SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 99-0344
W.G. FAIRFIELD COMPANY	:	
Respondent.	:	

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

On February 2, 1999, the Occupational Safety and Health Administration ("OSHA") issued a serious citation to W.G. Fairfield Company ("Fairfield") following an inspection conducted in response to a fatal accident. At the time of the accident, two Fairfield employees were digging a trench outside the guardrail on the northbound side of a six-lane interstate highway in Cincinnati, Ohio, in preparation for the installation of fiber-optic cable.[1] None of the interstate's lanes had been closed for the project and Fairfield was not using a flagman to direct or stop traffic, but signs had been placed on the northbound side of the interstate to warn approaching motorists, traveling at average speeds of 70 miles per hour, that work was being performed along the shoulder ahead.[2] During the digging process, the employees unexpectedly struck an abandoned cable which they thought may have been disturbed or pulled loose. In order to check the cable's connection, employee Floyd Wolfe

[1] A third Fairfield employee, foreman Larry Smith, was also assigned to the project, but was placing signs in another part of the 17-mile-long work area when the accident occurred.

[2] Fairfield followed the Ohio Manual for Traffic Control, as well as the Ohio Department of Transportation regulations, in establishing and instituting traffic control measures for this project.

crossed the three northbound lanes of the interstate on foot to inspect a junction box located at the median. During his apparent attempt to then cross the interstate's three southbound lanes, Wolfe was hit by an automobile and sustained fatal injuries.

In the citation, the Secretary alleged three serious violations of standards related to accident prevention, safety training, and the use of traffic controls. A penalty of $3,500 was proposed for each violation. Judge Michael Schoenfeld vacated the traffic control violation, but affirmed the accident prevention and training violations, assessing the proposed penalty for each. At issue before the Commission is whether the judge erred in his disposition of the two affirmed violations.[3] We affirm the judge's decision, but on different grounds.

BACKGROUND

Under the first item of the citation, the Secretary alleged that Fairfield violated 29 C.F.R. § 1926.20(b)(1) by failing to establish policies or procedures related to the safe movement of employees across active roadways.[4] Under the second item of the citation, the Secretary alleged that Fairfield violated § 1926.21(b)(2) by failing to instruct its employees exposed to vehicular traffic when crossing a major interstate as to a safe means of access to medians and the opposite side of the road.[5] Before the judge, the Secretary maintained that

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[3] The traffic control violation was not petitioned or directed for review and is not before the Commission.

[4] The cited provision requires as follows:

> **§ 1926.20 General safety and health provisions.**
> (a) *Contractor requirements.*
> . . . .
> (b) *Accident prevention responsibilities.*
> (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

[5] The cited provision requires as follows:

(continued...)

under these standards, Fairfield had "a duty to conform its safety program to address safe and effective ways to cross an active interstate [and]...should have developed a specific program and guidelines identifying when its employees would be permitted to cross active interstates." According to the Secretary, such a program would include "specific instructions to [Fairfield's] employees regarding how and under what circumstances it was safe and appropriate to cross."

In response, Fairfield argued that the Secretary had failed to provide any basis for such a requirement, either in the form of an OSHA standard or as evidence of industry practice. Although Fairfield acknowledged that crossing an active interstate highway on foot can be dangerous depending upon the circumstances, the company allowed its employees to engage in this practice and claimed that other contractors in the industry do the same.[6] While Fairfield conceded that its safety program, as well as the training provided to its employees, did not specifically address the practice of crossing an active interstate highway, it noted that

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[5](...continued)

> **§ 1926.21 Safety training and education.**
> (a) *General requirements.*
> . . . .
> (b)*Employer responsibility.*
> . . . .
> (b)(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

[6] It is not clear from the record how often employees might be confronted with a situation in which crossing an active interstate highway would be necessary. Compliance officer James Denton testified that it did not appear to be a common occurrence, and foreman Smith testified that the frequency of the practice varied from job to job. Fairfield's safety director, with twenty years of experience in the construction industry, testified that he has crossed active interstates fifty times. We note that although compliance officer Denton testified that two other highway construction employers have addressed the hazard in their safety programs, his testimony was contradicted by Fairfield's safety director and two of its foremen.

employees had received training at weekly safety meetings which included specific instructions to "pay close attention to the traffic around you," to "stay alert at all times," and to "make sure that you always know where you are and where the traffic is so that you don't accidentally end up in an active lane."[7] According to Fairfield, such training informed employees "about the hazards of working around moving traffic and about traffic control measures," and adequately prepared them to use their own judgment in deciding when and under what conditions to cross an active interstate highway.

In affirming both the accident prevention and training violations, the judge noted that while Fairfield had provided some training in traffic safety, the company "knew that its employees, Mr. Wolfe included, regularly crossed interstate highways on foot." The judge also found that compliance officer Denton, as well as Sergeant Dale Honnert, a sheriff's deputy who participated in the investigation of Wolfe's accident, "agreed that the proper training should have been to forbid employees to cross multiple lane interstate highways on foot." Therefore, the judge concluded that "a reasonable person could not stand at the side of a six lane interstate highway with traffic traveling between 55 and 70 miles per hour and rationally think they could cross safely on foot." Since this hazard was not addressed by Fairfield's safety program, the judge found that the company had failed to train its employees in "avoiding crossing multiple lane highways and in alternative safe means (such as driving to an appropriate location) of reaching the far side of the highway."

DISCUSSION

Under § 1926.20(b)(1), the Commission has held that "an employer may reasonably be expected to conform its safety program to any known duties and that a safety program

[7] In addition to weekly safety meetings, Fairfield conducted an annual training session on traffic safety at the start of each working season and required all of its foremen to attend work zone safety training conducted by the International Municipal Signal Association. Fairfield also provided employees with a copy of its safety manual, conducted safety inspections, and disciplined employees for violations of company safety rules.

must include those measures for detecting and correcting hazards which a reasonably prudent employer similarly situated would adopt." *Northwood Stone & Asphalt, Inc.*, 16 BNA OSHC 2097, 2099, 1993-95 CCH OSHD ¶ 30,583, p. 42,348 (No. 91-3409, 1994), *aff'd*, 82 F.3d 418 (6th Cir. 1996) (unpublished); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2206, 1991-93 CCH OSHD ¶ 29,964, p. 41,025 (No. 87-2059, 1993). The Commission has held that § 1926.21(b)(2) requires an employer to "instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware." *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015, 1991-93 CCH OSHD ¶ 29,902, p. 40,810 (No. 90-2668, 1992). *See also El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1424, 1993-95 CCH OSHD ¶ 30,231, p. 41,620 (No. 90-1106, 1993) (to establish violation of § 1926.21(b)(2), Secretary must show that the cited employer "failed to provide the instructions which a reasonably prudent employer would have given in the same circumstances").

In interpreting general standards such as these, the Commission has specifically considered whether a "'reasonable person,' examining the generalized standard in light of a particular set of circumstances, can determine what is required, or if the particular employer was actually aware of the existence of the hazard and of a means to abate it." *R & R Builders, Inc.*, 15 BNA OSHC 1383, 1387, 1991-93 CCH OSHD ¶ 29,531, p. 39,860 (No. 88-282, 1991). While the Commission has found industry practice to be relevant to such an inquiry, it has held that it is not dispositive "because to consider industry practice as determinative would permit an entire industry to avoid liability by maintaining inadequate safety."[8] *Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1794, 1991-93 CCH OSHD

[8] The Sixth Circuit, to which this case could be appealed, has held that a generally worded standard is enforceable by incorporating a "reasonableness test" as an element of proving the violation. *Ray Evers Welding Co. v. OSHRC*, 625 F.2d 726, 732 (6th Cir. 1980). The court, however, noted that "[r]easonableness is an objective test which must be determined on the basis of the evidence in the record. Industry standards and customs are not entirely (continued...)

¶ 29,770, p. 40,489 (No. 90-998, 1992). *See also Baker Tank Co./Altech*, 17 BNA OSHC 1177, 1179, 1993-95 CCH OSHD ¶ 30,734, p. 42,683 (No. 90-1786, 1995) (evidence of current industry practice relevant to reasonably prudent employer inquiry, but not dispositive where industry practice is shown to be inadequate).

For the reasons that follow, we find that having its employees cross an active, multiple lane, high-speed highway poses an obvious hazard that was recognized as such by Fairfield and therefore, triggered an obligation to instruct its employees in the recognition and avoidance of this hazard. This is not to suggest in any way, however, that all employers whose employees must cross a roadway during the workday are required to train their employees, regardless of the surrounding conditions. An employer's obligation to instruct and train is dependent upon the specific conditions, whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard. *See Northwood*, 16 BNA OSHC at 2099, 1993-95 CCH OSHD at p. 42,348.

Simply put, unless such a highway has been completely closed to active traffic, employees engaged in highway construction work are in danger of being hit by a moving vehicle whether they are working adjacent to the highway, flagging motorists on the highway, or crossing the highway. Of these practices, crossing an active highway on foot is clearly the most dangerous. Three of Fairfield's foremen agreed that the practice can be dangerous depending upon the circumstances. Indeed, Fairfield's own employees testified that the company was aware of and sometimes utilized the potentially safer alternative of driving a vehicle to the opposite side of an active interstate highway.[9] *See Andrew Catapano*

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[8](...continued)
determinative of reasonableness because there may be instances where a whole industry has been negligent.... However, such negligence on the part of a whole industry cannot be lightly presumed.... It must be proven." *Id.* at 732-33 (citations omitted).

[9] That the hazard in question may be obvious to the employer does not eliminate indeed, it underscores the requirement for specific instructions to its employees. As the (continued...)

Enterp., Inc, 17 BNA OSHC 1776, 1783-84, 1995-97 CCH OSHD ¶ 31,180, p. 43,610 (No. 90-0050, 1996) (consolidated) (employer's routine practices and testimony of own experienced employees constitutes proof of industry recognition under § 1926.28(a)). The Ohio Contractors Association ("OCA") also acknowledged in its amicus brief here that "the potential hazards presented by crossing an active interstate highway on foot are obvious," yet the organization has never issued a safety bulletin addressing these hazards.

Fairfield's safety program did address some of the hazards associated with working near traffic. Specifically, Fairfield instructed its employees regarding the hazard posed by working *next* to active lanes of traffic: "Working *near* moving vehicles is dangerous;" "Working *near* traffic is a dangerous job;" and "Make sure you always know where you are and where the traffic is so that you don't accidentally *end up in an active lane*."(Emphasis added). Further instructions, such as "never turn your back on traffic," were given to employees working as flagmen, and oncoming motorists were warned of their presence by appropriate signs.

Yet despite its awareness of the specific hazard associated with crossing an active highway and one possible means of abatement, Fairfield did little, if anything, to train its employees in the recognition and avoidance of that hazard. Foreman Smith admitted that under certain circumstances, it is safer for an employee to use a vehicle instead of crossing on foot.[10] When asked specifically whether there have been discussions with employees

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[9](...continued)
Commission has noted, "an employer cannot assume that its employees will all observe certain dangers and understand the significance of what they see.... What is obvious to an experienced supervisor may not be obvious to an inexperienced employee." *Pressure Concrete*, 15 BNA OSHC at 2016, 1991-93 CCH OSHD at p. 40,811. For instance, in crossing a multiple lane highway, an employee may be unable to accurately assess the flow of oncoming traffic moving at high speeds, particularly where motorists do not expect to encounter a pedestrian.

[10] Compliance officer Denton and all four of Fairfield's supervisory employees who testified (continued...)

about the use of a vehicle, Smith replied: "We try to tell them to do that first and take all possibilities." When asked when such discussions had occurred, he replied: "Just various weeks that we've had discussions. We bring it up and tell everybody to be careful, work safe." Fairfield's safety director, Randy Martin, also testified that the possibility of using a vehicle was discussed with employees and practiced when circumstances allowed: "I mean, if we have to go over there and say, take a bucket full of tools, then we'll probably drive a vehicle over there and park it."[11]

In our view, this testimony suggests, at best, an inadequate and superficial treatment of a serious hazard. *See R & R Builders*, 15 BNA OSHC at 1390, 1991 CCH OSHD at p. 39,863 (violation of § 1926.21(b)(2) affirmed where "occasional correction" of employees regarding use of fall protection failed to constitute evidence of "systematic training"). In fact, Fairfield does not deny that it failed to instruct its employees on how or when to cross an active highway. Rather, it contends that OSHA standards do not require such training. Fairfield also asserts that its general admonitions regarding the danger of working *near* traffic adequately dealt with the hazard of working *in* traffic.[12] But there is a significant

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[10](...continued)
at the hearing agreed that other options such as using a flagman to stop or direct traffic, or reducing the number of lanes of active traffic, are not always feasible on congested highways such as the interstate in question, particularly where the sole purpose would be to allow a single employee to cross. Fairfield's employees also testified that using a police officer to stop or direct traffic would have to be arranged with and approved ahead of time by the Ohio Department of Transportation who, according to the employees, would not have allowed such an arrangement for the sole purpose of allowing a single employee to cross.

[11] We recognize that the feasibility of using a vehicle may hinge upon the surrounding circumstances and physical conditions of the highway in question.

[12] In this regard, Commissioner Weisberg takes issue with his dissenting colleague's attempt to equate "working around moving traffic" with "crossing an active roadway." The dissenting opinion suggests that Fairfield's workrules, employee instructions, and general admonition concerning the dangers associated with working near traffic apply as well to (continued...)

difference between employees avoiding active lanes of traffic and employees actually entering traffic that is moving at high speeds in order to cross a multiple lane highway. Training employees in the recognition and avoidance of the former hazard does not adequately address the latter hazard, which clearly triggers the need for different instructions.

Based on Fairfield's actual knowledge of the hazard of crossing an active highway on foot and its failure to specifically address that hazard when it was aware of at least one potentially safer alternative, we find that Fairfield was required under the cited standards to address the practice in its safety program and employee training, particularly the option of

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[12](...continued)
crossing active roads and highways and provides adequate instruction to employees on safe movement across active roadways The essence of Fairfield's rules for working next to moving traffic is to "make sure that you always know where you are and where the traffic is so that you don't accidentally end up in an active lane." (Emphasis added.) There is a clear and obvious difference between workers being mindful of staying off active roadways and workers having to dodge moving traffic to cross a multiple lane highway.

Commissioner Weisberg observes that there are many practices and policies that can be established by a company and communicated to its employees for the safe movement of its workers across active highways and roadways. These include, for example, the option of using a vehicle, and providing warning signs on the road to alert motorists to worker crossings. He notes that crossing an active, multiple lane highway on foot is an obvious and a recognized hazard and under the cited standards Fairfield had a duty to address road crossing in its safety program and training. Fairfield conceded that its safety program and the training it provided to employees did not specifically address crossing active roadways. It is simply not enough for an employer in such circumstances to tell its workers without more to use "good judgment."

Commissioner Weisberg notes his dissenting colleague's concern that the majority's decision in this case, namely that the company had an obligation under the cited standards to establish policies or procedures and to instruct its employees as to safe movement across active roadways, will set in motion an unlimited cycle of new obligations for Fairfield and other employers similarly situated and will open the door to subjective application and enforcement. Yet there is no reason to believe that policies established to address "crossing an active roadway" will be any more burdensome or will be the object of more subjective application and enforcement than the policies or procedures now in place for "working around moving traffic."

using a vehicle.[13] *See El Paso Crane*, 16 BNA OSHC at 1426, 1993-95 CCH OSHD at p. 41,622 (employer that informs employees about available protective equipment and describes its use or the circumstances under which it must be used may be "doing all that anyone could reasonably do" to comply with § 1926.21(b)(2)). As the Commission has held, "[a]n employer can reasonably be expected to conform a safety program to any known duties." *R & R Builders*, 15 BNA OSHC at 1387, 1991 CCH OSHD at p. 39,860. *See also Nelson Tree Services, Inc. v. OSHRC*, 60 F.3d 1207, 1210 (6th Cir. 1995) (employer's knowledge establishes hazard recognition); *Continental Oil Co. v. OSHRC*, 630 F.2d 446, 448 (6th Cir. 1980) (employer's knowledge of potential hazard establishes recognition), *cert. denied*, 450 U.S. 965 (1981). *Cf. So. Ohio Bldg. Systems v. OSHRC*, 649 F.2d 456, 458-59 (6th Cir. 1981) (absent employer's actual knowledge, evidence of industry recognition, or proof of obvious hazard, recognition not established). Having given its employees the discretion to decide when and how to cross an active highway with six lanes of traffic traveling at average speeds of 70 miles per hour, Fairfield should have provided them with specific guidance for making such decisions.[14] *See El Paso Crane*, 16 BNA OSHC at 1426-

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[13] We agree with Fairfield that the Secretary has not established whether it is customary in the industry to instruct employees regarding specific measures to avoid the known hazard associated with crossing an active highway. We conclude, however, that even if Fairfield's failure to address the practice of crossing an active highway may be consistent with industry custom and practice, we would find such a practice to be deficient. *Baker Tank*, 17 BNA OSHC at 1179, 1993-95 CCH OSHD at p. 42,683. *See also Ray Evers*, 625 F.2d at 732. As the Commission has held, where the "potential consequences posed by [a] hazard...are so great[,]...the situation cannot be ignored." *Northwood*, 16 BNA OSHC at 2099, 1993-95 CCH OSHD at p. 42,348 (affirming a violation of § 1926.20(b)(1)).

[14] Chairman Rogers notes that under the circumstances here, the instructions required under the cited standards need not be detailed and specific, but rather may be general and, of necessity, accommodate the exercise of employee judgment and discretion. As the Commission has recognized: "General admonitions to employees to avoid a hazard or to act in a safe manner do not afford adequate guidance.... On the other hand, a safety rule is not inadequate merely because it requires employees to exercise a certain degree of discretion.... (continued...)

27, 1993-95 CCH OSHD at p. 41,622-23 (while an employer's instructions are not necessarily deficient just because they allow employees discretion as to how to proceed, they must provide "adequate guidance" to employees such that hazards are clearly identified, including the ways in which they can be avoided). Accordingly, we affirm the violations cited under § 1926.20(b)(1) and § 1926.21(b)(2).[15]

However, we find no basis on this record for the judge's finding that in order to comply with these standards, Fairfield was required to prohibit the practice of crossing an active highway on foot. The judge relied on the testimony of compliance officer Denton and Sergeant Honnert, but neither was definitive on this issue. Honnert's brief testimony was essentially limited to the circumstances surrounding the accident and the specific conditions of the interstate where the accident occurred. In response to questioning by the judge, he simply stated that it is not safe for a pedestrian to cross such an interstate and agreed that the practice is "highly dangerous," particularly along the section where the accident occurred.

Similarly, Denton testified that the standards in question required Fairfield to "develop some policies and procedures for employees to be instructed on, as far as how they're to gain access from one side of a road -- in this case an interstate highway, to the other...[a]nd instruct them on what those alternative means are for doing that...." Only when asked specifically during cross-examination whether it was OSHA's position that an employee could "never cross an interstate by stopping, looking for traffic, and then

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[14](...continued)
In certain situations a specific and detailed safety rule may be necessary, whereas in other situations such detail may be impractical, and it may be necessary to rely on employee judgment." *Alabama Power Co.*, 13 BNA OSHC 1240, 1244, 1986-87 CCH OSHD ¶ 27,892, p. 36,578 (No. 84-357, 1987) (citations omitted).

[15] Contrary to our dissenting colleague, we find that the requirement to establish a program is not duplicative of the requirement to train employees in the elements and implementation of that program, even though the program requirement may derive from the training requirement under these particular standards. Further, we note that Fairfield has not raised this particular concern in its briefs before the Commission.

proceeding across" did Denton suggest that a prohibition on crossing on foot may be appropriate: "I don't know that that's OSHA's position, it would be my position."

The fact that several states, including Ohio, generally prohibit pedestrians from having access to multiple lane highways is also not dispositive.[16] The Ohio law, as well as similar laws in New York and South Carolina, provides an exception for persons engaged "in the performance of public works or official duties," and the Secretary has conceded that this exception would apply here.[17] While, as the Secretary has noted, this exception does not exempt Fairfield from compliance with the requirements of the cited standards, it highlights the fact that these laws do not speak directly to the issue here: whether a reasonably prudent employer engaged in highway construction work would prohibit its employees from crossing an active highway on foot. At most, these laws establish that the practice is considered hazardous, a fact which Fairfield has not disputed. For these reasons, we do not adopt the judge's rationale in affirming the violations in question.

PENALTIES

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[16] The Ohio Revised Code (Anderson 1999) provides:

> § 4511.051 Prohibitions on use of freeways.
>
> No person, unless otherwise directed by a police officer, shall:
> (A) As a pedestrian, occupy any space within the limits of the right-of-way of a freeway, except: in a rest area; on a facility that is separated from the roadway and shoulders of the freeway and is designed and appropriately marked for pedestrian use; in the performance of public works or official duties; as a result of an emergency caused by an accident or breakdown of a motor vehicle; or to obtain assistance....

[17] After the Secretary relied upon the Ohio law, among others, in her brief before the Commission, Fairfield filed a motion to reopen the record and submitted documentation establishing that it was, in fact, engaged in the performance of a public work at the time of employee Wolfe's accident. The motion, which was not opposed by the Secretary, was granted.

The Secretary proposed a penalty of $3,500 for each violation. The judge assessed the proposed penalty amount for each violation, taking into account Fairfield's "small size, lack of any related prior violations and good faith." Neither party has addressed the issue of penalties on review and we see no reason to disturb the judge's findings on this matter. Therefore, we affirm the penalties as assessed by the judge.

ORDER

We affirm a violation of § 1926.20(b)(1) and assess a penalty of $3,500 (Serious Citation 1, Item 1). We affirm a violation of § 1926.21(b)(2) and assess a penalty of $3,500 (Serious Citation 1, Item 2).

/s/
Thomasina V. Rogers
Chairman

/s/
Stuart E. Weisberg
Commissioner

Dated: October 16, 2000

VISSCHER, Commissioner, dissenting:

The majority has concluded that under the two very broadly worded standards cited here,[1] Fairfield is required to have workrules that not only warn its employees about the hazards of moving traffic but that specifically set forth when and how employees may cross roads in the course of work. I strongly disagree with that conclusion and would vacate the citations before us in this case.

The Secretary has argued that the cited standards require construction contractors such as Fairfield to prevent their employees from crossing interstate highways on foot. The judge apparently agreed with the Secretary, though he was not entirely clear whether he read the standard as banning employees from crossing all interstate highways or only "six lane interstate highway[s] with traffic traveling between 55 and 70 miles per hour."

The majority understandably disagrees with both the judge and the Secretary that the cited standards impose an absolute requirement that Fairfield and other employers in its industry ban crossing interstate highways on foot. What the majority claims to have found instead is an obligation in the cited standards that Fairfield *either* prohibit employees from crossing "active interstates" *or* have *some* policy as to how and when employees may cross such roads, and to instruct employees accordingly. The majority does not explain what this policy would be, other than to say that these standards require Fairfield to advise its employees that they can use a vehicle to cross to a median or to the other side of the road.

In my view the construction offered by the majority stretches well beyond the permissible limits of the cited standards. Given their general language and the potential for subjective enforcement, the Commission has held that these standards only require such safety policies and training as a "reasonably prudent employer" would adopt. *See, e.g., Northwood Stone & Asphalt*, 16 BNA OSHC 2097, 2099, 1994 CCH OSHD ¶ 30,583, p. 42,349 (No. 91-3409, 1994)("[t]he Commission has held that, under 29 C.F.R. 1926.20(b)(1)

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[1] 29 C.F.R. § 1926.20(b)(1) provides that "[it] shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part." 29 C.F.R. § 1926.21(b)(2) requires that "[t]he employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury."

an employer may reasonably be expected to conform its safety program to any known duties and that a safety program must include those measures for detecting and correcting hazards which a reasonably prudent employer similarly situated would adopt")[2]; *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1424, 1993 CCH OSHD paragraph 30,231, p. 41,620 (No. 90-1106, 1993)("to establish noncompliance [with section 1926.21(b)(2)], the Secretary must establish that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances"). As the courts have said regarding other vague standards, such as 29 C.F.R. § 1926.28(a), this limitation is necessary to avoid enforcement that would violate constitutional due process. *See, e.g., Spancrete Northeast, Inc. v. OSHRC*, 905 F.2d 589, 593 (2d Cir. 1990); *Ray Evers Welding Company v. OSHRC*, 625 F.2d 726, 731-32 (6th Cir. 1980).

Generally, in order to show what measures and training a "reasonably prudent employer" would adopt, "reference to industry custom and practice will establish the standard of conduct." *Cape & Vineyard Div., New Bedford Gas & Edison Light Co. v. OSHRC*, 512 F.2d 1148, 1152 (1st Cir. 1975). Here, as the majority acknowledges, the Secretary did not prove that Fairfield's industry either forbids employees from crossing roads or had specific rules on when and how employees could do so.

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[2] The language of 1926.20(b)(1) requires that an employer "initiate and maintain such programs as may be *necessary to comply with this part*." (emphasis added) Thus the standard does not appear to create new areas of regulation, but requires that the employer maintain programs in those areas otherwise regulated in Part 1926. Traffic safety, including road crossing, is not otherwise regulated in Part 1926 (except with regard to the use of signs, signals and barricades in Subpart G), and therefore section 1926.20(b)(1) cannot be read as requiring employers to have a general program on that hazard (the employer may be required to address traffic safety under section 5(a)(1) of the OSH Act). The Secretary's only effort to address this apparent problem with the applicability of the cited standard (1926.20(b)(1)) is to assert that section 1926.21(b)(2), which obligates the employer to instruct on any "unsafe condition" (not limited to hazards otherwise regulated in Part 1926), is incorporated into 1926.20(b)(1), and therefore the latter standard requires a program, as well as instruction, on any unsafe condition, and is not limited to areas specifically regulated in Part 1926. The Secretary's reasoning, however, would make the citations issued to Fairfield in this case duplicative.

The majority dismisses the lack of proof of industry custom and practice by citing cases in which the Commission has said that industry practice is not dispositive if the safety practices of the industry as a whole are inadequate. But finding that the industry as a whole is negligent must be made on the basis of evidence in the record. "Reasonableness is an objective test which must be determined on the basis of evidence in the record. Industry standards and customs are not entirely determinative of reasonableness because there may be instances where a whole industry has been negligent in providing safety equipment for its employees. However, such negligence on the part of a whole industry cannot be lightly presumed . . . It must be proven." *Ray Evers Welding*, 625 F.2d at 732. The majority acknowledges that the testimony of a compliance officer and a deputy sheriff could not establish an industry obligation to ban crossing interstate highways on foot. But the majority has offered no other source for the duty they are announcing that Fairfield and its industry must either ban such road crossing or specifically instruct employees on how and when they should cross roads and highways.

The majority instead asserts that crossing an "active interstate" on foot is an obvious hazard and therefore Fairfield had a duty to address road crossing in its safety program and training. But this is not a case where the employer knew of the hazard and failed to address it. Fairfield does not deny that crossing a road under certain circumstances may be hazardous. But insofar as it is hazardous, it is one example of the hazard that Fairfield and its industry recognized and addressed: "working around moving traffic." With regard to this hazard, Fairfield does have workrules and did give instruction to its employees. Employees were instructed and reminded that "[w]orking near moving vehicles is dangerous." Employees were also told to "[p]ay close attention to the traffic around you-make sure you watch out for that car because its driver may not be watching out for you." There was an additional instruction to "[m]ake sure that you always know where you are and where the traffic is so that you don't accidentally end up in an active lane."

It is the majority's position that these instructions only address hazards associated with working next to traffic, and that the instructions therefore fail to satisfy the requirements of these standards because they do not specifically address when and how

employees may cross traffic. There is simply no basis in the record for such a limited reading of Fairfield's workrules. Fairfield's safety policy and instruction on "Work Zone Safety," which includes the instructions mentioned above, defines a work zone as "the section of roadway and its surroundings in which you are or will be performing work." The hazard identified in the policy and instruction-moving traffic-and the instructions to employees on what they should do to avoid the hazard obviously apply as much to crossing traffic as they do to working alongside of traffic.

More importantly, by supplementing the practices of Fairfield's industry with a new requirement of its own that road crossing be specifically addressed in workrules and training, the majority has set in motion an unlimited cycle of new obligations for Fairfield and other similarly situated employers. Such employers must now anticipate and include in their safety and training programs every possible subset of hazards that might be identified for employees who work around traffic. For example, in this case, the majority has accepted the Secretary's proposed abatement that employees be given instructions to get into a vehicle, drive to the next exit, turn around, and then park in the median. But doing so involves hazards of its own, such as merging into traffic from the side of the road and parking and exiting a vehicle at the median. The logical result of the majority's opinion is that the employer must not only instruct its employees on this method of crossing a roadway, but that it must also anticipate and include in its program and training each of these additional hazards this method presents. The majority suggests that violations are warranted here because these circumstances were unique, but the same may be said for every other set of circumstances. Indeed, the majority's reasoning allows the duty imposed by these general standards to be endlessly redefined, and opens the door to the very kind of subjective application and enforcement that the courts have sought to prevent.

/s/
Gary L. Visscher

Commissioner

Date: October 16, 2000

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 99-0344
W.G. FAIRFIELD COMPANY	:	
Respondent.	:	

APPEARANCES:

Anthony M. Stevenson, Esq.
Office of the Solicitor of Labor
For Complainant

Michael S. Holman, Esq.
Bricker & Eckler, LLP
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

The well known and oft-complained-of intricacies of OSHA regulations should not be permitted to obscure common sense. I cannot find that an employer's instructions to its employee, to be aware of traffic conditions, to look both ways and to watch out for traffic, constitute adequate training where the employee is crossing a six lane interstate highway where cars and trucks are traveling at speeds up to 70 miles per hour. I thus find that Respondent was in violation of the Act.

Background and Procedural History

This case arises under the Occupational Safety and 7ealth Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had its worksite inspected by a compliance officer ("CO") of the Occupational Safety and Health Administration "(OSHA"), W. G. Fairfield Company ("Respondent") was issued one citation alleging three serious violations and proposing a total civil penalty of $10,500 . Respondent timely contested the Citation and Notification of Proposed Penalties and on March 12, 1999, the case was assigned for "EZ Trial" pursuant to Commission Rule 203(a). By agreement of the parties limited discovery was permitted, and, pursuant to a notice of hearing, the case came on to be heard on May 25, 1999 in Columbus, Ohio. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in a business affecting interstate commerce. It is undisputed that at the time of this inspection Respondent was engaged in trenching and the laying of cable adjacent to an interstate highway. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.[3] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

The pivotal facts are undisputed. This case arises from a fatal accident that occurred on September 28, 1998. Respondent's employees, including the deceased, Mr. Floyd Wolfe, were working in a trench adjacent to Interstate 71 in Silverton, Ohio. The trench was located near an interstate exit and was outside the guardrails that were at the outer edge of a lane-wide shoulder. In the process of excavating, the employees struck a cable. Mr. Wolfe wanted to determine if the cable struck emanated from a pole box on the median strip. On foot, Mr. Wolfe crossed the three lanes of the interstate to get to the median and then, after examining a pole box there, proceeded to attempt to cross the further three lanes on the far side of the median strip. He was struck by an automobile while trying to cross the second set of three lanes of the interstate.

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[3] *Title 29 U.S.C. § 652(5).*

The Secretary did not rebut Respondent's evidence that Mr. Wolfe had received some training in "the motorists' state of mind, safety in working near traffic and the need to be physically and mentally prepared before entering a work zone in the vicinity of road traffic." (CX - 2) The Secretary, likewise, did not rebut the evidence that Mr. Wolfe was also trained with regard to the use of road warning signs and flagmen. Yet, Respondent knew that its employees, Mr. Wolfe included, regularly crossed lanes of interstate highways on foot.[4] The CO stated and a sheriff's deputy with extensive experience in highway safety agreed that the proper training should have been to forbid employees to cross multiple lane interstate highways on foot.[5] I conclude that a reasonable person could not stand at the side of a six lane interstate highway with traffic traveling between 55 and 70 miles per hour and rationally think they could cross safely on foot. Any other conclusion defies reason and experience[6].

Respondent thus failed to fulfil its duty to establish, initiate and maintain an effective accident prevention program related to the hazard of crossing an interstate highway on foot. Moreover, since such material was not part of its regular training program. I also find that Respondent failed to train each of its employees in avoiding crossing multiple lane highways and in alternative safe means (such as driving to an appropriate location) of reaching the far side of the highway[7]. Respondent attempts to make much of the fact that barriers were in the area between the south-bound lanes and the median. I find that under the facts and circumstances of this case that the deceased could have driven a company vehicle into such a position that he would have had safe access to be on foot in the median. The failure to include such training in its safety program and the failure to conduct such training constitute violations of the standards cited in items 1 and 2 of

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[4] The employee's crossing the interstate, while not anticipated by Respondent, cannot be considered to be unanticipated employee misconduct because it was conduct permitted under Respondent's safety program.

[5] The CO also suggested that road signs, barriers, traffic controls and even closing the highway would have protected the employee. While such actions would have abated the hazard, requiring an employer to take all of the administrative and police actions necessary to close an interstate highway to allow one employee to cross would be impractical and unrealistic.

[6] The obviousness of the hazard of crossing such an interstate highway on foot puts to rest Respondent's attempt to argue that the cited standards are vague or ambiguous.

the citation issued to Respondent.[8] Accordingly, Items 1 and 2 are AFFIRMED.

Item 3 of the citation is vacated because the Secretary did not show that any "traffic control" would have been appropriate.[9] The Secretary suggested that the deceased should have either driven to the median strip (perhaps via the next interchange) or that arrangements should have been made to close the road to traffic. While effective, driving to the next interchange is not a "traffic control" as contemplated by the standard. Closing the highway was not, on the facts of this case, an "appropriate" traffic control. The standard's language and location makes it plain that it is concerned with warning approaching motorists and, where warnings are inadequate, exerting power over the physical flow of traffic. Neither of these concerns is appropriate where, as here, the problem is not one of controlling the moving traffic but of controlling the movement of the employee. Stopping all traffic on a six lane interstate highway is not a reasonable solution to the problem created by a single employee believing he has to cross the road. Relying on a standard whose purpose is to establish when traffic controls are needed as a replacement for more stringent personnel controls is misplaced. Rather, the standard in Item 3 should be applied in cases where the Secretary shows that appropriate changes in the flow of traffic are necessary to ameliorate the hazard. Item 3 is VACATED.

Nature of Violations and Penalties

Items 1 and 2 are serious violations in that getting struck by vehicular traffic is likely to result in serious bodily harm. The violations are thus properly characterized as serious within the meaning of § 17(k) of the Act, 29 U.S.C. § 666(j). Considering Respondent's small size, lack of any related prior violations and good faith, a penalty of $3,500 for each violation is appropriate.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). Any proposed findings of fact and conclusions of law inconsistent

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[8] Item 1 of the citation alleges a violation of 29 C.F.R.§ 1926.20(b)(1) requiring an employer to "initiate and maintain such [safety] programs as may be necessary to comply with this part." Item 2, alleges a violation of 29 C.F.R. § 1926.21(b)(2).

[9] The cited standard requires that "flagmen or other appropriate traffic controls" must be provided where "signs, signals and barricades do not provide the necessary protection. 29 C.F.R. § 1926.201(a).

with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of § 5(a)(2) of the Act in that it failed to comply with the standards as alleged in Citation 1, Items 1 and 2.

4. The violations found above were serious within the meaning of § 17(k) of the Act.

5. Respondent was not in violation of § 5(a)(2) of the Act as alleged in Citation 1,item 3.

6. A civil penalty of $3,500 is appropriate for each of the two serious violations of the Act.

ORDER

1. Citation 1, Items 1 and 2 are AFFIRMED.
2. Citation 1, Item 3 is VACATED.
3. A civil penalty of $3,500 per item is assessed for Items 1 and 2 of Citation 1,

/s/

Michael H. Schoenfeld
Judge, OSHRC

Dated: 7-23-99
Washington, D.C.