OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor

Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. CPM CONSTRUCTORS, Respondent.	OSHRC DOCKET NO. 08-1111

Appearances:

Kevin E. Sullivan, Esq.
Boston, Massachusetts
U.S. Department of Labor
For the Complainant

Paul Koziell, Esq.
Freeport, Maine
For the Respondent

Before: G. Marvin Bober
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This matter is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 651 et seq. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a work site of Respondent, CPM Constructors ("CPM" or "Respondent"), on June 20, 2008; the site was located in Freeport, Maine. As a result of the inspection, OSHA issued to CPM a Citation and Notification of Penalty alleging a serious violation of 29 C.F.R. § 1926.200(a) with a proposed penalty of $1600. CPM timely contested the citation and the proposed penalty.

By agreement of the parties, and with the approval of the Administrative Law Judge, the parties have submitted this case for a decision on the record pursuant to Commission Rule 61, 29 C.F.R. § 2200.61.[1]

Stipulation of Facts[2]

Complainant Secretary of Labor and Respondent CPM make the following stipulations of fact because they believe this case is controlled by an issue of law. Such stipulations are made to avoid the time and expense of an evidentiary hearing and are for the purposes of this proceeding only.

1) The parties agree that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Occupational Safety and Health Act of 1970 (the Act).

2) The parties agree that CPM is a Maine Corporation engaged in interstate commerce within the meaning of section 3(5) of the Act.

3) The parties agree that CPM is a general contractor and employs anywhere from 50 to 120 employees at a given time depending on time frame and work load.

4) The parties agree that CPM was conducting road paving and related work at a workplace located on Main Street, Freeport, Maine that was inspected by OSHA on June 20, 2008. The parties agree that the workplace is a high traffic area with a high volume of pedestrians, on street parking, and retail businesses.

5) The parties agree that as a result of the aforesaid inspection, Respondent was issued Serious Citation 1, Item 1 dated July 2, 2008, which citation alleged that Respondent failed to remove or to cover promptly a flagger sign when no flagger was present in violation of 29 CFR

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[1]Rule 61 provides as follows: "A case may be fully stipulated by the parties and submitted to the Commission or Judge for a decision at any time. The stipulation of facts shall be in writing and signed by the parties or their representatives. The submission of a case under this rule does not alter the burden of proof, the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof."

[2]The following sets out the Stipulation of Facts submitted by the parties.

1926.200(a). 29 CFR 1926.200(a) provides that "Signs and symbols required by this subpart shall be visible at all times when work is being performed, and shall be removed or covered promptly when the hazards no longer exist." 29 CFR 1926.201(a) provides, in pertinent part, that the use of flaggers shall conform to Part VI of the Manual on Uniform Traffic Control Devices ("MUTCD") (1988 Edition, Revision 3 or the Millennium), which are incorporated by reference in 1926.200(g)(2). The MUTCD specifies the minimum distance between signs and the minimum distance of the last sign to the flagger.

6) The parties agree that there was one work zone starting on southern Main Street and running west on Mallet Drive in Freeport, Maine. These roadways ran perpendicular to each other. Signs were set up to notify drivers on all roadways of the work zones and the presence of flaggers. Earlier in the day on June 20, 2008, CPM worked on the west side of Main Street by going south and then reversed direction and worked on the east side of Main Street by going north. CPM finished this portion of the work around 10:30 am. Afterwards, CPM moved its crew to the Mallet Drive portion of the work zone. The flaggers followed CPM. The flagger sign that was not removed was located on Route 1 (Main Street) in the work zone area near the Fire Station, which is approximately four tenths of a mile away from the work that continued on Mallet Drive and from the remaining flagger on Mallet Drive work zone.

(7) The parties agree that the roadways in issue are in an urban (low speed) setting due to heavy traffic congestion and high volume of pedestrians and, accordingly, that the MUTCD specifies that the minimum distance between the last sign (Flagger Ahead sign) and the flagger is 100 feet. The parties further agree that the Flagger Ahead sign located near the Fire Station was four-tenths of a mile from the remaining flagger on the Mallet Drive work zone and remained at that location for approximately 45 minutes. The parties further agree that both 29 CFR 1926.200(a) and the MUTCD are silent as to the maximum distance between the last sign (flagger ahead sign) and the flagger.

Discussion and Conclusion

Cited Regulation

Citation 1, Item 1, alleges a violation of 29 C.F.R. § 1926.200(a), which provides as follows:

> (a) *General*. Signs and symbols required by this subpart shall be visible at all times when work is being performed, and shall be removed or covered promptly when the hazards no longer exist.

Applicable Portions of the MUTCD

The cited standard, §1926.200(a), does not explicitly incorporate provisions of the MUTCD. However, as the parties stipulated, § 1926.201(a) incorporates by reference Part VI of the MUTCD via § 1926.200(g)(2).[3] I therefore find that the cited standard incorporates by reference the mandatory provisions of Part VI of the MUTCD and that the non-mandatory provisions of the MUTCD may be used as guidance in interpreting any disputed terms in the MUTCD.[4] *See KS Energy Serv., Inc.*, 22 BNA OSHC 1261, 1264 & 1265 n.8 (No. 06-1416, 2008) ("*KS Energy*") (Commission decision stating that only mandatory provisions of the MUTCD are incorporated as OSHA standards; that the Commission "construes 'each part or section [of a law] so as to produce a harmonious whole'"; and that it is permissible to refer to other provisions of the MUTCD when interpreting a disputed term of a provision). (Citations omitted).

The MUTCD "provides the transportation professional with the information needed to make appropriate decisions regarding the use of traffic control devices on streets and highways." MUTCD, Introduction. It "differentiate[s] between Standards that must be satisfied for the particular circumstances of a situation, Guidance that should be followed for the particular circumstances of a situation, and Options which may be applicable for the particular circumstances of a situation." *Id*. Part VI, "Temporary Traffic Control," of the MUTCD covers, among other

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[3]29 C.F.R. § 1926.201(a), "Flaggers," provides in pertinent part that "[s]ignaling by flaggers and the use of flaggers, including warning garments worn by flaggers shall conform to Part VI of the [MUTCD], which are incorporated by reference in § 1926.200(g)(2)." 29 C.F.R § 1926.200(g)(2), "Traffic," provides in pertinent part that "[a]ll traffic control signs or devices used for protection of construction workers shall conform to Part VI of the [MUTCD]."

[4]As I just found, the cited standard incorporates by reference provisions from portions of either the 1988 Edition, Revision 3 or the Millennium Edition of Part VI of the MUTCD. In her brief, the Secretary proffers statements from the Millennium Edition of the MUTCD. CPM proffers statements from the 2003 Edition of the MUTCD, which is not incorporated by reference. I thus look only to the Millennium Edition of the MUTCD for the purposes of deciding this case.

temporary traffic control topics, "Flagger Control" and "Temporary Traffic Control Zone Devices," which includes the flagger sign.[5] MUTCD, Table of Contents.

Chapter 6E, "Flagger Control," section 6E.05, "Flagger Stations," provides as guidance that "[f]lagger stations should be preceded by proper advance warning signs." MUTCD, § 6E.05.

Chapter 6F, "Temporary Traffic Control Zone Devices," section 6F.15, "Warning Sign Function, Design, and Application," provides as a standard that a "temporary traffic control warning sign" must "conform to the Standards for warning signs presented in Part 2 [of the MUTCD] and in FHWA's 'Standard Highway Signs' book."[6] MUTCD, § 6F.15. Part 2, "Signs," chapter 2C, "Warning Signs," section 2C.02, "Application of Warning Signs," provides as a standard that "[t]he use of warning signs shall be based on an engineering study or on engineering judgment." MUTCD, § 2C.02. As guidance for this standard, section 2C.02 provides in pertinent part:

> The use of warning signs should be kept to a minimum as the unnecessary use of warning signs tends to breed disrespect for all signs. In situations where the condition or activity is seasonal or temporary, the warning sign should be removed or covered when the condition or activity does not exist.

Section 6F.29, "Flagger Sign (W20-7, W20-7a)," of the MUTCD provides as a standard that "[t]he Flagger sign shall be removed, covered, or turned away from road users when the flagging operations are not occurring." This section also provides as guidance that "[t]he Flagger (W20-7a) symbol sign should be used in advance of any point where a flagger is stationed to control road users."[7] MUTCD, § 6F.29.

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[5]The term "flagger sign" in this decision is intended to include the many other terms used by the parties and the MUTCD which refer to the sign that warns drivers of flaggers. Such terms include: Flagger Ahead sign, flagger ahead sign, Flagger sign, Flagger symbol sign, and the FLAGGER word message sign.

[6]The preface of the FHWA "Standard Highway Signs" book notes that it pertains only to the design of the actual signs, not the placement of them, making this resource not applicable in this case.

[7]Section 6F.29 also provides as an option that "the FLAGGER (W20-7) word message sign with distance legends may be substituted for the Flagger (W20-7a) symbol sign." MUTCD, § 6F.29.

Chapter 6H, "Application of Devices," section 6H.01, "Typical Applications," of the MUTCD illustrates an example of the use of flaggers in the portion entitled "Notes for Figure 6H-11 - Typical Application 11: Lane Closure on Low-Volume Two-Lane Road." MUTCD, § 6H.01, pg. 6H-26. This section provides as a standard that "[w]hen flaggers are used, the Flagger symbol sign shall be used in place of the YIELD AHEAD sign."

Issues

"To prove a violation of an OSHA standard, the Secretary 'must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.'" *KS Energy*, 22 BNA OSHC 1261 at 1265. The citation alleges that CPM violated § 1926.200(a) by failing to promptly remove or cover a flagger sign when no flagger was present.

The Secretary notes in her brief that "the flagger sign at issue in this case should have been promptly removed at the completion of work in this work zone (when the hazards no longer existed) and placed within a reasonable distance (100 feet to 300 feet) from the flagger at the location where work was proceeding." (Sec'y Br. at 4) (emphasis removed). The Secretary asserts that the MUTCD specifies the minimum distance as 100 feet between a flagger sign and a flagger, making the 2000 foot distance that CPM implemented at this work site "patently unreasonable." (Sec'y Br. at 3.) CPM argues that it fully complied with the requirements of § 1926.200(a), and that the distance between the flagger sign and the flagger was reasonable under the circumstances. (CPM Br. at 2, 5.)

First, I turn to the issue of whether the Secretary has shown applicability of the cited standard. The cited standard provides that "a required sign" must be removed or promptly covered when no hazard exists. 29 C.F.R. § 1926.200(a). Nothing in 29 C.F.R. § 1926.200(a) requires a flagger sign when using a flagger. Section 6F.29 of the MUTCD states that a flagger sign *should* be used when a flagger is used, but this statement is discretionary. MUTCD, § 6F.29. Section 6E.05 states that "flagger stations *should* be preceded by proper advance warning signs." MUTCD, § 6E.05. This statement is also discretionary and furthermore, the term "proper advance warning signs" could include flagger signs as well as other signs, such as "Road Work Ahead" signs. It is

noteworthy that the Secretary apparently has no issue with the Road Work Ahead sign that accompanied the flagger sign on Route One as shown in the schematic stipulated by both parties as a diagram of CPM's work site. The only mandatory statement that appears in Part VI of the MUTCD specifically requiring a flagger sign is in section 6H.01, "Notes for Figure 6H-11 - Typical Application 11: Lane Closure on Low-Volume Two-Lane Road." MUTCD, § 6H.01, pg. 6H-26. In this section, the mandatory statement provides that "[w]hen flaggers are used, the Flagger symbol sign shall be used in place of the YIELD AHEAD sign." I find that this standard requiring the use of a flagger sign does not pertain to the facts of this case because, as the parties stipulated, the road at issue was a "high traffic area," and not a "low-volume" road. Because the citation specifically mentioned a flagger sign, and the research performed in the MUTCD did not pinpoint any specific requirement to use a flagger sign in these particular circumstances, I conclude that the Secretary has failed to prove that the cited standard applied to the facts of this case.[8]

Second, even if the Secretary had shown the applicability of the standard, I find that she has not proven noncompliance with its terms. According to section 6F.15 of the MUTCD, a "temporary traffic control warning sign" must "conform to the Standards for warning signs presented in Part 2 [of the MUTCD]." MUTCD, § 6F.15. Thus, I look to Part 2 of the MUTCD, which provides as a standard that "[t]he use of warning signs shall be based on an engineering study or on engineering judgment." MUTCD, § 2C.02. As guidance for this mandatory statement, Section 2C.02 provides in pertinent part:

> The use of warning signs should be kept to a minimum as the unnecessary use of warning signs tends to breed disrespect for all signs. In situations where the condition or activity is seasonal or temporary, the warning sign should be removed or covered when the condition or activity does not exist.

Turning to the facts of this case, the citation alleges improper placement of a flagger sign because no flagger was present, i.e., no flagging activity existed. The Secretary argues essentially that the flagging activity on Mallet Drive did not exist for purposes of the cited standard by asserting that the 2000-foot distance between the flagging activity on Mallet Drive and the flagger sign on

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[8]Even though it seems odd that the MUTCD requires a flagger sign when a flagger is present in one type of flagging situation, and then specifically states as guidance that flagger signs *should* be used in other flagging situations, I must follow what the standards require and trust that they place primary importance on worker safety.

Route One was "patently unreasonable." (Sec'y Br. at 3.) CPM argues essentially that the flagging activity on Mallet Drive did exist for purposes of the cited standard, and asserts that the placement of the flagger sign was reasonable under the circumstances. CPM also asserts that any other placement of the sign would have rendered it ineffective (due to it being lost in "the flood of traffic, pedestrians, on street parking, and retail business signs and advertisements") and posed a hazard. (CPM Br. at 4.)

Neither party mentions whether CPM used an engineering study or engineering judgment to determine the placement of the flagger sign, but the parties nonetheless request that I decide whether the 2000-foot distance between the flagging activity and the flagger sign was reasonable or unreasonable. The Secretary proffers interpretations of many of the guidance sections of the MUTCD in support of her argument that the 2000-foot distance was "patently unreasonable." Yet, she does not allege that CPM failed to use an engineering study or engineering judgment to determine the placement of the flagger sign. CPM, on the other hand, proffers reasons, tailored to the specific facts of this case, that support its decision regarding the placement of the flagger sign. Although CPM does not mention whether it used engineering studies or judgments, the Secretary does not even make an allegation in this regard. By not alleging that CPM failed to use an engineering study or engineering judgment in its placement of the flagger sign, based on the limited stipulated facts of this case, I conclude that the Secretary has failed to prove noncompliance with the cited standard's terms.

Conclusion

Because the Secretary has not demonstrated that the cited standard applied to the facts of this case, I conclude that the Secretary failed to prove a violation in this case.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1 Item 1 alleging a "serious" violation of 29 C.F.R. § 1926.200(a) is VACATED.

G. MARVIN BOBER
Administrative Law Judge

Dated: January 21, 2009
Washington, D.C.