

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1924 Building - Room 2R90, 100 Alabama Street, S.W.

Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant

v.

The Lane Construction Corporation,

Respondent.

OSHRC Docket No. **16-0534**

Appearances:

Dane L. Steffenson, Esquire, U.S. Department of Labor, Office of the Solicitor,
Atlanta, Georgia
For the Secretary

David Bondanza, Esquire, The Lane Construction, Atlanta, Georgia
For the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

On the night of September 9, 2015, a truck driver operating a dump truck in reverse struck and killed a superintendent of The Lane Construction Corporation (Lane). Lane's employees were in the process of milling and repaving a section of Veterans Expressway in Tampa, Florida. Following a fatality investigation conducted by the Occupational Safety and Health Administration, the Secretary issued a Citation and Notification of Penalty to Lane on March 7, 2016, alleging, in Item 1, a serious violation of the general duty clause, § 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act). The Secretary alleges Lane exposed its employees to struck-by hazards by failing to implement an Internal Traffic Control Plan (ITCP) or some other method to maximize separation between pedestrians and moving vehicles. The Secretary proposed a penalty of \$7,000.00 for the alleged violation.

Lane timely contested the Citation. The Court held a hearing in this matter on February 9 and 10, 2017, in Clearwater, Florida. The parties filed briefs on April 3, 2017. For the reasons that follow, the Court **VACATES** Item 1 and assesses no penalty.

JURISDICTION AND COVERAGE

Lane timely contested the Citation and Notification of Penalty on March 8, 2016. The parties stipulate the Commission has jurisdiction over this action and Lane is a covered business under the Act (Tr. 10). Based on the parties' stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Lane is a covered employer under § 3(5) of the Act.

BACKGROUND

The Accident

In 2013, the Florida Department of Transportation awarded Astaldi Construction Corporation, a general contractor, a contract to widen Veterans Expressway in Hillsborough County, Florida (Exh. C-4). Astaldi hired Lane to perform milling (grinding up the old asphalt) and repaving work for the project. Lane hired Cordova Transport, Inc., to provide dump trucks to haul away the milled asphalt for the operation. Cordova Transport subcontracted with OB Trucking to provide drivers for the dump trucks (Tr. 357-358). The night of the accident, Lane had been working sporadically on the project for approximately one year (Tr. 25-26).

On the night of September 9, 2015, Lane was in the process of milling the northbound lane on a section of Veterans Expressway south of a bridge that crosses Hillsborough Avenue. The far-right northbound lane was closed with cones dividing it from the one remaining active lane of traffic (Tr. 41). Astaldi had responsibility for the Temporary Traffic Control Plan with regard to public traffic (Tr. 68). There was a concrete barrier wall (known as a Jersey barrier) located on the far-right side of the closed lane, placed there to protect non-Lane employees on the other side engaged in bridge work (Tr. 40-42). The dump trucks were staged on the Hillsborough Avenue Bridge, from where they would be driven in reverse to the milling machine under the direction of Lane's designated spotter (Tr. 35).

The roadway was 12 feet wide. Lane's milling machine was 7 feet wide, so Lane needed to make two passes with the milling machine on each section of the roadway to complete the milling process. The total operation area was approximately 1,000 feet long (Exh. R-1, pp. 2, 4; Tr. 25-27).¹ Daniel Estry, Lane's senior safety supervisor, explained how the milling machine and the dump trucks operated together.

¹ Counsel for the Secretary stated the distance between the staged trucks and spotter located by the milling machine was 3,000 feet (Tr. 13, lines 14, 16, 23). Miguel Cordova stated the distance was 4,000 feet (Exh. R-6, p. 21).

The mill machine is a large machine that grinds up the asphalt and it goes on a conveyor and it's thrown into a dump truck. From there, it's hauled back to wherever the destination might be. And then, oftentimes, they haul the asphalt back to the plant, they unload, they wash out their truck, they've put in new asphalt, and then that is brought out to the jobsite where it gets in the paver. And the asphalt is dumped into a paver and it's spread on the roadway.

(Tr. 27)

Following the milling machine was a broom tractor that sweeps the underlying asphalt "so that the surface is clean enough so that the liquid asphalt will stick to it." (Tr. 33) The paving crew must "lay a layer of liquid asphalt that's called tack. And that causes it to adhere to the old asphalt." (Tr. 33)

Lane had two employees working on the milling operation: the mill operator and the spotter, leadman Travis Grimes (Tr. 128-129). Grimes's job was to signal to the truck drivers to back their dump trucks from the staging area to the milling machine. Using a lighted wand, he would signal the next truck driver in line to back up and he would spot the truck as it did so. Once the truck was backed up to the milling machine and stopped, Grimes would cease his spotting duties and turn to the milling machine to make adjustments so the milled asphalt could be deposited in the dump truck. After the dump truck was filled with the milled asphalt, the driver would drive the truck away from the milling machine and Grimes would resume his spotting duties and signal for the next truck to back up. This process occurred multiple times (Tr. 34-36, 58, 129-130, 361-362).

At 11:04 p.m. on September 9, 2015, Lane's Superintendent texted Miguel Cordova, owner of Cordova Transport, who was in the staging area with the dump trucks, to tell him one of the vehicles was leaking motor oil on the roadway. He believed it was coming from one of the dump trucks supplied by Cordova Transport. Cordova texted in response he was on his way and he proceeded to walk south passed Hillsborough Avenue, where he met Lane's Superintendent and Dwayne Ludwig, recently hired by Lane to replace the Superintendent, who

CSHO Pruna Padilla, who conducted the fatality investigation for OSHA, received information from the Florida Highway Patrol (FHP) resulting from its investigation of the accident. Included as part of her Inspection Narrative is a map of Lane's Veterans Expressway worksite. The legend of the map includes the notation, "Milling area, approximately 1,000 feet." On the map, the distance between the milling machine and the dump truck where it stopped after striking the Superintendent is noted as "560 feet." A notation states, "FHP Corporal Niles Daughtry measured this distance on 9/9/15 at the site." (Exh. R-1, p. 4) The Court credits the information provided by the CSHO and the FHP over the estimates of the Secretary's counsel and Cordova, and determines 1,000 feet is the most accurate approximation of the length of the milling area.

planned to relocate for a new job soon. It was Ludwig's first night on the job and the Superintendent was training him. As the three men walked south on the roadway, by the light of their cell phones they observed drips of motor oil on the surface that had been milled. The Superintendent, who was talking on his cell phone to another Lane manager as they walked, pointed out the oil spots to Cordova. At some point, the Superintendent stopped walking and stood still as he talked on his phone. Cordova and Ludwig continued walking the length of the operation to the milling machine (Tr. 185-187, 202-203, 314-315). "All employees, including [the Superintendent] were wearing a high visibility vest adequate for night operations." (Exh. R-1, OSHA Inspection Narrative, p. 5)

When Cordova and Ludwig arrived at the milling machine, they ascertained that the oil drops had not come from any of the dump trucks, but were from Lane's broom tractor. Cordova and Ludwig started walking north again and met with the Superintendent, who was still talking on his phone (Tr. 188-190). At this point, Cordova held up his lighted cell phone and waved it, hoping to attract the attention of the driver of the next staged truck (Tr. 214). Cordova and Ludwig left the Superintendent where he stood talking and moved over to the Jersey barricade nearby (Tr. 300-301).² As they waited, Cordova left Ludwig "and ran out" to the driver's side of the next truck in line at the staging area (Tr. 300). Cordova yelled to the driver and attempted to use his cell phone to signal him, but failed to attract his attention on the noisy worksite. The driver, a nephew of the owner of OB Trucking, had only recently obtained his commercial license. His girlfriend was sitting next to him on the passenger side of the truck's cab (Tr. 258-259). Cordova told the driver "he needs to get rid of that person off the truck." (Tr. 204) Cordova stated, "I keep screaming and signal him with my phone." (Tr. 256) "And I said, 'Hey,

² Cordova testified Grimes, the designated spotter, told him to send the next truck when he returned to the staging area (Tr. 196-198, 204, 212, 215, 217-218, 240). He added later that the Superintendent, who was on the phone, "also told me to get him a truck." (Tr. 216) Grimes denied telling Cordova to send the next truck or knowing that Cordova was going to direct the next driver to back up (Tr. 159). Ludwig stated he was standing with Cordova near the Jersey barricade waiting for the Superintendent to finish his phone call and Cordova "kind of looked down the road and realized there wasn't a truck at the milling machine and he ran out and got the truck to back up. So, he went out and had the truck backing up, got it moving, and then he came back over the barrier wall and stood with me while it backed down through." (Tr. 300-301) The Court credits Grimes's testimony that he did not request Cordova to send a truck and Ludwig's testimony that Cordova sent the next truck of his own accord once he realized there was no truck at the milling machine. Grimes and Ludwig were credible witnesses, testifying each in a forthright manner. Cordova's manner, on the other hand, was often evasive and forgetful. He contradicted himself on a number of issues (Tr. 216-217, 220-221). Lane's counsel effectively impeached him with his previous statement to the police and his deposition testimony (Tr. 213-226, 255-269). The Court does not credit Cordova's statement that either Grimes or the Superintendent told him to send the next dump truck to the milling machine.

don't you [expletive], I'm sorry my language, but that's what I said, hey, don't you [expletive] see me?" And I'm waving a wand [sic] and standing in the back. "Back up.'" (Tr. 258)³ The driver started backing up his truck. In the side mirrors of the truck, he could see the lights of the milling machine approximately 1,000 feet behind him. The backup alarm was functioning. The truck was traveling between 3 and 5 miles per hour. After traveling a short distance, the driver felt a bump, which he attributed to the roughened asphalt left by the milling operation. He only realized he had backed over a person when he saw the body of the Superintendent in front of the truck (Exh. R-1, p. 5).

Lane's Safety Program

Compliance Safety and Health Officer (CSHO) Linette Pruna Padilla conducted the fatality inspection in this case (Tr. 330). She acknowledged Lane had a written safety program that included backing and spotting safety procedures for its employees, but stated, "In this particular worksite, Lane had not followed some of their rules." (Tr. 345)

Lane's written safety program requires its employees to follow these relevant rules:

Workers on Foot

Do not walk close behind a covered vehicle that is backing up and stay a safe distance around the vehicle in view of the driver at all times.

Do not distract the designated spotter or act as another spotter which causes confusion. A separate spotter can be used for the sole purpose of watching overhead power lines.

* * *

Training

Employees will receive training at new hire orientation.

Communication will be established between subcontractor drivers and designated spotters on site to determine agreed upon procedures.

Internal Traffic Control Plans

Supervisors or project managers can incorporate plans in their daily JHA (Job Hazard Analysis) to address the flow of moving equipment, workers on foot, and vehicles at a worksite to minimize or eliminate vehicles and employees from crossing paths. These plans can significantly reduce or possibly eliminate the need for vehicles to back up on a site.

³ The quoted statements are transcribed from an audiotape played at the hearing. The audiotape is of an interview with Cordova recorded by an officer of the Florida Highway Patrol during his investigation of the fatal accident. The audiotape was played at the request of Lane's counsel, over the Secretary's objection, "both as impeachment and to refresh [Cordova's] recollection." (Tr. 241) The Court permitted the playing of portions of the audiotape for those purposes (Tr. 241-248).

Spotter Procedures

Spotters should meet with new drivers and agree on hand signals and emergency alerts before backing up and will remind drivers of their responsibility to stop backing up immediately if they lose sight of the spotter.

Spotters will always maintain visual contact with the driver while the vehicle is backing.

(Exh. C-9, pp. 3-4)

CSHO Pruna Padilla testified Lane had rules for “backup guidelines and the spotter, so they do have rules that can maximize this separation, but I didn’t see they were followed. ... [I]f they were followed, yes, that can definitely reduce the hazard.” (Tr. 345)

CITATION NO. 1

The Secretary’s Burden of Proof

To prove a general duty clause violation, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). He must also prove that the employer had knowledge of the hazardous condition. *Burford’s Tree, Inc.*, 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010), *aff’d*, 413 F. App’x 222 (11th Cir. 2011) (unpublished).

S. J. Louis Constr. of Texas, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016).

Item 1: Alleged Serious Violation of § 5(a)(1)

Item 1 of Citation No. 1 alleges,

The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to the hazard of being struck by vehicular traffic inside a work zone:

- a) At the work area on Northbound Veterans Expressway (SR 589), south of Hillsborough Avenue in Tampa, Florida, on or about 09/09/2015, an employee who was talking on his cell phone and walking in the work zone area was struck by a dump truck.

Among other methods, one feasible and acceptable method of abatement is for the employer to:

- a) Develop and implement an internal traffic control plan for inside the work areas to minimize backing and other conflicts between employees and work vehicles/equipment and to maximize the separation of vehicles and

pedestrians. (Reference ANSI/ASSE A10.47-2015, Work Zone Safety for Highway Construction, Section 6.4.)

- b) Develop and implement a site-specific safety plan for safe employee access to and egress from the work area, whether driving or walking. (Reference ANSI/ASSE A10.47-2015, Work Zone Safety for Highway Construction, Section 6.5.)⁴
- c) Communicate the details of the site specific safety plan and internal traffic control plan to all employees onsite and all vehicle operators entering the site. (Reference ANSI/ASSE A10.47-2015, Work Zone Safety for Highway Construction, Section 6.4.1.)

An Activity in the Worksite Presented a Hazard

There is no dispute that Lane's Superintendent was struck and killed by a dump truck driven by an OB Trucking employee. Lane concedes a "hazard exists when vehicles or machinery are put into motion at the jobsite" (Lane's brief, p. 7). The Secretary met the first element of his prima facie case, establishing the existence of a struck-by hazard.

The Employer or Its Industry Recognized the Hazard

Lane concedes it is aware moving vehicles on the construction site presented struck-by hazards to employees on foot: "There is no dispute that a vehicle-pedestrian accident may cause serious physical harm to an employee." (Lane's brief, p. 15) In addition to Lane's recognition of the hazard, the record establishes the highway construction industry recognizes the struck-by hazards moving vehicles present to pedestrians. ANSI/ASSE A10-47-2009 (*Work Zone Safety for Highway Construction*) and ANSI/ASSE A10.17-2006 (*Safe Operating Practices for Hot Mix Asphalt (HMA) Construction*) each address the hazard.⁵

It is well established that voluntary industry standards are admissible and probative evidence of industry recognition of hazards. *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 871 (3d Cir. 1979); *H-30, Inc. v. Marshall*, 597 F.2d 234 (10th Cir. 1979); *Titanium Metals Corp. of America v. Usury*, *supra* note 3; *Beaird-*

⁴ The Citation refers to the 2015 version of ANSI/ASSE A10.47. The only version of ANSI/ASSE A10.47 admitted into the record is the 2009 version (Exh. R-3). There is no section 6.5, referred to in instance b of the Citation's feasible methods of abatement, in the 2009 version. The Secretary did not refer to section 6.5 in his brief, other than when quoting the Citation.

⁵ Section 6.4 of ANSI/ASSE A10-47-2009 states, "Prior to starting work, a site specific plan shall be developed and implemented for safe worker access to and egress from the work area, whether driving or walking."

Section 2.1 of ANSI/ASSE A10.17-2006 states, "In the paving operations, interference with pedestrian and vehicular traffic shall be avoided wherever possible and shall be kept to a minimum in time and scope in circumstances where it cannot be avoided. When interference results, a specific written traffic control plan and paving pattern shall be formulated and implemented."

Poulan, A Division of Emerson Electric Co., supra; The Boeing Co., Wichita Division, 77 OSAHRC 188/D13, 5 BNA OSHC 2014, 1977–78 CCH OSHD ¶22, 266 (No. 12879, 1977); *cf. Betten Processing Corp.*, 75 OSAHRC 43/E2, 2 BNA OSHC 1724, 1974–75 CCH OSHD ¶19,481 (No. 2648, 1975) (ANSI standard used to show industry recognition of the hazard had been incorporated by reference.).

Cargill, Inc., 10 BNA OSHC 1398, 1402 (No. 78-5707, 1982).

In 2012, the Secretary published a Request for Information (RFI) “seeking information about backover incidents that occur when drivers or mobile equipment operators have an obstructed view to the rear.” *Reinforced Concrete in Construction, and Preventing Backover Injuries and Fatalities*, 77 Fed. Reg. 18973-01 (March 23, 2012) (Exh. R-4). The Secretary published the RFI due to concerns raised by a search of OSHA’s Integrated Management Information System, which identified 358 fatal accidents caused by backing vehicles over a six-year period, from 2005 through 2010. Relevant to this case, the RIF states,

Three types of vehicles caused a large number of deaths: 61 deaths involved dump trucks; 31 deaths involved tractor trailers; and 20 deaths involved garbage trucks. . . . Eight of the deceased workers were using cell phones when the backover incident occurred. Twenty-one fatalities involved vehicles with no driver. Twenty-five of the victims were acting as spotters for the vehicles that backed over them. In many of the cases, employers were using spotters to comply with the existing backover-related standards. In some [of] these cases, OSHA cited employers under § 5(a)(1) of the Occupational Safety and Health Act of 1970, known as the General Duty Clause.

Id.

The Secretary has established Lane and the highway construction industry recognize the struck-by hazard presented to pedestrians by moving vehicles.

The Hazard Was Likely to Cause Death or Serious Physical Harm

As noted, Lane concedes, “There is no dispute that a vehicle-pedestrian accident may cause serious physical harm to an employee.” (Lane’s brief, p. 15) The Secretary has established the third element of the alleged violation.

Lane disputes the two remaining elements: (1) the feasibility and effectiveness of the Secretary’s proposed means to eliminate or materially reduce the hazard and (2) Lane’s actual or constructive knowledge of the hazardous condition.

Means to Eliminate or Materially Reduce the Hazard

The Secretary has the burden of “demonstrat[ing] both that the [proposed abatement] measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard.” *Beverly Enters.*, 19 BNA OSHC at 1190, 2000 CCH OSHD at p. 48,981. “Feasible means of abatement are those regarded by conscientious experts in the industry as ones they would take into account in ‘prescribing a safety program.’” *Id.* at 1191 (quoting *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973)). If the proposed abatement “creates additional hazards rather than reducing or eliminating the alleged hazard, the citation must be vacated for failure to prove feasibility” *Kokosing*, 17 BNA OSHC at 1875 n.19, 1995-1997 CCH OSHD at p. 43,727 n.19. But the Secretary is not required to show that the proposed abatement would completely eliminate the hazard. *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1122, 1993-1995 CCH OSHD ¶ 30,048, p. 41,279 (No. 88-572, 1993).

Acme Energy Servs., 23 BNA OSHC 2121, 2127 (No. 08-0088, 2012)

The ANSI/ASSE Standards

The Citation refers to Section 6.4 of ANSI/ASSE A10.47, which provides:

Access and Egress to Work. Prior to starting work, a site specific safety plan shall be developed and implemented for safe worker access to and egress from the work area, whether driving or walking. These plans shall be updated and evaluated by the controlling contractor when necessary (e.g., changes in work site operations or environment).

CSHO Pruna Padilla testified the referenced section is feasible because “it can rely on workers that you already have there at the mill and communication in between these workers in the mill and the dump truck. ... [T]hey have to, like, check that, ‘Okay, everything is done,’ establish a plan that they go through and then they can communicate with each other before restarting.” (Tr. 343-344)

Lane points out the referenced section addresses access and egress to work, which is not the work activity at issue. Section 6.4 is designed to allow employees to go to and leave from the work area with a maximum of separation from vehicles. It is not specific to protecting workers on foot. It calls for the development and implementation for workers “whether driving or walking.” Section 6.4 applies to employees going to and from work, and not to employees actually performing their assigned tasks, as is made clear by the immediately following section, 6.4.1:

This plan shall include information on the location of employee parking, sanitation facilities, break areas, and a path from employee parking area to work areas.

(Exh. R-3)

Ludwig testified a site specific safety plan for worker access to and egress from the work area is not applicable to the milling and paving activity Lane was performing the night of the accident. “[T]here’s moving parts everywhere in this process and it’s not really that you can’t keep people out of the work zone and keep them in certain areas. You have to have access all over the work zone that you’re in. ...All the workers, whether they’re the milling crew, the cleaning crew, the superintendent, the trucks. They all need access and are moving parts within this work zone.” (Tr. 296) In his brief, the Secretary acknowledges the need for Lane’s employees to be present *in* the work area. “Respondent’s superintendents are regularly on foot in the lane closure performing quality control while the operation is occurring.” (Secretary’s brief, p. 6) In this case, the Superintendent and Ludwig were required to be in the work area in order to follow the trail of motor oil drops on the roadway at night. They were not in the process of accessing or egressing the work area—they were walking in the work area to determine the source of the oil leak.

Lane argues a more applicable ANSI standard is ANSI/ASSE A10.17, the scope of which is “those operations involving hot mix asphalt (bituminous) mixtures and materials for construction and resurfacing.” (Exh. R-11, section 1.1) Section 2.1 addresses “Vehicular and Pedestrian Traffic” and provides, “In the paving operations, interference with pedestrian and vehicular traffic shall be avoided wherever possible and shall be kept to a minimum in time and scope in circumstances where it cannot be avoided. When interference results, a specific written traffic control plan and paving pattern shall be formulated and implemented.” (Exh. R-11) This ANSI standard is more specifically applicable to the milling and paving operations Lane was performing the night of the accident than Section 6.4 of ANSI/ASSE A10.47.

Section 3.3 of ANSI/ASSE A10.17 addresses “Backing Vehicles” and states:

3.3.1 Trucks that must back to the spreader or paver to discharge their loads shall be directed by a guide person positioned well within view of the driver of the truck.

3.2.1.1 The guide person shall not stand in the path of the traffic stream.

3.3.1.2 The guide person shall not ride on the running board of the truck.

3.3.1.3 The guide person shall keep all workers and other personnel clear of all backing vehicles.

3.3.1.4 The driver of the vehicle shall not discharge material until given an “all clear” signal by the guide person.

3.3.2 An audible warning device mounted on the vehicle shall be detectable by workers in the area, and shall be sounded automatically while the vehicle is backing.

3.3.3 Operators of bidirectional, self-propelled vehicles shall be certain that the travel area is free of foreign material, personnel and vehicles before moving or changing direction. The operator shall face the direction of travel and utilize mirrors.

3.3.4 All vehicles shall approach the paver slowly and with caution.

3.3.6 All vehicles shall be equipped with backup alarms and mirrors specified by the original equipment manufacturer’s specifications.

(Exh. R-11)

The Secretary has adduced no evidence showing Lane failed to comply with any of these subsections. Lane employee Grimes was not directing the truck backing up at the time of the accident, so he was not in a position to keep personnel clear of the backing truck—it was a non-employee, Cordova, who directed the truck to back up and who had the responsibility to keep personnel clear of the truck.

The Secretary has not established Lane failed to comply with ANSI/ASSE A10.17, the more applicable standard, and he has not established compliance with section 6 of the standard he cited in Item 1, ANSI/ASSE A10.47, would eliminate or materially reduce the cited hazard.

The Secretary’s RIF discussed backover prevention methods, including the proposed means of abatement at issue, the ITCP.

Internal traffic control plans (ITCP) is another method used to address backover construction equipment, workers, and vehicles at a Worksite to prevent vehicle impacts with workers. These plans can significantly reduce, or possibly eliminate, the need for vehicles to back up on a site. ANSI standard A10.47-2009, *Work Zone Safety for Highway Construction*, section 6.3 recommends that employers develop ITCPs and communicate them to employees. In addition, section 6.3.3 states that an ITCP should include a diagram of travel routes; a listing of all onsite personnel and equipment; a checklist of site-specific safety hazards and how to minimize these hazards; a list of safety notes defining site-specific injury prevention measures; and a plan for communicating the ITCP to workers, truck

drivers, and equipment operators. *However, OSHA has no information on the effectiveness of this consensus standard.*

77 Fed. Reg. 18973-01 (March 23, 2012) (Exh. R-4) (emphasis added).

The Secretary concedes in his RIF that OSHA has no information on the effectiveness of ITCPs as recommended by the ANSI *Work Zone Safety for Highway Construction* standard. He is, therefore, unable to meet his burden of establishing “a feasible and *effective* means existed to eliminate or materially reduce the hazard.” (emphasis added)

Lane’s Safety Program

In his post-hearing brief, the Secretary posits an alternative means of abatement to the ITCP he cited in Item 1 of the Citation. The Secretary contends Lane’s existing safety program “could constitute abatement if Respondent implemented and enforced them as Respondent claims it intended.” (Secretary’s brief, p. 14) CSHO Pruna Padilla testified that if Lane’s safety program “were followed, yes, that can definitely reduce the hazard.” (Tr. 345) “[W]here the employer has a mechanism designed to eliminate a hazardous condition, the burden is on the Secretary to establish that the employer's measures were inadequate. *Cerro Metal Products*, 12 BNA OSHC 1821, 1822–23 (No. 78-5159, 1986), *citing National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257, 1266–68 & n. 40 (D.C.Cir.1973).

Specifically, the Secretary claims Lane’s safety measures were inadequate because, on the night of the accident, Grimes failed to follow four of Lane’s internal safety rules.

Grimes as the designated spotter did not go over the signals with the driver and did not even know that the night of the accident was the driver’s first night driving at the Worksite. ... Although Respondent’s program required a spotter to be able to see the driver, maintain eye contact, and ask the driver to keep the window rolled down, there was no hope of that occurring with the spotter hundreds or a thousand feet behind the truck in the dark. ... Grimes wore no contrasting color reflective vest or fluorescent hard hat as the program required. ... And, although the program allegedly resulted in spotter signals being printed on a card that was given to every worker, Respondent’s own lead man and designated spotter never saw or knew of such a card.

(Secretary’s brief, p. 14)

Of these four internal rules’ infractions, the Secretary focuses on Grimes’s failure to go over spotter signals with the new driver who struck the Superintendent as crucial. In her Inspection Narrative, CSHO Pruna Padilla writes conclusively that if Lane had communicated its spotter signals to the OB Trucking driver before work started, “then the driver would have

refused to move until he observed the ground man/spotter signaling to back up.” (Exh. R-1, p. 6) The evidence does not support this speculative statement. CSHO Pruna Padilla also writes that, prior to the night of the accident, the OB Trucking driver “had visited several construction sites with his uncle . . . and another family friend who also owns and operates a similar dump truck. During these site visits, milling and paving operations were observed by [the driver] as part of his training on how to interpret the spotters and operators’ signals.” (Exh. R-1, p. 5) There is no evidence the driver did not understand he was to respond only to the designated spotter.⁶

In addition to establishing the inadequacy of an employer’s “mechanism designed to eliminate a hazardous condition,” the Secretary “must show that knowledgeable persons familiar with the industry would regard additional measures as necessary and appropriate in the particular circumstances existing at the employer’s worksite.” *Inland Steel Co.*, 12 BNA OSHC 1968, 1970-71 (No. 79-8296, 1986). The Secretary did not present an expert witness in this proceeding. The ANSI Standards admitted into the record, which are evidence of industry recognition, do not recommend the additional measures (the four internal rules of Lane’s safety program cited by the Secretary) as “necessary and appropriate” for the conditions existing at Lane’s worksite.

The Court determines the Secretary has failed to establish Lane’s existing safety program was inadequate to materially reduce the incidence of struck-by hazards at its worksite.

Knowledge of the Hazardous Condition

When the Secretary has alleged a violation of the general duty clause, he “must show that the employer had actual knowledge of the violation or could have discovered it with the exercise of reasonable diligence. *NY State Elec. & Gas Co. v. Sec’y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996).” *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007). This proceeding arises in the Eleventh Circuit.

Under Commission precedent, the Secretary can establish the knowledge element of his burden of proof by imputing a supervisor’s knowledge of the violative condition, including knowledge of his or her own misconduct, to the employer.⁷ *See, e.g., Deep S. Crane & Rigging Co.*, 23 BNA OSHC 2099, 2102 (No. 09-

⁶ The Court recognizes the cause of the accident is not at issue. *Wheeling-Pittsburgh Steel Corp.*, 16 BNA OSHC 1218 (No. 89-3389, 1993). The Secretary does raise the issue, however, of Grimes’s failure to go over the spotter signals with OB Trucking’s driver. To the extent this failure may have contributed to the accident, the Court notes the Secretary had the burden of establishing the inadequacy of Lane’s program. He did not call the driver to testify as to whether he would have refused to obey the urgent demands of his boss’s boss in these unusual circumstances, had Grimes gone over the spotter signals with him.

0240, 2012) (noting that under Commission precedent, a supervisor's knowledge of his own misconduct is imputed to the employer), *aff'd*, *Deep S. Crane & Rigging Co. v. Harris*, 535 F. App'x 386 (5th Cir. 2013) (unpublished); *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) (stating that a supervisor's knowledge of a violative condition is imputed to the employer). However, in *ComTran*, the Eleventh Circuit held “the Secretary does not carry [his] burden and establish a prima facie case with respect to employer knowledge merely by demonstrating that a supervisor engaged in misconduct.” *ComTran*, 722 F.3d at 1316. The *ComTran* court did, however, “draw a distinction between a supervisor's knowledge of a subordinate's misconduct (*which everyone agrees is imputable to the employer*) and knowledge of his own misconduct (which the clear majority of circuits have held is not).” *Id.* at 1316-17 (emphasis added).

Empire Roofing Co. Se., LLC, Respondent., 25 BNA OSHC 2221, 2224 (No. 13-1034, 2016).

The Secretary's argument regarding who had knowledge of the alleged violation and what the alleged violation is unclear. Three of Lane's employees present the night of the accident are identified in the record as supervisors: the decedent Superintendent, the superintendent-in-training Ludwig, and the spotter and leadman Grimes. Even though (as discussed in the previous section) the Secretary points to Grimes as the Lane employee who failed to follow Lane's internal rules, the Secretary argues it was the decedent and Ludwig who “were engaged in and therefore had actual knowledge of the violative conduct. [They] knowingly walked around the middle of the lane closure between the milling machine and the dump trucks where Respondent claims to have a rule that no one is supposed to walk.” (Secretary's brief, pp. 15-16) Lane has a written rule that states, “Do not walk close behind a covered vehicle that is backing up and stay a safe distance around the vehicle in view of the driver at all times.” (Exh. C-9) At the time the supervisors were walking with Cordova, the designated spotter had not signaled for the next truck to back up. It was Cordova, who was not a Lane employee, who set the truck in motion.⁷

The Secretary's confusion over which supervisory personnel had knowledge of what violative conduct stems from the unusual circumstances of this case. Lane was following the applicable ANSI standards and had an adequate safety program in place at its worksite. The

⁷ The Secretary states, “Ludwig admitted to knowing that Cordova, rather than Respondent's spotter, was going to move the truck.” (Secretary's brief, p. 16) Ludwig testified it was his first night on the job, he was in training, and he had worked with other companies that had subcontracted with Cordova Transport. In some instances Cordova directed the trucks on other worksites. Ludwig stated, “I had no idea at that point if [Cordova] was told to do that or if that was something on a regular basis that happens, you know, when they're further apart [.]” (Tr. 288-289) As a new hire undergoing training his first night on the job, Ludwig would not be expected to know all aspects of Lane's safety program. As such, his knowledge is not imputed to Lane.

precipitating event for the accident was Cordova's order to the OB Trucking driver to back up the truck. Cordova knew he was not authorized to order trucks to back up on Lane's worksite (Tr. 208).

In *ComTran*, the Eleventh Circuit found the supervisor's conduct in digging an unsafe excavation was not foreseeable to the employer.

"Idiosyncratic," "isolated," "unforeseeable," and "implausible" appear to be accurate descriptions of [the supervisor's] behavior in this case. He was an experienced supervisor with, insofar as the record is developed, no history of any OSHA violations, let alone "serious" ones. In fact, . . . the President of ComTran, testified at the hearing that when he first heard about what happened he "couldn't believe it" and thought there must be "something more to the story."

ComTran Grp., Inc. v. U.S. Dep't of Labor, 722 F.3d 1304, 1317 (11th Cir. 2013).

Here, Cordova's behavior was also idiosyncratic, isolated, unforeseeable, and implausible *and* he was not an employee of Lane's. Neither was the OB Trucking driver. The fact this tragic accident occurred does not negate Lane's evidence it took adequate steps to minimize exposure of its employees to struck-by hazards at the worksite. "Because OSHA is designated to encourage abatement of hazardous conditions themselves, however, rather than to fix blame after the fact for a particular injury, a citation is supported by evidence which shows the preventability of the generic hazard, if not this particular instance." *Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 642 (5th Cir. 1979).

This "particular instance" occurred because of a set of unusual circumstances—the owner of one subcontractor directed a driver for another subcontractor to back up a truck, even though he had last seen, only a few minutes before, Lane's Superintendent standing in the path of the truck talking on his cell phone. Here, an inexperienced driver recently hired by his uncle found himself suddenly being screamed and cursed at by the man who had hired his boss, ordering him to back up. He had already gotten in trouble for letting his girlfriend sit in the truck. It is unsurprising a driver in that situation would obey, rather than defy, the owner's authority. Cordova's officious direction to the driver was an intervening event unforeseen by Lane. Lane's safety program and its milling operation as set up the night of the accident were adequate to minimize exposure of its employees on foot to the generic hazard of being struck by vehicles. Lane did not anticipate the particular instance of Cordova's commandeering of the spotter's duty.

The Court finds the Secretary failed to establish his proposed abatement measures would be effective in materially reducing the incidence of the hazard, and failed to establish knowledge

of the violative condition. Accordingly, the Secretary has not met his burden of establishing a prima facie case. Therefore, it is unnecessary for the Court to address Lane's affirmative defense of unpreventable employee misconduct.

Item 1 of the Citation is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby ORDERED:

Item 1 of Citation No. 1, alleging a serious violation of § 5(a)(1), is **VACATED** and no penalty is assessed.

SO ORDERED.

Dated: August 22, 2017

/s/
SHARON D. CALHOUN
Administrative Law Judge
Atlanta, Georgia