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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

NYC DEPARTMENT OF TRANSPORTATION
(5 Dubois Avenue, Staten Island, NY)

Petitioner,

To Review Under Section 101 of the Labor Law:
A Notice of Violation and an Order to Comply With
Section 27-a of the Labor Law, issued July 5, 2006

- against -

THE COMMISSIONER OF LABOR,

Respondent.
-----X

DOCKET NO. PES 06-004

RESOLUTION OF DECISION

WHEREAS:

The Petition in the above-captioned case was filed with the Industrial Board of Appeals (Board) on September 1, 2006 seeking review of the Notice of Violation and Order to Comply with Labor Law § 27-a (Notice and Order) issued by the Commissioner of Labor (Commissioner) on July 5, 2006.

The Notice and Order issued by the Commissioner involves the use and positioning of traffic control devices by the New York City Department of Transportation (Petitioner or DOT) at the time of a traffic accident on September 22, 2005 which occurred at a DOT road construction worksite in Staten Island, New York. The Commissioner issued the following Citations:

Citation 1 Item 1, a serious violation, states:

“29 CFR 1926.200(g)(2). All traffic control signs or devices used for protection of construction workers shall conform to part VI of

the Manual of Uniform Traffic Control Devices (MUTCD), 1988 Edition, Revised 3, September 3, 1993, FHWA-SA-94-028 or part VI of the Manual on Uniform Traffic Control Devices¹, Millenium Edition, December 2000, FHWA, which are incorporated by reference.

“a) Traffic control signs or devices used on the worksite for protection of construction workers did not conform to part VI of the MUTCD, Millenium Edition, December 2000. Appropriate warning signs and detour signing were missing, at Slosson Avenue and Lortel Avenue. The Road Closed sign should be used in advance of the point where a highway, avenue or road is closed to all users.”

[Footnote added.]

Citation 1 Item 2, a serious violation, states:

“29 CFR 1926.202. Barricades for protection of employees shall conform to Part VI of the Manual on Uniform Traffic Control Devices (1988, Revision 3 or Millenium Edition), which are incorporated by reference in 1926.200(g)(2).

“a) Proper barricades were not used on site for protection of employees working the job site in Staten Island at Slosson Avenue and Lortel Avenue. A barricade is a portable or fixed device having one to three rails with appropriate markings and is used to control road users by closing, restricting, or delineating all or a portion of the right of way. Traffic cones are used to channelize road users, divide opposing motor vehicle traffic lanes and delineate short duration maintenance and utility work.”

The Commissioner filed her Answer on February 6, 2007. A Reply to the Answer was filed on March 16, 2007. District Council 37 of the American Federation of State, County & Municipal Employees, AFL-CIO (DC 37) filed a Motion to Intervene as a party on October 26, 2006. The Board granted the Motion on March 28, 2007 allowing DC 37 to Intervene for the limited purpose of assisting the Board by presenting direct eyewitness testimony about the actual safety conditions at the site “before the accident occurred as well as the practices routinely and regularly followed by Petitioner.”

Upon notice to the parties a hearing was held on January 30, 2008 and continued on January 31 and February 8, 2008 in New York City before Board Chairperson Anne Stevason, designated hearing officer in this matter. Also present at the hearing were Board Member J. Christopher Meagher and Associate Counsel Devin A. Rice. Petitioner was represented by the

¹ All references to the MUTCD are to the MUTCD, Millenium Edition, December 2000, which was in effect at the time of the alleged violations. “The Manual on Traffic Control Devices (MUTCD) is incorporated by reference in 23 Code of Federal Regulations (CFR), Part 655, Subpart F and shall be recognized as the national standard for traffic control devices on all public roads open to public travel . . .” MUTCD, Introduction at p. I-1.

New York City Office of Legal Affairs, Susan Rogerson Pondish of counsel. Respondent Commissioner was represented by Maria Colavito, Counsel to the Department of Labor (DOL), Benjamin T. Garry of counsel. Intervenor DC 37 was represented by Kim Hsueh, Assistant General Counsel.

Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues. Testifying for DOT were: Deputy Commissioner of DOT, Joseph Cannisi; District Supervisor Michael Coppola; Director of Training Julianna Weissner; Director of Equipment for the Roadway Maintenance Repair Division, Thomas Bartkowski; Director of Electrical Inspections Unit, Peter D'Amico; Expert Witness John Logan and Victor Scalici, Gas Roll Engineer. Testifying for the Commissioner were: George Cachola, New York Police Department (NYPD) Police Officer; Anthony Racioppo, NYPD Detective; Louis Ciccotto, DOT Highway Repairer; Michael Moschella, DOT Highway Repairer; Rochelle Sawyer, Public Employee Safety and Health (PESH) Inspector and William Marquardt, Expert Witness. Finally, testifying for Intervenor DC 37 were: John Grieci, DOT Highway Repairer and Gene DeMartino, Highway Repairer and President of DC 37 Local 376.

At the February 8, 2008 hearing, after all parties had rested, DOT made a motion to dismiss and sought to introduce evidence into the record that it received from the New York Department of State in support of its Motion. Both the Commissioner and DC 37 objected to the motion and to the introduction of new evidence. All parties were directed to include their arguments regarding the Motion and the admission of new evidence in their closing briefs. The parties submitted opening and reply briefs and the last brief was received by the Board on June 2, 2008.

SUMMARY OF EVIDENCE

Prior to the commencement of the hearing, the parties stipulated to the following facts:

“(1) Beginning on or about September 20, 2005, workers from the New York City Department of Transportation [DOT] were engaged in a resurfacing project on Slosson Avenue between Victory Boulevard and Motley Avenue in Staten Island, NY.

“(2) The first phase of the project, milling, began on Slosson Avenue and Victory Boulevard and progressed approximately to Reon Avenue.

“(3) On the evening of September 21, 2005, the milling portion of the resurfacing project continued on Slosson Avenue covering the area from approximately Reon Avenue to Todt Hill Road.

“(4) Slosson Avenue is a two-way roadway that runs north-south and is regulated by a posted speed limit of 30 miles per hour.

“(5) On September 22, 2005, at approximately 1:55 a.m. a vehicle, operated by Vincent Ventafredda, negligently and illegally entered a DOT work zone, causing injury to three DOT employees. As a result, one of the three injured employees, Assistant City Highway Repairer, Nicky Antico, died of his injuries on September 27, 2005.”

Mr. Ventafredda pled guilty to second degree manslaughter and on March 1, 2007, he was sentenced to two years and four months to seven years in connection with the death of Mr. Antico.

In addition to the Stipulations, evidence of the following was introduced:

EVIDENCE PRESENTED BY DOT

According to DOT, prior to commencing work, DOT supervisors visited the work site and determined the safety set-up. On the night in question a row of 28 inch cones with retro-reflective stripes was placed across the width of Slosson Avenue at Lortel. (Attached as Appendix "A" is a map of the area in question, submitted at hearing as Intervenor's Exhibit 1.) An additional row of cones was placed across Slosson Avenue at Reon Avenue. The three DOT employees were hit by Mr. Ventafredda's vehicle while working on Slosson Avenue between Lortel Avenue and Schmidts Lane. In addition to the cones, there were two signs utilized by DOT. A "Do Not Enter" sign was placed on the ground, leaning against a cone at Lortel and Slosson; and a "No Thru Traffic" sign was on the ground, leaning against a light pole at Reon and Slosson. The work zone had two light towers set up to illuminate the work zone and there were twelve street lights between Reon and Schmidt. There were work vehicles equipped with strobe lighting. The roadway from Victory to Reon was milled at the time of the accident, meaning that it was rough and uneven.

DOT Deputy Commissioner Cannisi testified that cones, rather than barricades, are used for all DOT roadway repair and maintenance work and that barricades are especially inappropriate for a single-shift milling operation. Cones are more reflective, are easier to move which permits numerous work truck entries and exits, and are flexible so that they will collapse when struck as opposed to shattering which creates further hazards in the work zone. DOT's expert John Logan² testified that the work zone was set up properly given the circumstances and that cones were appropriate to close the road. The purpose of the MUTCD is to convey to drivers information concerning changed road conditions. Logan testified that the only mandatory requirements of the MUTCD are those statements labeled "Standards." While the "Guidance" statements are recommended, they are not mandatory. There is no requirement in the MUTCD that signs be used but if signs are used, they must comply with certain standards, such as size and height. A public authority can use other cues besides signs to alert the driver to traffic conditions. In the instant case the other cues consisted of the milled roadway prior to the work area, flood lighting, strobe lights, task lighting and street lights. Logan also testified that cones can be used to close a road and that tapering of traffic is not necessary in advance of a road closure where the work is taking place in a grid system of streets since the traffic must go either right or left. In the instant case, all of the above constituted advance warning to the drivers that there was a changed condition and the driver will have to go out of his normal path. In reviewing Citation 1, Items 1 and 2, Logan found no indication of any mandatory standards

² Logan qualified as an expert on the MUTCD. Among his other accomplishments, he is a member of the National Commission on Uniform Traffic Control Devices which advises the Federal Highway Administration on the MUTCD. He has been Vice Chair of the Temporary Traffic Committee of the Commission, which writes Part VI of the MUTCD, since 1990.

being violated. He testified that each work zone is different and that the work zone in question was set up properly.

EVIDENCE PRESENTED BY DOL

DOL presented witness testimony which was consistent, as a whole, with the evidence presented by DOT with regard to the set up of the work zone. The major point of contention was whether there was a row of cones across the width of Slosson Avenue at Reon Avenue with a sign leaning up against a lamppost which read "No Thru Traffic."

On September 22, 2005 PESH Investigator Rochelle Sawyer (Sawyer) commenced an investigation into the incident. She held an opening conference at which time she informed DOT how PESH would investigate the incident. Sawyer then visited the site, took pictures and interviewed workers present at the accident.

On July 5, 2006, after meeting with DOT on a number of occasions to discuss the incident, DOL issued a Notice of Violation (NOV) and Order to Comply to DOT, after having conducted two Closing Conferences with DOT prior to issuing the NOV. Sawyer's Investigative Narrative indicated that "several employees, including members of the safety crew, indicated that the employer does not have the proper signs or set-ups of traffic control devices to deter things of this nature from happening. According to the employees, their (sic) were no signs positioned on stands further up Slosson Avenue informing the public that work was being performed and that the road was closed." The Narrative also indicated that a required second flagger was absent and "there were no warning signs placed ahead of the work zone at each end informing the public that a flagger was present, that men were working and that the road was closed." The Narrative concluded that:

"According to the New York State Manual on Uniformed Traffic Control Devices (MUTCD) most accidents are caused by traffic hitting someone or something in the work area. The reason this usually happens is because: Drivers didn't see the hazard, didn't see the accident in time to react, or didn't know what to do when they did see it. Any devices used (including flaggers) must be highly visible, for traffic safety devices use bright colors and flashing lights, and warning signs should be in advance of the activity and repeated because it is very easy for the average driver to miss one sign but not all. The purpose of the signs are to give the average driver advance notice of a hazard or condition ahead that may require special action. This should include but is not limited to, symbol signs or legend signs."

The Narrative Conclusion further provides that violations were found and that Citations would be issued against DOT.

Sawyer testified that she initially wrote three citations, however, the third citation for a flagging violation was later removed after a closing conference was held with DOT. The purpose of the closing conference is to explain the PESH findings. In this case, a second closing

conference was also held after which the Notice of Violation, Order and Narrative were served on DOT. The purpose of issuing a violation and narrative is to inform the employer about changing their conduct. In this case, the NOV was issued so that DOT would change the manner in which they set up their work zones so that the employees would be better protected. The violation is also relevant if a second violation is found and willfulness is an issue. Sawyer also testified that citations must be based on mandatory language and that the PESH Manual requires that the citation include the appropriate section number of the adopted standard violated per the Standard Alleged Violation Elements (SAVE) which is a computer program utilized by investigators in issuing citations. The citations in question were written in a generalized manner so that they would apply to the set up of future work zones. Although Sawyer could not specify a particular standard in the MUTCD that was violated, she said that the MUTCD does make mention of a written traffic control plan and also provides for advance warning.

DOL's expert witness, William Marquardt³, testified that, in his opinion, the work zone was not in compliance with the MUTCD. Marquardt further opined that the entire MUTCD has been adopted by OSHA as mandatory standards, not just the standard statements. The guidance statements in the MUTCD are strong recommendations. Failure to comply with a guidance statement is citable because absent engineering judgment or study, the "should language" shall not be deviated from. The fundamental principle of traffic control is to convey a clear and simple message to people and the MUTCD provides examples of typical applications. No one set of traffic control devices satisfy all conditions which is why some discretion is given to the public authority. However, in order to deviate from the guidance statements, or "should language," engineering judgment is needed. Since the road was closed barricades and not cones should have been used across the roadway. The first advance warning sign of the work zone should have been some distance ahead of Reon, i.e. ahead of the point of transition. Advance warning may vary from a single sign or rotating strobe lights on a vehicle to a series of signs. The advance warning area is where road users are informed about an upcoming work zone or incident area. The MUTCD standards do require advance warning. However, they do not require signs. Marquardt concluded that the citations were valid under the MUTCD since the signage was inadequate given the set up being used; and barricades and not cones should have been used to close the road.

DISCUSSION

STANDARD OF REVIEW

When a petition is filed, the Board reviews whether the Commissioner's Order is valid and reasonable. The Petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in the [petition] shall be deemed waived" (Labor Law § 101).

The Board is required to presume that an order of the Commissioner is valid (Labor Law

³ Marquardt is a Hazardous Waste Specialist employed with the American Federation of State and County Municipal Employees since 1991. In that position he wrote a health and safety manual for highway workers and has conducted numerous training sessions regarding work zone safety including the MUTCD. Marquardt qualified as an expert in the MUTCD.

§ 103 [1]). Pursuant to the Board's Rules of Procedure and Practice 65.30 [12 NYCRR 65.30]: "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable.

THE MOTION TO DISMISS

After the parties rested, Petitioner made a Motion to Dismiss based on the fact that Respondent has no authority to enforce the MUTCD since it was never filed with the New York State Department of State as required by Section 8 of Article IV of the New York State Constitution which requires that all rules and regulations adopted by a state agency be filed in order to be effective. In support of its motion, DOT presented two letters: the purported letter that it sent on January 30, 2008 to the Department of State requesting a search to determine whether the MUTCD was filed by any state agency; and the purported letter that it received on January 31, 2008 from the Department of State stating that there was no filing.

Respondent opposes the motion on several grounds. In particular, it argues that the motion must fail because the issue was not raised in the petition or at any time prior to the close of hearing. Labor Law § 101(2) provides that any objection to the order not raised in the appeal shall be deemed waived and although Board rules allow for an amendment to the petition, Petitioner failed to request leave to amend its Petition prior to the conclusion of the hearing. In addition, Respondent argues that the letter which DOT is attempting to submit without testimony, lacks foundation. It maintains that it is prejudiced by the late assertion of this motion.

The Board denies Petitioner's motion based on its failure to raise the issue in its Petition as well as any time prior to the close of the hearing. Board Rule 66.2 allows for amendment of the pleading, with the approval of the Board, any time prior to the close of hearing. Although the Board has discretion to waive application of a rule pursuant to Rule 65.1, absent prejudice, the Board declines to do so because the basis of the motion was discernible at any time after the citation was issued and raising it at this late date was prejudicial to Respondent.

THE PESH STATUTORY SCHEME

The federal Occupational Safety and Health Act of 1970 (OSHA) (29 U.S.C. §§ 651 *et seq.*) was enacted to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions" (29 U.S.C. § 651[b]). While OSHA excludes government employees, it requires that states, as a condition of Federal funding, submit a plan for the development of occupational safety and health standards for public employees (29 U.S.C. § 667 [b]). A state's plan will be approved if it "contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupation safety and health program applicable to all employees of public agencies of the State and its political subdivisions" (29 U.S.C. § 667 [c] [6]). Pursuant to this Federal mandate, New York enacted the Public Employee Safety and Health Act (PESH) (Labor Law § 27-a) (*see Goldstein v. New York State Industrial Board of Appeals*, 292 AD2d 706 [3d Dept. 2002]). In addition, it developed a State Plan which was approved by the federal government (*see* 29 CFR §§ 1956.50 *et seq.*).

The PESH Act requires that DOL adopt, by rule, all safety and health standards promulgated under OSHA (Labor Law § 27-a [4] [a]). DOL has adopted the federal OSHA standards, including the General Industry Standards found in Part 1910 (29 CFR 1910) and the Construction Standards found in Part 1926 (29 CFR 1926) by regulation found at 12 NYCRR § 800.3. Pursuant to its State Plan and federal regulations (29 CFR § 1956.51 [j]) DOL has also adopted and publishes a Field Operations Manual (FOM) for its PESH program, which sets forth DOL's policies and procedures regarding conducting inspections, issuance of violations and other PESH activities.

Every public employer in New York has the duty to comply with the safety and health standards promulgated under PESH (Labor Law § 27-a [3]). PESH enforcement procedures are detailed in Labor Law § 27-a (6) and provide that “[i]f the commissioner determines that an employer has violated a provision of this section, or a safety or health standard or regulation promulgated under this section, he or she shall with reasonable promptness issue to the employer an order to comply which shall describe particularly the nature of the violation including a reference to the provisions of this section, standard, regulation or order alleged to have been violated”

OSHA Construction Industry Standards, OSHA Part 1926, incorporate by reference the standards contained in Part VI of the MUTCD, Millenium Edition. The standard at 29 USC § 1926.200(g) (2) specifically refers to the MUTCD and provides:

“(2) All traffic control signs or devices used for protection of construction workers shall conform to Part VI of the Manual of Uniform Traffic Control Devices (“MUTCD”), 1988 Edition, Revision 3, September 3, 1993, FHWA-SA-94-027 or Part VI of the Manual on Uniform Traffic Control Devices, Millenium Edition, December 2000, FHWA, which are incorporated by reference. . . .” (Emphasis in the original.)

When standards are incorporated by reference, only the mandatory provisions are adopted. 29 USC § 1926.31 provides:

“(a) The standards of agencies of the U.S. Government, and organizations, which are not agencies of the U.S. Government which are incorporated by reference in this part, have the same force and effect as other standards in this part. Only the mandatory provisions (i.e., provisions containing the word “shall” or other mandatory language) of standards incorporated by reference are adopted as standards under the Occupational Safety and Health Act.”

The PESH FOM further provides that a citation in a notice of violation and order to comply shall be based only on mandatory language in PESH standards. FOM V B 2 states, in part:

“Citations shall not be issued unless the citation is based on mandatory language in PESH standards.”

THE MUTCD

Part VI of the MUTCD, entitled “Temporary Traffic Control,” provides standards to be used by public bodies when the normal function of a roadway is suspended. “The primary function of temporary traffic control is to provide for the safe and efficient movement of vehicles, bicyclists, and pedestrians through or around temporary traffic control zones while reasonably protecting workers and equipment” (MUTCD § 6A.01).

Statements contained in the MUTCD are divided into four categories:

“(1) *Standard* – a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device. All standards are labeled, and the text appears in bold large type. The verb shall is typically used. Standards are sometimes modified by Options;

“(2) *Guidance* – a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate. All Guidance statements are labeled and the text appears in large type. Guidance text is the same size as Standard text, but it is not bold. The verb should is typically used. Guidance statements are sometimes modified by Options;

“(3) *Option* – a statement of practice that is a permissive condition and carries not requirement or recommendation. Options may contain allowable modification to a Standard or Guidance. All Option statements are labeled, and the text appears in small type. The verb may is typically used;

“(4) *Support* – an informational statement that does not convey any degree of mandate, recommendation, authorization, prohibition or enforceable condition. Support statements are labeled, and the text appears in small type. The verbs shall, should and may are not used in support statements” (MUTCD, Introduction pp I-3, 4).

Since the federal regulations provide that only the mandatory provisions of standards incorporated by reference are adopted as standards under OSHA, only the MUTCD Standards, as opposed to Guidance, Options, etc., are included as OSHA standards and only these standards can form the basis for a citation when they are violated (*see The Ruhlin Company, OSHRC Docket No. 04-2049* [“We hold that because section 6D.02 is an advisory, not a mandatory, standard in the MUTCD, the provision is *not* incorporated as an OSHA standard via § 1926.200(g)(2). . . .”]; *KS Energy Services Inc., 2008 OSHARC LEXIS 39* [2008]). In

addition, the MUTCD definition of a Guidance statement specifically states that it is not mandatory.

THE REQUIREMENTS OF LABOR LAW § 27-a (6)(a)

Labor Law § 27-a (6) (2) requires that an Order to Comply issued pursuant to PESH “describe particularly the nature of the violation including a reference to the provision of this section, standard, regulation or order alleged to have been violated.” The requirement of particularity serves two purposes: (1) it informs the employer specifically of the PESH violation so that it may be abated; and (2) it provides the employer with fair notice of the violation so that it is able to defend (*see KS Energy Services, Inc, supra*).

DOT argues that based on this section, an order must state the specific standards that have been violated and that a reference to the general OSHA standard which incorporates the MUTCD by reference is legally insufficient. The specific MUTCD standards must be cited in the order. In support, DOT refers to the PESH FOM SAVE for a Standard Incorporated by Reference which instructs the PESH Investigator to insert the appropriate section of the adopted standard.

Respondent Commissioner argues that federal case law under the OSHA section comparable to Labor Law § 27-a (29 USC § 658) supports its contention that the particularity requirement can be satisfied if, when circumstances are viewed as a whole, the employer has been given notice of the violation. Circumstances, in addition to the citation, include other communications with the employer, the investigative narrative and the employer’s own knowledge of the industry. This ability to cure the ambiguities and generalizations of the citation is, in part, a recognition that citations are not written by legal professionals (*see, e.g. Rea v. Brennan, 495 F2d 822 [2d Cir 1974]*).

Although New York state citation procedures mirror federal OSHA citation procedures, federal regulations have been promulgated under OSHA which provide for additional procedures which are not mirrored under New York law. The federal regulations provide that if an employer contests the citation, then the Secretary of Labor is required to file a complaint with the Occupational Safety and Health Review Commission (OSHRC). The complaint may amend the citation or further specify the violation. (29 CFR § 2200.33.) This ability to amend the citation in the complaint has been held to cure a citation which has failed to describe a violation with particularity.

In *Donovan v. Royal Logging, 645 F2d 822 (9th Cir 1981)* (cited by Respondent) an employer was cited for failure to provide protective equipment following a logger’s death. The original citation listed a standard which did not apply to the logging industry yet specified the underlying facts which constituted the violation. Four months prior to the OSHRC hearing the Secretary’s motion to amend the complaint to allege a violation of the general duty clause was granted. The court found that amending the complaint to add the general duty clause as the legal standard violated was not prejudicial because it was based on the same set of facts contained in the original citation.

New York State procedures provide for the issuance of an order, after which the burden is on the employer, if it wants to contest the citation, to prove that the citation is invalid or unreasonable. Although other factors, such as the Narrative, may be used to provide further specificity and particularity to support the adequacy of the Notice to the employer, the citation must still comply with Labor Law § 27-a (6) (a), inform the employer of the standard violated and provide some indication of the facts constituting the violation.⁴

THE CITATIONS

1. TRAFFIC CONTROL SIGNS AND DEVICES

Citation 1 Item 1, a serious violation, states:

“29 CFR 1926.200(g)(2). All traffic control signs or devices used for protection of construction workers shall conform to part VI of the Manual of Uniform Traffic Control Devices (MUTCD), 1988 Edition, Revised 3, September 3, 1993, FHWA-SA-94-028 or part VI of the Manual on Uniform Traffic Control Devices, Millenium Edition, December 2000, FHWA, which are incorporated by reference.

“a) Traffic control signs or devices used on the worksite for protection of construction workers did not conform to part VI of the MUTCD, Millenium Edition, December 2000. Appropriate warning signs and detour signing were missing, at Slosson Avenue and Lortel Avenue. The Road Closed sign should be used in advance of the point where a highway, avenue or road is closed to all users.”

There are two issues with regard to this citation. The first is whether the citation contains sufficient notice of a violation of an OSHA standard and the second is whether a standard was, in fact, violated. Petitioner argues that the citation lacked sufficient “particularity,” failed to cite to any specific section of the MUTCD and thus did not comply with Labor Law § 27-a (6)(a) and is therefore, invalid. Respondent argues that the particularity requirement has been met; reference to the OSHA standards which incorporate the MUTCD is sufficient and all necessary notice not supplied in the citation was provided in the many conferences with DOT officials and in the investigative narrative.

Although 29 CFR § 1926.200(g)(1) provides: “(1) *Construction areas* shall be posted with legible traffic signs at points of hazard.” (Emphasis in the original.), Petitioner was cited under 29 CFR § 1926.200(g)(2) and not (g)(1). Part VI of the MUTCD does not require the use of signs, per se, in temporary traffic control. It does, however, require that when signs are used that they comply with certain standards. For example, MUTCD § 6F.03 Sign Placement provides, as a Standard, that:

⁴ We do not rule on whether the citation may be amended at hearing to conform to proof since, in this case, there was no motion to amend made.

“Signs mounted on barricades, or other portable supports, shall be no less than 0.3 m (1ft) above the traveled way.”

However, there is no mention of § 6F.03 in the Order, Citation, Narrative or Answer. There is also no mention of the height of the signs anywhere.⁵

Respondent, for the first time in its Post-hearing brief, also argues that Petitioner was in violation of MUTCD § 6G.03 Location of Work Standard:

“When the work space is within the traveled way, except for short-duration and mobile operations, advance warning shall provide a general message that work is taking place, shall supply information about highway conditions, and shall indicate how motor vehicle traffic can move through the temporary traffic control zone.”

In *KS Energy Services, Inc.*, OSHRC Docket No., 06-1416, 2008 OSAHRC LEXIS 39 (2008), the OSHA Review Commission upheld the above standard against an attack that it was unconstitutionally vague. The Commission found that MUTCD § 6G.03 “requires an employer to provide advance warning that conveys three categories of information: (1) ‘a general message that work is taking place,’ (2) ‘information about highway conditions,’ and (3) ‘how motor vehicle traffic can move through the temporary traffic control zone.’” In *KS Energy*, the Commission did not reach the issue of whether cones were sufficient to convey how vehicles are to move through a temporary traffic control zone because it found that since the cones were at the point of immediate transition, they failed to provide information “in advance” of the work area. The Commission also found that a straight arrow sign pointing traffic to follow the cones to the left also failed to comply with § 6G.03 since it was not in advance of the transition area.

Petitioner argues that it was not cited with a violation of this section but that in any event, advance warning was provided. There is no requirement for the use of signs as advance warning. It would seem, however, that signs would be the obvious choice in conveying information. In this instance, Petitioner argues, advance warning included: “28-inch retro-reflective cones placed across the entire width of Slosson Avenue at Lortel Avenue . . . and at Reon Avenue at some point prior to the accident . . . ; two light towers. . . which provided floodlighting and task light to illuminate the work zone . . . ; work vehicles inside the work zone equipped with strobe lighting . . . ; retroreflective safety gear worn by the crew members . . . and signs indicating ‘Do Not Enter’ and ‘No Thru Traffic.’” In addition, the condition of the milled road operated as advance warning. Petitioner’s expert testified that given the above factors, there was sufficient advance warning.⁶

⁵ While we do not reach the issue of whether this standard was violated, we do note that the DOT signs in use were leaning against the cones and on the ground. Given that the main purpose of a citation is to provide the employer with information to correct a violation, the Board asks that DOT take notice of this apparent deficiency in worksite set up.

⁶ The above conditions do seem to satisfy the first two prongs of § 6G.03 in that they provide a general message that work is taking place and information about highway conditions. Less clear is whether the set-up constitutes warning in advance of the transition area as to how vehicles are to move through the zone. The cones and sign were at the exact place of transition.

There is no mention of § 6G.03 anywhere in the Citation, Order, Narrative or Answer. Nor is there any evidence in the record that DOL apprised DOT that there was a violation of such standard in any of its other pre-hearing communications. The Citation does provide that the "The Road Closed sign should be used in advance of the point where a highway, avenue or road is closed to all users." However, this language is quoted from a specific MUTCD guideline, § 6F.19, which we have already held is not a mandatory standard and therefore cannot form the basis for a citation. The PESH Manual also requires that the specific standard violated be listed in the citation and that if the standard is one incorporated by reference, then the adopted standard be listed.

By virtue of the above, general citation to Part VI of the MUTCD⁷, is not sufficiently specific to comply with particularity requirements of Labor Law § 27-a (6). Therefore, we find that the Order in this case is not reasonable and valid.

2. FAILURE TO USE BARRICADES

Citation 1 Item 2, a serious violation, states:

"29 CFR 1926.202. Barricades for protection of employees shall conform to Part VI of the Manual on Uniform Traffic Control Devices (1988, Revision 3 or Millenium Edition), which are incorporated by reference in 1926.200(g)(2).

"a) Proper barricades were not used on site for protection of employees working the job site in Staten Island at Slosson Avenue and Lortel Avenue. A barricade is a portable or fixed device having one to three rails with appropriate markings and is used to control road users by closing, restricting, or delineating all or a portion of the right of way. Traffic cones are used to channelize road users, divide opposing motor vehicle traffic lanes and delineate short duration maintenance and utility work."

There is no mandatory standard in the MUTCD that requires the use of barricades to close a road. Although 29 CFR § 1926.202 requires that barricades for the protection of employees shall conform to the MUTCD, DOL cites to no standard which requires that barricades were required to have been used in this instance. As such, there is no basis for Citation 1 Item 2.

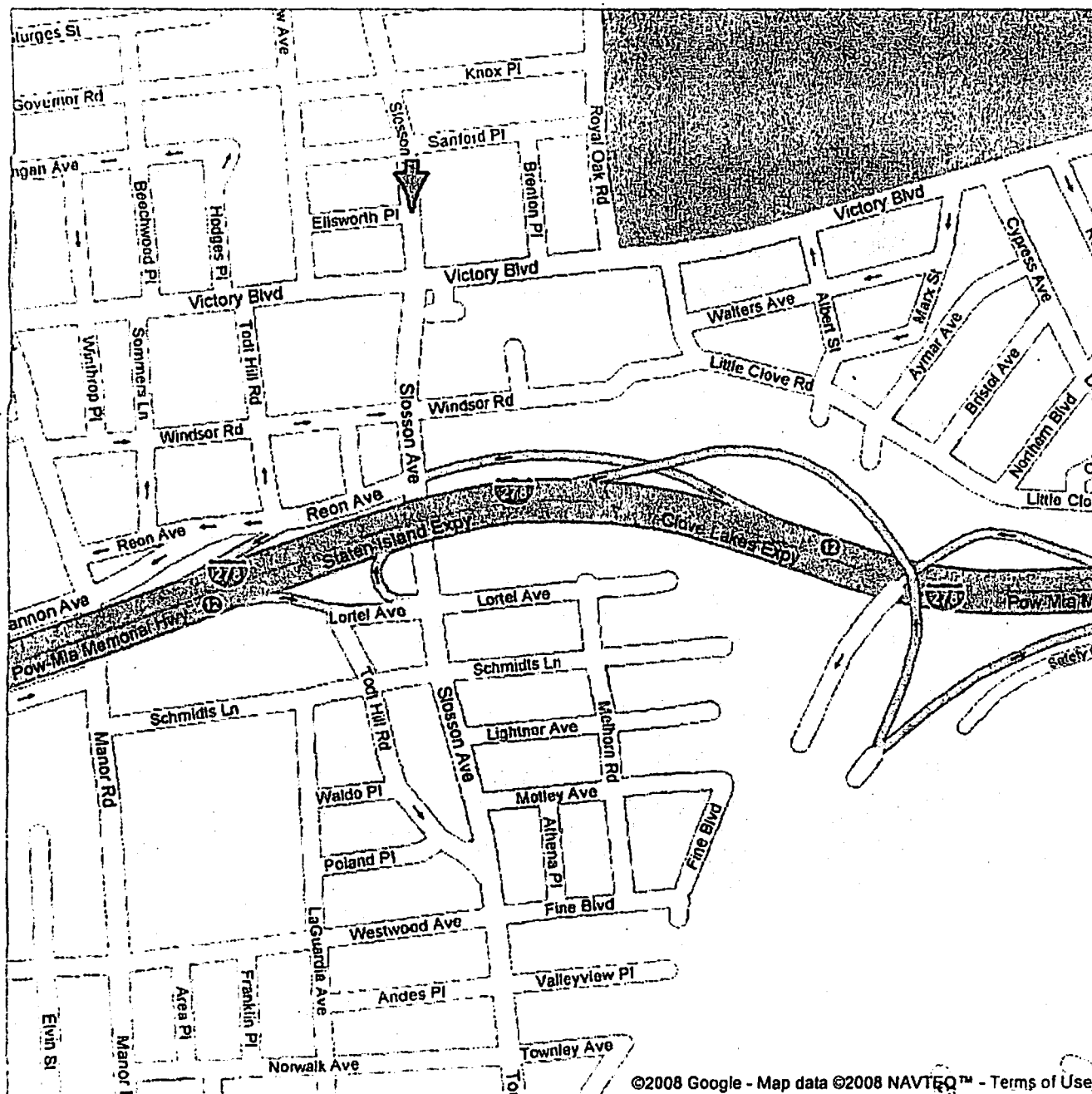
⁷ Part VI consists of over 200 pages and over 150 Standards



Address **Slosson Ave**
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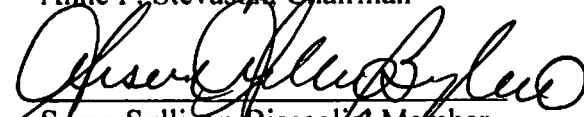
APPENDIX "A"

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

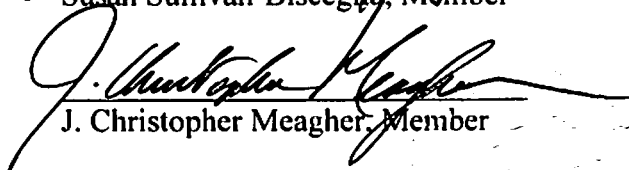
The Notice of Violation and Order dated July 5, 2006 is hereby revoked.



Anne P. Stevason, Chairman



Susan Sullivan-Bisceglia, Member



J. Christopher Meagher, Member

Did not participate

Mark G. Pearce, Member



Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
December 17, 2008.

THE STATE OF NEW YORK
IN SENATE
January 12, 1911.

REPORT OF THE
COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE

APRIL 1, 1910.



[Handwritten signature]

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STATE OF NEW YORK, DEPARTMENT OF THE LAND OFFICE.