affecting commerce.³ (Stips. 8, 10.) It had nine employees at a construction worksite in West Chester, PA from May 31, 2017 through June 5, 2017.⁴ (Stips. 1, 2, 12.) Flagger Force is also an employer within the meaning of section 3(5) of the OSH Act, as it is engaged in a business affecting commerce.⁵ (Stips. 9, 11.) It also had employees at the same construction worksite on the same days. (Stips. 1, 3-5, 12.) Based upon the record, including the parties' admission to jurisdiction, the undersigned concludes the Commission has jurisdiction over the parties and the subject matter of this case.

II. Background

Brubacher was retained by the Islamic Society of Chester County (Islamic Society) and Aqua Pennsylvania (Aqua) to perform construction work associated with the installation of a water line along Pottstown Pike to service the Islamic Society's property.⁶ (Tr. 225, 307-8; Stip. 1, 12;

³ Stipulation 8 provides: "Brubacher is an "employer" within the meaning of Section 3(5) of the [OSH Act]." And stipulation 10 states: "Brubacher is an employer engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the [OSH Act]."

⁴ Stipulation 1 is: "Brubacher was conducting paving and excavating operations at, or in the vicinity of, Pottstown Pike and Taylors Mill Rd. in West Chester, PA 19380 (hereafter "worksite") from approximately May 31, 2017 through June 5, 2017 (hereafter the "relevant period")." Stipulation 2 provides: "Brubacher had nine employees at the worksite on June 5, 2017, including but not limited to paving supervisor, David Duda and hourly employees Brent Horst and Joey Sipes." Stipulation 12 states: "Brubacher's worksite qualified as a "construction area," as used in 29 C.F.R. § 1926.200(g)(1).

⁵ Stipulation 9 specifies: "[Flagger Force] is an "employer" within the meaning of Section 3(5) of the [OSH Act]." Stipulation 11 states: "[Flagger Force] is an employer engaged in a business affecting commerce within the meaning of sections 3(3) and (3) of the [OSH Act]."

⁶ The parties stipulated that: "Brubacher was conducting paving and excavating operations at, or in the vicinity of, Pottstown Pike and Taylors Mill Rd. in West Chester, PA (hereafter "worksite") from approximately May 31, 2017 through June 5, 2017 (hereafter the "relevant period")." (Stip. 1.)

Gov. Exs. 22, 25, 26.) The construction worksite abutted the northbound side of Pottstown Pike from Taylors Mill Road through Cross Pointe Drive. (Tr. 225-26, 261-62; Stip. 12.) Brubacher first excavated land to allow Aqua to lay the water pipes in the ground. (Stip. 1, 12.) After Aqua laid the pipe, Brubacher employees covered the trench and worked on paving over the surface. (Tr. 592.) The paving work began on Wednesday, May 31, 2017. (Stip. 1.) The project took four days and was completed on Monday, June 5, 2017. (Stip. 1; Tr. 592.)

The work took place within the northbound lane and shoulder of Pottstown Pike, a multi-lane road in West Chester, PA. (Stip. 1; Gov. Exs. 16, 17, 22.) The paving work required an adjustment to the road's regular traffic pattern. (Gov. Ex. 22.) A traffic control plan for this adjustment was approved by the Pennsylvania Department of Transportation (Penn DOT). (Gov. Exs. 8, 21.) The approved traffic pattern shifted traffic from the northbound lane into what is ordinarily a middle lane for turning. (Gov. Ex. 21.) The speed limit for traffic moving both north and southbound remained the same as it was before the work began, 45 miles per hour. (Tr. 628; Gov. Ex. 16.) Cones were placed to divert traffic and provide a barrier between the vehicles traveling north and those traveling south. (Gov. Exs. 16, 21.) In addition, one flagger worked at the north end of the worksite, and another worked at the south end. (Tr. 623; Gov. Ex. 21, 22.) The flaggers were to assist with making drivers aware of the changed traffic pattern. (Gov. Ex. 21.)

To implement the traffic control plan, Brubacher retained Flagger Force.⁷ (Stip. 3; Tr. 593; Gov. Ex. 30.) Flagger First's business is to provide its clients with traffic control services such as flagging operations, lane closures, and shifting traffic patterns. (Gov. Ex. 34 at 3.) Brubacher and

⁷ Stipulation 3 provides: "Brubacher contracted with [Flagger Force] to conduct, manage, and otherwise provide flagging and/or provide traffic control services at the worksite during the relevant period, in accordance with the terms of the Master Subcontract Agreement between Brubacher and [Flagger Force], dated April 19, 2016."

Flagger Force have a long-standing relationship, whereby Flagger Force provides most of the traffic control services needed at Brubacher worksites and assists with training Brubacher employees about flagging. (Tr. 228, 571; Gov. Exs. 8, 24.)

David Duda was Brubacher's supervisor for the Pottstown Pike worksite. (Tr. 345, 589; Stip. 2.) He met with the Flagger Force employees to explained what work his crew would be doing and where they would be working. (Tr. 615-17; Gov. Ex. 21.) After work began on May 31, 2017, which was Flagger Force's first day at the worksite, Mr. Duda completed a Safety Observation Compliance Form. (Tr. 601; Gov. Ex. 32.) Mr. Duda explained that he typically completes this type of form on the first day of a project to make sure he does not "overlook anything." (Tr. 601-2.) Before completing the form, Mr. Duda traveled the entirety of the worksite to see that three sets of advance warning signs were properly in place. (Tr. 604.) Specifically, he checked to make sure Flagger Force set up advance warning signs in three places: (1) on the northbound side of Pottstown Pike; (2) on the southbound side of Pottstown Pike; and (3) along the Route 322 exit ramp, which connects another road to a section of Pottstown Pike near the worksite. (Tr. 604; Gov. Ex. 32.)

After the work began, it became apparent that the traffic control pattern was not functioning as expected. Mr. Duda, in consultation with the Flagger Force employees working at the site, adjusted how much time motorists had to enter the new traffic pattern and improved the visibility of the signs for motorists entering Pottstown Pike from the Route 322 exit ramp. (Tr. 597-600.) These changes were maintained through the first three days of the project. (Tr. 606, 652.)

During these first three days, the same employees from Flagger Force arrived each day. (Gov. Ex. 21.) On the last day of the project, June 5, 2017, two different Flagger Force employees

were sent to the worksite.⁸ (Tr. 181, Gov. Exs. 21, 31; Stip. 4.) Unlike the prior days, these employees only set up warning signs on the northbound side of the Pottstown Pike, which was side closest to where the paving and excavation work was being done. No advance warning signs were placed on the southbound side or along the Route 322 exit ramp as had been done on the first three days. (Gov. Ex. 16.)

About two and a half hours after Brubacher started work, around 11:30 a.m., a car traveling northbound on Pottstown Pike failed to adhere to the traffic control pattern and ran into a Flagger Force employee. (Tr. 89; Gov. Exs. 19, 22.) The employee was seriously injured. (Tr. 183.) A Brubacher employee, Joey Sipes, called 911 and emergency responders arrived at the worksite. (Tr. 230; Gov. Ex. 22.)

The emergency response team included two West Goshen Township Police Officers, Officer Virgilio and Officer Grandizio. (Tr. 37, 110.) Officer Grandizio interviewed three Brubacher employees, including Mr. Duda and Mr. Sipes, shortly after arriving at the scene. (Tr. 110-11.) These interviews were recorded. (Tr. 286.) Officer Virgilio was the lead investigator of the accident at Brubacher's worksite. (Tr. 41, 110, 158.) As part of his investigation, Officer Virgilio reviewed video footage of the worksite that was taken earlier in the day of the accident when another officer drove by worksite as well as other evidence. (Tr. 46-47, 112.)

OSHA commenced its investigation the day after the accident, on June 6, 2017. (Stip. 6.) By that time all worked had stopped at the worksite. (Stip. 1.) Compliance Officer Allen Wilcox (CO) visited the worksite and spoke with representatives of Brubacher and Flagger Force. (Tr. 261, 263, 265; Gov. Exs. 3, 4.) He also collected information from the West Goshen Township

⁸ Stipulation 4 is: "On June 5, 2017 [MD] and [JL] were the employees providing traffic control services at the worksite on behalf of [Flagger Force]."

Police, including video footage of the worksite and the recorded interviews with the Brubacher employees. (Tr. 48-49, 286, 289.)

III. Discussion

To establish a violation of a specific standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) its terms were violated; (3) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition; and (4) one or more employees had access to the cited condition. *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982). The cited standard, 29 C.F.R. § 1926.200(g)(1), states that: “construction areas shall be posted with legible traffic signs at points of hazard.”⁹ There is no dispute that the Pottstown Pike worksite, which included Brubacher’s paving and excavating operations, constitutes a “construction area” within the meaning of the standard. (Stips. 1, 12.) The parties contest the other elements of the Secretary’s burden.

A. Flagger Force

1. Applicability, Violation, and Exposure

The Secretary alleges that Flagger Force violated 29 C.F.R. § 1926.200(g)(1) by failing to provide at least one advance warning sign for motorists approaching the worksite from two directions: (1) the southbound lane of Pottstown Pike, or (2) the exit ramp connecting Pottstown Pike to Route 322. The parties agree that there were no signs at those locations. (Gov. Exs. 16,

⁹ After the citation’s issuance, the cited standard was modified to provide: “At points of hazard, construction areas shall be posted with legible traffic control signs and protected by traffic control devices.” Signs, Signals, and Barricades, 84 Fed. Reg. 21416, 21433, 21577 (May 14, 2019) (to be codified at 29 C.F.R. Parts 1910, 1915 & 1926).

20, 51.) Instead, they argue that those locations were not points of hazard within the meaning of the cited standard.

The purpose of posting the traffic signs the cited standard requires is to warn motorists of construction work being done along the roadway. *See Sunshine Guardrail Servs.*, No. 96-631, 1996 WL 650480 (O.S.H.R.C.A.L.J., Oct. 28, 1996). To satisfy the adequate advance warning requirement, employers must convey: (1) that work is taking place, (2) information about highway conditions, and (3) information about how traffic can move through the temporarily revised traffic pattern. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1262 (No. 06-1416, 2008) (affirming a violation of 29 C.F.R. § 1926.200(g)(2), which also addresses “Signs, Signals, and Barricades”).

a) *Southbound Lane*

Unlike motorists approaching the worksite from the northbound lane, those traveling southbound on Pottstown Pike were not warned they were about to approach the worksite. While the traffic control pattern did not require a full lane shift for southbound motorists, the lane was partially obstructed. (Gov. Exs. 16, 17, 21.) Mr. Duda indicated that the traffic pattern required an approximately two-foot diversion for vehicles traveling in the southbound lane. (Gov. Ex. 21.) If motorists were not aware of the diversion, they could cross into the northbound lane. (Tr. 343.) This could result in crashes impacting the worksite. *Id.* In addition, the traffic control plan required the placement of a number of cones along what was typically the middle turning lane. (Tr. 293; Gov. Ex. 16.) If a vehicle were to strike one of the cones it could become airborne and hit the flaggers or other workers. (Tr. 343; Gov. Ex. 22.) The cones were “like a projectile” and could “come flying through the air” if struck by a vehicle. (Tr. 227, 627-28.) Indeed, early on the morning of June 5, 2017, a pickup truck with a trailer on it knocked over a row of cones after they were set up. (Tr. 223-24, Gov. Ex. 22.) Besides the risk posed by the cones, Mr. Duda also thought

that the work might require periodic disruption to the southbound traffic flow. (Tr. 651.) Because of that possibility, Mr. Duda testified that there should have been a “flagman ahead” sign on both the north and southbound sides of the road. (Tr. 605, 651.)

Flagger Force’s own policies also recognized the need for advance warning signs on each side of a worksite. (Tr. 192, 741-42, 744, 755-56; Gov. Ex. 33, FF Exs. 10, 12.) Consistent with this policy, the Master Services Agreement, which governed the relationship between Flagger Force and Brubacher, specifically required at least two warning signs to be placed at appropriate distances from either end of the work zone. (Tr. 285-86.) Finally, there is no dispute that there were signs on both sides of the road for the first three days of the project.

Thus, the Secretary adequately showed that the southbound lane of Pottstown Pike was a “point of hazard” where advance warning signs were required, and Flagger Force failed to have any warning signs at that location.

b) Exit Ramp

Motorists on the Route 322 exit ramp had to merge into traffic along the northbound lane of Pottstown Pike, the same lane along which Brubacher and the Flagger Force employees were working. As discussed, the northbound lane was diverted as a result of Brubacher’s work. The end of the exit ramp was a short distance from the beginning of the worksite—approximately 250 feet. (Tr. 93, 101-2; Gov Ex. 7 at 5.)

For the first three days of the project, Flagger Force installed at least two signs indicating “work area ahead” and “flagman ahead” along the Route 322 exit ramp. (Tr. 485, 605-6.) Shortly after work began the signs were re-positioned to improve their visibility. (Tr. 597.) In addition to the signs placed by Flagger Force, the end of the ramp also had a stop sign. (Tr. 102.)

Flagger Force argues that this stop sign satisfied the cited standard. (Flagger Force Br. at 18-19.) However, as this stop sign was always in place, its presence did not alert drivers that they would be quickly entering a worksite with a different traffic pattern and that there may be flaggers in the road.¹⁰ (Tr. 102.) Not only did the initial traffic plan recognize that the stop sign alone would be insufficient, but the conditions at the worksite also made that apparent. Mr. Duda discussed motorists failing to come to a complete stop at this particular stop sign. (Tr. 607-8.) Many motorists treated the sign as requiring a yield, rather than a full stop. *Id.* They tended to “jet out at 45 miles per hour” rather than fully stopping before attempting to merge.¹¹ *Id.* The CO explained that the focus of motorists on the ramp would be to “pay attention to any oncoming traffic” and they would not necessarily realize the nearby worksite and changed traffic pattern. (Tr. 344.)

This is sufficient to show that the exit ramp was also a point of hazard and as such should have had at least one advance warning sign. *See* 29 C.F.R. § 1926.200(g)(1).

2. Exposure

There is no dispute that two Flagger Force employees were working in and around Pottstown Pike when two points of hazard lacked appropriate signage. (Tr. 390; Gov. Exs. 4, 7, 16-18.) Flagger Force argues that its employees did not have reason to be on the Route 322 exit ramp and so were not exposed to that hazard. (Flagger Force Reply Br. at 7.) However, the need for signage on the exit ramp and along both directions of the Pottstown Pike arose because Flagger

¹⁰ Flagger Force argues that *Groves-Brown & Lambrecht-Denton Joint Venture*, No. 79-5070, 1981 WL 18957 (O.S.H.R.C.A.L.J., June 5, 1981), supports finding that the permanent stop sign was sufficient. (Flagger Force Br. at 18-19.) In addition to not being binding, *Groves-Brown* is also factually distinct. That matter involved a worker using a temporary handheld stop sign to alert motorists as opposed to Flagger Force’s attempt to rely on a stop sign that was always in place and did not alert motorists to the upcoming worksite. 1981 WL 18957 at * 3-4.

¹¹ Mr. Duda also described the exit ramp as an area “where everybody likes to cut everybody off.” (Tr. 599.) This created a situation where “usually the signs don’t get seen.” *Id.*

Force employees were working along that road, including at a point a short distance from the end of the ramp. (Gov. Exs. 16, 17A, 18.) As such, they were exposed to the hazardous condition that is the focus of the cited standard. *See RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995) (finding that the zone of danger for purposes of assessing employee exposure to be the “area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent”).

3. Knowledge

On June 5, 2017, two Flagger Force employees arrived at the worksite—one crew leader and one crew member.¹² (Stips. 4, 5; Tr. 667.) The crew leader arrived at the worksite first. (Tr. 615-16.) He met with Mr. Duda, who walked the length of the worksite with him and explained the traffic control pattern that had been in place over the first few days of the job. (Tr. 617-20.) The crew leader set up the traffic cones and the warning signs on the northbound side of the road. (Tr. 227, 621.) The crew member showed up later and then both him and the crew leader took up positions as flaggers near the start and end of the cones lining the worksite. (Tr. 623.) The flaggers kept a lookout for distracted motorists and those who were unsure of how to follow the adjustment to the usual traffic pattern. (Gov. Ex. 21.)

The crew leader knew where he set up the signs and had actual knowledge of the hazardous condition. (Tr. 518.) The parties dispute whether his knowledge can be imputed to Flagger Force. In general, a supervisor’s knowledge of a hazardous condition is imputable to his or her employer. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff’d*, 19 F.3d 643 (3d Cir. 1994) (unpublished). The issue here is whether the crew leader was a supervisor.

¹² Stipulation 5 is: “June 5, 2017 was the first day [MD] or [JL] worked at the worksite during the relevant period.”

Flagger Force argues that it did not consider the crew leader to be a supervisor. (Tr. 450-51; Gov. Ex. 51.) He was an hourly employee who did not have the authority to hire or fire people. (Tr. 166, 451.) Nor could he discipline any other employee. *Id.* In Flagger Force’s view, no supervisor ever visited the worksite.¹³

The Secretary responds that despite how Flagger Force labeled its employees, the crew leader had sufficient authority over the crew member such that he can be considered a supervisor for purposes of imputing knowledge.¹⁴ *See Diamond Installations, Inc.*, 21 BNA OSHC 1688, 1690 (No. 02-2080, 2006) (supervisory status turns on the delegation of authority, not the title of the employee). An employee who has been delegated authority over other employees, even if temporarily, is considered to be a supervisor for the purposes of imputing his knowledge to an employer. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2068-69 (No. 96-1719, 2000) (determining that a crew leader was a supervisor whose knowledge could be imputed even though he had no authority to discipline other employees); *Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-630, 1992) (finding temporary delegation of authority sufficient for purposes of imputing knowledge). The employee’s formal title is not controlling—what matters is the substance of the employee’s duties. 18 BNA OSHC at 2068. The employee’s authority need not be widespread. It is sufficient if they are “in charge” of one or two other employees. *See Access*

¹³ Notably, when discussing its efforts at reasonable diligence and its employee misconduct defense, Flagger Force touts the crew leader’s role in supervision and ensuring safety rules are enforced. (Flagger Force Br. at 21, 24.)

¹⁴ When asked whether there was a Flagger Force supervisor present at the worksite, the CO explained that the crew leader was present and he was in charge of setting up and implementing the traffic pattern, including the correct placement of signs. (Tr. 391, 449.) The CO explained that his investigation did not determine that Flagger Force considered the crew leader to be a supervisor. (Tr. 450.) However, whether a person has sufficient supervisory authority for purposes of imputing knowledge is a legal conclusion, and thus neither the Secretary nor the undersigned is bound by the CO’s assessment. *See e.g., Jim Boyd Constr., Inc.*, 26 BNA OSHC 1109, 1113 n. 6 (No. 11-2559, 2016) (whether efforts constitute “good faith” is legal determination so the CO conclusions are not binding); *Kaspar Wire Works, Inc. v. Sec’y of Labor*, 268 F.3d 1123, 1128 (D.C. Cir. 2001) (“the Commission is not bound by the representations or interpretations of Compliance Officers”).

Equip. Sys., Inc., 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999) (employee who was “in charge of” or “the lead person for” one or two employees who erected scaffolds “can be considered a supervisor”); *Pa. Power & Light Co. v. OSHRC*, 737 F.2d 350, 352, 355 (3d Cir. 1984) (hereafter, *PP&L*) (finding that the crew leader of a three-person electrical utility crew at a remote worksite was a supervisor for purposes of determining the employer's knowledge of violative conditions).

Crew leaders and crew members both have a role in identifying unsafe conditions. Any crew leader or crew member could stop work for safety issues. (Tr. 748.) But crew leaders have more training than crew members and Flagger Force required there to be at least one crew leader at each job site. (Tr. 169, 173, 746, 769.) The crew leader was “in charge” at the worksites. (Tr. 166, 168, 391, 623, 746.) They were tasked with ensuring that each worksite is set up in accordance with Flagger Force’s policies and the designated traffic pattern for the job.¹⁵ (Tr. 166, 203, 391, 685, 745-46, 758; Gov. Ex. 8 at 3.) The crew leader was responsible for assessing whether the Manual on Uniform Traffic Control Devices (MUTCD) or Pennsylvania’s Temporary Traffic Control Guidelines apply, and then to comply with the requirements of the applicable regulations. (FF Ex. 12; Gov. Ex. 8.) The crew leader was issued a truck, signs, cones, and other safety equipment.¹⁶ (Tr. 167, 731-32.) Crew leaders are the employees responsible for obtaining the proper safety equipment needed to complete the work Flagger Force was hired for, mainly the protection of workers on or near roads. (Tr. 176-77, 194; Gov. Ex. 24.) If the crew leader determined additional equipment was needed, he or she would contact the regional office to get the equipment. (Tr. 732.) While the branch managers were the employees who determined who

¹⁵ Flagger Force’s training program specifies that the “crew leader sets the pattern.” (FF Ex. 12 at 76.)

¹⁶ Crew leaders kept their trucks at their homes and then drove to each worksite. (Tr. 176.)

got promotions and handled formal discipline, there is no evidence they ever supervised work in the field directly.¹⁷ (Tr. 763.)

As crew leader, MD was tasked with responsibility for the safety of the Flagger Force employees at the worksite and implementing the correct traffic cone pattern. (Tr. 203, 208-9.) He met with Brubacher to discuss the traffic pattern, led the set-up work, and determined where he and the other flagger would be working. (Tr. 451, 623.) After discussing the planned construction work with Brubacher, consistent with Flagger Force's policy, he led the pre-job brief to explain the tasks to be done with the crew member. (Tr. 194-95, 201.) During any such pre-job brief, the crew leader had the obligation to inform the crew members of "the hazards to the crew," explain job responsibilities, and discuss how to do the job safely and securely. (Tr. 195, 745-46; Flagger Force Br. at 8.) MD was in charge of setting up and making sure the traffic pattern, including the sign placement, was correct. (Tr. 166, 391, 394, 518.) He considered himself qualified to be responsible for the other Flagger Force employee he was supervising at the worksite. (Tr. 201.) His work at job sites was not directly overseen by anyone else.¹⁸ (Tr. 179.) On this record, the crew leader had been delegated sufficient authority to be considered a supervisor and his actual

¹⁷ Separate quality inspectors checked on approximately 20% of all job sites per month and reported their findings to the branch managers. (Tr. 763, 766.)

¹⁸ Neither crew leaders nor crew members are required to report to a Flagger Force office regularly. (Tr. 699.) Work assignments are sent out through a phone application. (Tr. 181.) Crew leaders are only required to report three times a year for safety training, but they did come into the office to pick up equipment at other times. (Tr. 670, 732.)

knowledge of the violative conditions can be imputed to his employer.¹⁹ *Kerns*, 18 BNA OSHC at 2069; *PP&L*, 737 F.2d at 352, 355.

Ordinarily, after the Secretary establishes the applicability of the cited standard, its violation, employee exposure, and employer knowledge of the violative condition, the burden shifts to the employer to show that the violation should be excused based on some affirmative defense. *See e.g., Astra Pharm.*, 9 BNA OSHC at 2129. However, in *Kerns*, the Commission concluded that under Third Circuit precedent, when the employer's knowledge of a hazardous condition can only be inferred through "proof of a supervisor's misconduct," the Secretary cannot shift the burden of persuasion of the issue of misconduct to the employer. 18 BNA OSHC at 2069 (discussing *PP&L*, 737 F.2d at 352, 355). In such situations, the violation will be "excused" if the supervisor's misconduct was contrary to a consistently enforced company policy, supervisors were adequately trained, and reasonable steps were taken to discover safety violations. 737 F.2d at 358. In contrast, "[i]n cases where the Secretary proves that a company supervisor had knowledge of, or participated in, conduct violating the [OSH Act], we do not quarrel with the logic of requiring the company to come forward with some evidence that it has undertaken reasonable safety precautions." *Id.* at 357.

The present matter aligns with such a situation. The Secretary relies on the supervisor's actual knowledge of the violative condition—his own failure to place the advance warning signs at points of hazard as required by the cited standard. In any event, apart from the burden of proof,

¹⁹ The Secretary also argues that Flagger Force had constructive knowledge of the violative conditions. (Sec'y Br. at 43.) To establish constructive knowledge, the Secretary must prove that the employer, with the exercise of reasonable diligence, should have known of the hazardous condition. *See e.g., Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1219 (No. 10-2659, 2015). For the same reasons addressed in connection with the unpreventable employee misconduct defense, the record does not contain enough support for a finding of constructive knowledge. *Burford's Tree Inc.*, 22 BNA OSHC 1948, 1951-52 (No. 07-1899, 2010) (factors for evaluating constructive knowledge are the same for evaluating unpreventable employee misconduct defense), *aff'd*, 413 F. App'x 222 (11th Cir. 2011) (unpublished).

the test applied in *PP&L* largely tracks the Commission’s test for establishing unpreventable employee misconduct.²⁰ Compare 737 F.2d at 358 with *Nooter Constr., Inc.*, 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994). So, for the reasons discussed below, regardless of whether the Third Circuit would extend *PP&L* to apply to the fact pattern at issue here, the undersigned finds that the violation should be vacated because the record shows it was the result of unpreventable employee misconduct.

4. Unpreventable Employee Misconduct

To establish the defense of unpreventable employee misconduct, the employer must show it: (1) established specific work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered. *Nooter*, 16 BNA OSHC at 1578.

The Secretary admits that Flagger Force had a specific written work rule intended to prevent missing advance warning signs. (Sec’y Br. at 43.) Indeed, Flagger Force’s first “fundamental principle” of flagging was to have advance warning signs in place. (FF Ex. 10.) Flagger Force anticipated the hazards contemplated by the cited standard and formulated a specific rule to facilitate compliance.

Besides its specific written work rule requiring advance warning signs, Flagger Force also had general safety rules. It required compliance with “federal, state, and local laws” and the company’s “best practices.” (Gov. Ex. 36 at 12.) All employees must adhere to the company’s

²⁰ The undersigned notes that in its opening brief Flagger Force discusses *PP&L* only in the context of its unpreventable employee misconduct defense. (Flagger Force Br. at 23.) In its Reply Brief, Flagger Force discusses the overlap between the Commission’s test for unpreventable employee misconduct and the one the Third Circuit sets out in *PP&L*. (Flagger Force Reply Br. at 8.)

safety program. (Gov. Exs. 35, 36; Tr. 726-27.) Flagger Force’s Field Employee Handbook (Handbook) specifies that employees are to follow the procedures learned in training. (Gov. Ex. 36 at 12; Tr. 756.) Any violation of a safety rule is “absolutely prohibited and could lead to termination.” (Gov. Ex. 36 at 14.) All employees receive a copy of the Handbook at the start of their employment. (Tr. 682.)

As for the second prong of the defense, communication of the work rule, the Secretary admits that “Flagger Force training for both crew members and crew leaders emphasizes the need for advance warning signs.” (Sec’y Br. at 9.) Flagger Force incorporated its specific work rule into a comprehensive training program. (FF Exs. 10, 12.) Crew members receive a four-hour training course and pass a written exam. (FF Ex. 10; Tr. 678.) This training course is separate from a longer six-hour orientation program. (Tr. 679-80.) Employees must re-take the four-hour training course every three years. (Tr. 749.)

Flagger Force’s training directly addressed the specific work rule at issue here. It required all crew members and crew leaders to know the “ABCs of Flagging,” which were the “fundamental principles” of flagging. (Tr. 741-42; FF Ex. 10 at 19.) The “A” in its “ABCs of Flagging” was a clear shorthand way to remind employees of the need for “advance warning signs.” (Tr. 741-42; FF Ex. 10 at 19.) The written training materials explicitly direct employees to never begin a flagging operation “without signs on the road.” (FF Ex. 10; Tr. 744.) The training also addresses sign placement, including with diagrams showing signs on both sides of the road and along intersecting roads. (FF Ex. 10 at 63, 77-78, 121.)

Crew leaders completed the same course as crew members and then completed an additional three-day training. (Tr. 169, 173, 753, 769; FF Ex. 12.) Like the crew member training, the crew leader training also explained the requirement to have advance warning signs and

specifically instructed crew leaders to “[i]ninstall necessary signage.” (FF Ex. 12 at 63.) It reviews the information from the crew member training about the placement of advance warning signs and provides additional instructions about sign placement specific to different traffic patterns and road conditions, such as the presence of other roads near worksites.²¹ (Tr. 753, 755-56; FF Ex. 12 at 54-58, 72, 82-91, 123-30.) Crew leaders are also required to attend additional one-day re-fresher trainings three times a year.²² (Tr. 669-70, 748.) Thus, Flagger Force specifically trained workers about its rule related to the cited standard and the hazards anticipated by that standard.

Both MD and the other flagger (JL) were tested on their knowledge of flagging, and both passed before beginning to work on the Pottstown Pike project.²³ (Tr. 683-85, 750; Gov. Exs. 37, 38.) MD could not recall all of the training he received, but he “absolutely” knew he needed to set up advance warning signs. (Tr. 192.) In addition, there’s no dispute that all required advance warning signs were in place every other day that Flagger Force employees were at the Pottstown Pike worksite.

As for uncovering violations of work rules, Flagger Force’s quality specialists conduct random checks of worksites to ensure compliance. (Tr. 687-89, 764-66.) Flagger Force’s inspection process requires an examination of 41 separate issues, including assessing whether signage is correct, whether employees are abiding by the MUTCD, and whether they are acting safely. (Tr. 764.) In general, Flagger Force observes the work zone of crew leaders at least twice

²¹ Both the initial crew member training and the additional crew leader training included “hands-on” demonstrations. (Tr. 171, 173, 190; FF Exs. 10, 12.) However, the additional hands-on training section of the crew leader training did not include on-site demonstrations of setting up traffic control patterns. (Tr. 173.)

²² Flagger Force also had employees in the role of advance crew leader. (Tr. 169.) These employees received further training beyond what the crew leaders received and could operate additional types of traffic control equipment, such as arrow panels. (Tr. 175-76, 769.) There was no advance crew leader at the Pottstown Pike worksite on June 5, 2017. (Tr. 770.)

²³ The test for crew members includes questions about signage. (Tr. 751.) MD was tested after he completed the crew member training and again after completing the crew leader training. (Tr. 189, 684-85; Gov. Ex. 37.) His most recent training was completed on April 18, 2017, less than two months before the site inspection. *Id.*

per month and has an auditing system to randomly visit at least 20% of the company's worksites per month. (Gov. Exs. 8, 13; Tr. 764-66.) If inspectors find issues on a repeated basis, they will inspect the relevant employees more frequently. (Tr. 765.) In the six months prior to the accident, about 3,000 random inspections were conducted by the regional office which staffed the Pottstown Pike project. *Id.*

While a Flagger Force inspector had not visited the Pottstown Pike project, MD's worksites were inspected four times in the two months preceding his being assigned crew leader on June 5, 2017.²⁴ (Gov. Exs. 41-44, 45A.) When MD served as crew leader, the inspections of his worksites neither uncovered any issues related to advance warning signs nor gave any indication that he did not understand the fundamental principles of his training.²⁵ (Tr. 752-53; Gov. Exs. 41-44, 45A.) This is entirely consistent with MD's testimony at the hearing when he expressed no hesitation when asked whether he understood the requirement to have advance warning signs. (Tr. 192; Gov. Ex. 41-45A.) The Secretary tries to spin MD's good safety record and his understanding of the advance warning sign rule as showing Flagger Force's program was deficient because this well-regarded employee ended up violating a safety rule on June 5, 2017. (Sec'y Br. at 46.) However,

²⁴ This is consistent with the company's goal of inspecting the worksites of each crew leader twice per month. (Tr. 688, 766; Gov. Ex. 13.)

²⁵ Prior to MD's promotion to crew leader, an inspection of a site where he was working as a crew member found that "one of the shift right signs" was missing. (Gov. Ex. 45A.) The rest of the signage was compliant and there is no evidence that the setup violated any OSHA standard. *Id.* Another inspection on the same day of a different worksite where MD was also working as a crew member revealed that "every sign was spaced properly, and the side streets covered properly." *Id.* The remaining two inspections were of sites where MD served as crew leader. *Id.* Neither of these inspections uncovered any issues related to signage or a traffic pattern. *Id.* Notably, one of these inspections related to a similar traffic pattern set up as was required for the Pottstown Pike project. (Gov. Ex. 41, Tr. 766-67.)

this record actually reflects an idiosyncratic violation of an enforced work rule by an employee who understood the rule and whose past behavior gave no indication he would violate it.²⁶

With no evidence of a lack of understanding or prior violations of work rules by the Flagger Force employees assigned to the Pottstown Pike worksite, the Secretary points to infractions by other employees. (Sec’y Br. at 24-27.) Flagger Force’s inspection records show that the company periodically uncovered violations of its work rule about signage and then took action in response. (Gov. Exs. 45B-E.) At a minimum, Flagger Force verbally coached employees and corrected any issues with the traffic pattern identified during an inspection. *Id.* The inspection records support the testimony of Flagger Force’s safety manager, Joshua Foltz, who explained that when inspectors identified a work rule violation, the issue was immediately corrected and then the inspector would coach the employees about issues identified.²⁷ (Tr. 703, 763, 768.)

Consistent with Flagger Force’s progressive system of discipline, on occasion, additional disciplinary steps beyond verbal coaching were taken to address violations of the advance warning sign work rule. (Tr. 697, 703, 763-65, 772-74; Gov. Exs. 8, 36 at 12, 15.) In January 2015, Flagger Force demoted an employee for, among other reasons, having improper advance warning signs. (Gov. Ex. 47 at 11-14.) A few months later, Flagger Force terminated a different employee for, among other reasons, his failure to have any advanced warning signs set up before a curve in the road. *Id.* at 18-21. The Secretary argues that there was no evidence beyond verbal coaching for violations of the advance warning sign rule in 2016. (Sec’y Br. at 27-29.) However, there is also

²⁶ In *Am. Eng’g & Dev. Corp.*, 23 BNA OSHC 2093 (No. 10-0359, 2012), the supervisor had a good safety record and was supervising two new employees. 23 BNA OSHC at 2098. The Commission found that under the circumstances the one occasion when the conduct did not comply with the company’s safety rule was not sufficient to undermine the evidence showing that the employer consistently enforced its safety program. *Id.*

²⁷ Mr. Foltz also discussed how the Handbook’s more general rules requiring adherence to applicable laws and to act safely were enforced. (Tr. 726-27.) The company believed safety was its first objective. (Tr. 726.) To achieve this objective, it trained employees and then made sure employees adhered to their training in the field. *Id.*

no evidence of worksites lacking all advance warning signs or otherwise violating 29 C.F.R. § 1910.200(g)(1) during that time. (Gov. Ex. 45A-E.) Although the inspection records identify concerns with signage at worksites, none indicate a failure to have at least one advance warning sign as required by the standard the work rule addresses.²⁸ *Id.* Flagger Force showed a history of issuing written warnings and taking other disciplinary actions taken when employees failed to follow the rule to ensure proper advance warning signs.²⁹ (Gov. Ex. 47.)

Flagger Force had a clear written safety rule directly addressing the cited hazard. The requirement for advance warning signs was a “fundamental principle” and the rule was emphasized in several ways. (FF Ex. 10.) Its crew leader attended the training covering the rule, was tested on it, and “absolutely” understood signage was required. (Tr. 54.) MD had no history of violating the relevant rule, or other safety rules, despite being regularly inspected. (Gov. Exs. 41-44, 45A.) There is no evidence that he departed from his training on June 5, 2017 because he believed it was appropriate or would not result in adverse consequences.³⁰ On the contrary, failing to set up advance warning signs had led to a variety of punitive measures against other employees. (Gov. Exs. 45A-E, 47.) There is no reason why Flagger Force should have anticipated a potential

²⁸ The Secretary notes that some of the disciplinary records in evidence are dated after June 5, 2017. (Sec’y Br. at 27.) One such record, dated June 28, 2017, explains that it is following two written warnings that occurred earlier in the year (before the OSHA investigation). (Gov. Ex. 47 at 1.) Another record appears to relate to an employee who previously received verbal coaching before being written up. *Id.* at 3-4.

²⁹ The Secretary contends that because Flagger Force uncovered violations of its work rule through its enforcement, the rule was ineffective or poorly communicated. (Sec’y Br. at 45-46.) The Secretary is correct that some of the inspection reports indicate a failure to comply with Flagger Force’s signage requirements. (Gov. Ex. 45B-E.) For example, some entries note that worksites were “safe” but missing some sign or traffic control device. (Gov. Ex. 45D.) But, none of the reports describe worksites without any advance warning signs or establish past violations of 29 C.F.R. § 1926.200(g)(1). (Gov. Ex. 45B-E.) Rather than reflecting a poor understanding of the work rule, the uncovered violations show that employees understood the requirement to have at least one warning sign. *Id.* The records also support Flagger Force’s argument that it took steps to ensure adherence to its rules, including those rules that went beyond what OSHA requires. (Tr. 687; Gov. Ex. 45B-E.)

³⁰ Because of his traumatic brain injury, the crew leader had no recollection of specific events on the day he failed to set up the advance warning signs. (Tr. 182-83.) He also indicated that his injury impacted his recollection of other things, such as the details of his training. (Tr. 200.)

departure from its training program and the established written work rule by this crew leader. Flagger Force showed that the crew leader's failure to set up appropriate warning signs on the morning of June 5, 2016 was the result of unpreventable employee misconduct.

Accordingly, Citation 1, Item 1a from the citation issued as a result of OSHA Inspection No. 1263466 is vacated and no penalty is assessed.

B. Brubacher

1. Applicability and Violation

For the same reasons discussed above in connection with the citation issued to Flagger Force, the cited standard applied to Brubacher's worksite and was violated. Brubacher was engaged in construction work. (Stip. 12.) The work took place on the shoulder of Pottstown Pike and required an adjustment to the road's typical traffic pattern. The cited standard requires at least one advance warning sign for each point of hazard. 29 C.F.R. § 1926.200(g)(1) (requiring "traffic signs at points of hazard"). Brubacher's worksite had no advance warning signs at two points of hazard, along the southbound side of Pottstown Pike and the Route 322 exit ramp. (Gov. Exs. 16, 20, 51.)

2. Exposure

Brubacher had nine employees working on June 5, 2016 when there was inadequate signage. (Tr. 342; Gov. Exs. 6, 12; Stip. 2.) Brubacher alleges that the Secretary failed to show exposure because its employees were not working alongside the southbound side of the road or on the exit ramp where there was no signage. (Brubacher Br. at 23-24.) This argument is rejected.

On the morning of June 5, 2017, after work at the site had begun but before the accident, a West Goshen police officer drove along the Route 322 ramp to Pottstown Pike and then past the worksite. (Gov. Ex. 16, Tr. 79, 84-85.) Video taken by a dashboard mounted camera in the

officer's vehicle shows cars on both sides of the road passing the worksite within a few feet of Brubacher's employees. (Gov. Exs. 16-18.) Only a row of cones separated the north and southbound sides of the road. *Id.* Mr. Duda explained how his view of the southbound side of the road and the exit ramp was obscured. (Tr. 619, 625-26, 651-52.) As he could not see these approaches to the worksite despite being in a fixed location, motorists traveling in the area would similarly not be able to see the worksite until they were very close to it.

Turning to the lack of signage on the exit ramp, Brubacher notes that the worksite could be visible from the very end of the ramp. (Tr. 446.) The end of the ramp was approximately 250 feet apart from the start of the worksite. (Tr. 93, 98-99, 101-2.) However, as discussed above, motorists tended to not fully stop at the end of the exit ramp. Even those who did obey the stop sign, would tend to be focused on oncoming traffic rather than looking for a temporary worksite about which they had no warning. (Tr. 344; Gov. Ex. 16.)

Besides the proximity of the workers and the vehicle traffic, a Brubacher employee explained how the cones themselves can injure workers. Once hit by a moving vehicle the cones can become projectiles and strike workers. (Tr. 227.) This same employee also adjusted the cones in the roadway after they were knocked down by a passing trailer.³¹ (Tr. 223, 226-27; Gov. Ex. 22.) Particularly considering the 45 miles per hour speed limit on the road and the fact that Brubacher employees were right at the edge of the northbound lane, the Secretary established that Brubacher's own employees were exposed to the cited hazard.³²

³¹ Mr. Duda also indicated in his interview with Officer Grandizio that he moved two cones to the southbound lane after the accident. (Gov. Ex. 21 at 10-11.) Thus, there were times when Brubacher employees were out of their vehicles and in the roadway.

³² Brubacher argues it should be treated only as a controlling employer. (Brubacher Br. at 17.) However, the cited standard relates to a hazard to which Brubacher's own employees were exposed. Thus, it was both a controlling and exposing employer at the worksite. *See S. Pan Servs. Co.*, 25 BNA OSHC 1081, 1085-86 (No. 08-0866, 2014).

3. Knowledge

The Secretary does not allege that a Brubacher supervisor had actual knowledge of the lack of signage on the southbound side of the road and on the exit ramp. (Tr. 487.) Nor would the record support such a finding. The two approaches were not in plain view from where the Brubacher employees were working. Curves in the topography obstructed the locations where the signs needed to be placed. (Tr. 499-500, 508, 625-26, 651-52.) *See Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2085 (No. 06-1542, 2012) (declining to find actual knowledge when foreman's view of the condition was restricted). Further, Flagger Force's crew leader told Mr. Duda, the Brubacher supervisor at the worksite, that the signs were in place. (Tr. 622, 626, 656-57.) Rather than rely on actual knowledge, the Secretary argues that Brubacher should be found to have constructive knowledge of the violation because it failed to engage in reasonable diligence. (Tr. 488, 589; Gov. Ex. 21; Stip. 2.)

Reasonable diligence involves consideration of several factors, including "an employer's obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). As noted above, Brubacher retained Flagger Force to implement the worksite's traffic control plan. At all times, a Flagger Force crew leader was present at the worksite to oversee the flagging and traffic control work. (Tr. 166, 746, 769.) Although Brubacher trains its employees about traffic control, Flagger Force has more experience and expertise in traffic control. (Tr. 477-78, 573, 634, 644.) Flagger Force "are the specialists in their field" and they routinely provided traffic control services for Brubacher worksites. (Tr. 251, 477, 506, 576; Gov. Ex. 24.) The relationship was governed by a Master Subcontract Agreement, under which Flagger Force was responsible for supplying labor, supervision, and equipment needed for traffic control. (Gov. Ex. 24.) Flagger Force agreed to comply with all applicable laws. (Gov. Ex. 24 at

2, Tr. 479). The agreement also required Flagger Force to abide by a detailed Subcontractor and Vendor Safety Program (Safety Program). (Gov. Ex. 24.) The Safety Program required subcontractors and their employees to comply with Brubacher's Safety Program and all applicable OSHA standards. *Id.* at 7-8. The Safety Program specifically addresses the cited standard. It requires "[a]t least two warning sides" to be placed at appropriate distances from the work zone. *Id.* at 8.

Besides these contractual obligations, Mr. Duda also explained the need for advance warning signs directly to its subcontractor. At the start of the project, he met with the Flagger Force crew and discussed the project. (Tr. 615.) Mr. Duda completed a Safety Observation Compliance Form, documenting his first formal inspection of the worksite on May 31, 2017. (Tr. 601; Gov Ex. 32.) He explained how "first and foremost" he wanted to make sure the work was being done "safely" as he did not "want to see anybody get hurt." (Tr. 645-46.) For this initial inspection on the project's first day, he traveled the entirety of the worksite to make sure that all three sets of advance warning signs were in place, i.e., along the north and southbound sides of Pottstown Pike and on the exit ramp. (Tr. 604.) His notes from the inspection indicate that he checked the traffic control and for road hazards.³³ (Gov. Ex. 32.) He specifically noted that "signs are okay." (Tr. 604; Gov. Ex. 32.) After work started, collectively with Flagger Force, he decided that the signs on the exit ramp were not sufficiently visible to motorists and should be repositioned. (Tr. 598-99.) This correction was promptly made. (Tr. 598-600.) As the project progressed, other minor adjustments were made to the traffic control pattern based on how

³³ The Safety Observation Compliance Form has various headings listing the topics the safety observer is to examine depending on the nature of the worksite. (Gov. Ex. 32.) Under the topic "Traffic Control/Road," the form notes various things to check, including whether traffic control signs are in place. *Id.* Mr. Duda completed this section by writing "signs are okay" and the number "4," which he explained meant there were two flaggers and that all signs and cones called for by the plan were present. (Tr. 604.)

motorists were responding to the setup. (Tr. 223; Gov. Ex. 21.) Mr. Duda conducted another inspection on the third day of the project during which he again confirmed the presence of the warning signs at three locations. (Tr. 606, 652.)

On the last day of the project, Mr. Duda discussed the signage and traffic control plan with Flagger Force before any work began. (Tr. 616-621, 624-25; Gov. Ex. 21.) He spoke directly with the crew leader, MD, and walked the worksite with him. (Tr. 617-20; Gov. Exs. 21, 31.) He explained where the signs had been placed on the prior days. (Gov. Ex. 21.) This discussion included addressing where to place the advance warning signs on the exit ramp and the southbound side of Pottstown Pike.³⁴ (Tr. 617-620; Gov. Ex. 6.) Mr. Duda emphasized that he wanted the cones and signage to comply with the appropriate safety standards. (Gov. Ex. 31.)

Mr. Duda was trained in traffic control and flagging. (Tr. 477-78, 634.) He did not have the same level of training or experience as Flagger Force employees, but he had enough training to identify issues. (Tr. 644, 660.) For example, during the project, he saw another construction crew possibly planning to engage in road work nearby. (Tr. 653-54.) He was concerned that this work might make it more difficult for motorists, as they'd be navigating around two worksites. (Tr. 613-14, 653-54.) He also knew that the relevant state regulator (PennDOT) typically would not issue permits for two projects in such proximity. (Tr. 507, 653-54; Gov. Ex. 21.) He contacted a PennDOT inspector to have him review the work being done in the area. (Tr. 613-14, 653-54.)

³⁴ A Brubacher employee explained that at this worksite he had not seen any need to correct Flagger Force's work. (Tr. 228.) However, Brubacher did check on the traffic control work and sometimes had to address safety issues. (Tr. 229.)

The inspector visited the area and shut down the other project. (Tr. 653-54.) The PennDOT inspector did not cite any issues with the warning signs in place for Brubacher's worksite.³⁵

Mr. Duda also met with the crew member present on June 5, 2017. Although he had some initial hesitation when he learned the crew member was new to Flagger Force, the crew leader (MD) gave him confidence that the plan would be implemented correctly. (Tr. 656.) He had no reason to believe MD would depart from where the signs had been placed each previous day of the project. The crew leader told Mr. Duda he would set up the signs. (Tr. 620-21.) Mr. Duda asked if he needed any assistance and the crew leader declined the offer, explaining that he had his vehicle and that the set up would not take long. (Tr. 621.) Before beginning work on the site, the crew leader assured Mr. Duda that everything was "good to go." (Tr. 490-91, 622, 626, 656-57.) Mr. Duda had no reason to believe that the crew leader would disregard his instructions as well as Flagger Force's training and misrepresent that the signs were in place.³⁶ (Tr. 488, 508.)

Mr. Duda explained that he would not have permitted work to begin if he knew that warning signs were missing. He would have ceased work until they were in place. (Tr. 611.) Mr. Duda did not just assume Flagger Force would put up the advance warning signs. He met with the team, instructed them about the issue, and then checked their work. Mr. Duda could see the advance warning signs on the northbound side and assessed the placement of the cones before work began. (Tr. 658.) After seeing that the cones were laid down, the tapers to move drivers into the correct position were set up, and the three signs on the northbound side were up, Mr. Duda did not consider it necessary to visually confirm that the Flagger Force crew leader was truthful when

³⁵ Mr. Duda was personally familiar with this PennDOT inspector and believed he would promptly shut down any worksite not complying with an approved traffic control plan. (Tr. 653.) He described him as "the most opinionated and the hardest inspector," so he believed that he would have brought any safety issues at Brubacher's worksite to his attention right away. (Tr. 654.)

³⁶ Flagger Force also trained Brubacher employees in traffic control and flagging. (Tr. 573, 634.)

he indicated the setup of the warning signs was complete. *Id.* The Brubacher crew began work at approximately 9:00 a.m., and no Brubacher employee learned of the missing signs until after the accident a few hours later. (Tr. 626, 651-52; Gov. Exs. 21, 22.)

Brubacher took reasonable steps under the circumstances to ensure that the traffic control plan, including the advance warning signs, would appropriately be placed at points of hazard as required. Mr. Duda performed regular safety inspections and confirmed that the signs were in place as part of those inspections. (Tr. 514, 601-602, 652-53; Gov. Ex. 32.) Brubacher trained its own employees about flagging and then retained an expert in traffic control to ensure compliance with the traffic control plan, including the presence of warning signs. It had frequent experience with Flagger Force and had not experienced safety issues with them in the past. The CO acknowledged that Flagger Force had not previously been cited for OSHA violations after other inspections. Nor is there any dispute that Flagger Force has a reputation of being qualified to perform traffic control services. (Tr. 506.) Certainly, Brubacher's retention of a qualified expert alone did not relieve it of all responsibility to comply with the cited standard. But, this fact is relevant to assessing what to level of supervision was appropriate. *See S.J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1896 (No. 12-1045, 2016) (more generalized instructions acceptable given the level of experience and the continued presence of a crew leader). Mr. Duda provided instructions, conducted periodic inspections, and obtained verbal confirmation that the signage at issue was in place before work commenced at the site. *See LJC Dismantling Corp.*, 24 BNA OSHC 1478, 1481-82 (No. 08-1318, 2014) (finding employer's efforts adequate to preclude a finding of constructive knowledge in light of the employee's extensive training, experience, and good safety history). The Secretary failed to establish that Brubacher should be charged with

constructive knowledge of the violative condition. Thus, Citation 1, Item 1a of the citation issued to Brubacher as a result of OSHA Inspection No. 1280576 is vacated and no penalty is assessed.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. From Docket Number 18-0033, Citation 1, Item 1a, alleging a serious violation of 29 C.F.R. § 1926.200(g)(1) by Brubacher Excavating, Inc. is VACATED, and no penalty is assessed.
2. From Docket Number 18-0019, Citation 1, Item 1a, alleging a serious violation of 29 C.F.R. § 1926.200(g)(1) by Traffic Control Services LLC is VACATED, and no penalty is assessed.

SO ORDERED.

/s/
Covette Rooney
Chief Administrative Law Judge, OSHRC

Dated: February 24, 2020
Washington, D.C.