Hawkeye Construction

SAFETY AND HEALTH

Federal guidelines

The Department rules that address flagging activities can incorporate standards from the federal Manual on Uniform Traffic Control Devices (MUTCD). Stricter Department standards, however, take precedence over the MUTCD to ensure the safety of workers. **….*In re Hawkeye Construction,* BIIA Dec., 06 W1072 (2007)** *[Editor's Note:* The Board's decision was appealed to superior court under Chelan County Cause No.008-2-00069-3.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: HAWKEYE CONSTRUCTION, INC.	**)**	**DOCKET NO. 06 W1072**
	)	
CITATION & NOTICE NO. 309876795	**)**	**DECISION AND ORDER**

APPEARANCES:

Employer, Hawkeye Construction, Inc., by
Cummins, Goodman, Fish, Denley & Vickers, P.C., per
George W. Goodman

Employees of Hawkeye Construction, Inc.
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Bourtai Hargrove, Assistant

The employer, Hawkeye Construction, Inc., (Hawkeye) filed an appeal with the Board of Industrial Insurance Appeals on August 2, 2006, from a Citation and Notice of the Department of Labor and Industries dated June 2, 2006. In this Citation and Notice, the Department cited one serious violation of WAC 296-155-305 (8)(c), and assessed a total penalty of $1,200. The Department's Citation and Notice is **AFFIRMED AS MODIFIED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the Department and the employer to a Proposed Decision and Order issued on July 10, 2007, in which the industrial appeals judge vacated the Citation and Notice dated June 2, 2006, as well as the total penalty. Contested issues addressed in this order include whether the federal Manual on Uniform Traffic Control Devices (hereafter MUTCD) pre-empts the Washington State Department of Labor and Industries' authority to regulate flagger safety; whether the employer violated the safety standard set forth in WAC 296-155-305(8)(c); and if so, whether the total penalty amount was properly calculated.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. We have granted review because the industrial appeals judge improperly required the Department to prove that a violation of the safety standard created a hazard to the workers. Additionally, the industrial appeals judge failed to address an issue raised by the employer concerning federal pre-emption in his Proposed Decision and Order.

We first take up an issue raised by the employer concerning our industrial appeals judge indicating to the parties at the conclusion of hearings that he would delay writing a proposed order to allow time to submit briefs. The proposed order was issued one day after receiving the Department's brief, but a few days before Hawkeye's brief was due. Hawkeye then attempted to have the industrial appeals judge rescind the proposed order and issue a new one, arguing that the proposed order failed to address all issues raised by Hawkeye. Hawkeye then addressed its concern to the Board, asking that the Board "amend" the proposed order. As we explained, however, the only procedure available to Hawkeye was to file a Petition for Review of the proposed order, which in fact it did.

The employer argues that by not being allowed to have its post-hearing brief considered by the industrial appeals judge, it was not allowed to place all the legal issues before the Board. We reject this notion. The procedure for placing legal issues before the Board is to file a timely Notice of Appeal and present evidence at hearings. Hawkeye did both and our industrial appeals judge, based on the record of evidence presented at the hearings, issued a Proposed Decision and Order in which he vacated the citation. There is no requirement that our judges obtain or even consider briefs submitted by parties. Certainly our industrial appeals judge, once he assured parties that briefs could be submitted, should have waited until after the deadlines for the briefs before issuing the proposed order. But such a mistake does not impair the employer's ability to make all legal arguments it feels are appropriate by petitioning the Board for review. Nor does failure to consider arguments made in a brief modify the ability of courts reviewing Board decisions to consider the evidence presented in the appeal. It is the evidence and the law on which cases are decided, not briefs. All issues Hawkeye raises in this appeal from a Citation and Notice of the Department of Labor and Industries, including whether the federal MUTCD pre-empts the Washington State Department of Labor and Industries from establishing safety regulations for flaggers operating on roads and highways in Washington, should have been addressed in the proposed order. It is one reason we have granted review. More importantly, we have granted review because our industrial appeals judge used an incorrect standard for evaluating whether the citation should be affirmed.

Department Authority to Regulate Flagger Safety

As the Court of Appeals commented in *Superior Asphalt and Concrete Co. Inc. v. Department of Labor and Indus.*, 121 Wash. App. 601, 604 (2004), employers are statutorily mandated to comply with WISHA promulgated rules and regulations, including WAC 296-155-350.

"In 2000, in response to the increase of flagger fatalities in this state, the legislature directed the Department to adopt permanent rules revising any safety standards governing flaggers. RCW 49.17.350. As a result, WAC 296-155-305 was amended."

MUTCD is the national standard for all traffic control devices on all public roads. Pursuant to Chapter 6G, Section 01 of the MUTCD, every temporary traffic control (TTC) zone is different. The goal of temporary traffic control (TTC) is to promote safety with a minimum of disruption to road users. Proper judgment is the key factor in determining what temporary traffic controls will accomplish that goal. MUTCD promulgates few hard and fast rules. If the MUTCD makes a practice mandatory or prohibited, it is called a "Standard." If the practice is a recommendation that is subject to deviation, it is called "Guidance." An informational statement that does not convey any degree of requirement is called "Support."

MUTCD provides that decisions regarding the most appropriate typical application to use as a guide for a specific TTC zone require evaluating each individual situation, looking at four factors: duration, location, type of work, and highway type. Work duration is a major factor in determining the number and types of devices used in TTC zones, and there is a Standard setting for five categories of work duration, including "short duration" and "mobile." Short duration is work that occupies a location up to one hour and mobile is work that moves intermittently or continuously. Hawkeye argues that the operation the employer was involved in at the time of the inspection fell into the short-duration category rather than the mobile category as defined by MUTCD, and that, therefore, application of the WAC is not appropriate.

MUTCD provides under "Support" that mobile and short-duration operations are activities that might involve different treatments from most maintenance and utility operations that are generally short-term stationary work (another category of work duration). MUTCD recognizes that mobile and short-duration operations might require devices that have greater mobility, and cautions that safety not be compromised by using fewer devices simply because the operation changes location frequently. However, MUTCD notes that mobile operations often involve frequent short stops for activities such as utility operations, and that they are similar to short-duration locations. In these situations, MUTCD recommends that warning signs, and other devices be used and moved periodically to keep them near the mobile work area. Another listed option would be using flaggers for mobile operations that often involve frequent stops. Thus, MUTCD recognizes that because mobile and short duration operations are similar, the warning devices are recommended to be moved to be near the work area.

As pointed out by Hawkeye in its Petition for Review, 23 CFR 655.603(b) authorizes states to produce their own manuals on traffic control devices or to supplement the MUTCD. In Washington State, the grant of authority for operating a uniform system of traffic control is with the Washington Department of Transportation (WDOT) in conforming to the standards set forth in MUTCD. The state MUTCD is found in WAC 468-95-010.

Hawkeye argues that the Department of Labor and Industries has no authority to amend MUTCD. We agree. However, in implementing rules and regulations concerning flagger safety and health on the job in WAC 296-155-305, the Department of Labor and Industries is not amending or supplementing MUTCD, but making mandatory the suggested distances contained in table 6C-1 in the MUTCD for purposes of worker safety. Additionally, the Department of Labor and Industries' regulation added the exemption under which Hawkeye was cited for "mobile operations." The entirety of this regulation, while incorporating the MUTCD distances, is directed at regulating safety for workers working on or near roads and highways. We do not accept Hawkeye's argument that the Department of Labor and Industries is without authority to regulate worker safety by referring to MUTCD guidelines and making certain of those guidelines mandatory.

The testimony of Dan McMurdie, the Department's manager of the Construction and Specialty Services Program with the Division of Occupational Safety and Health, established that the amendments mandated by the Washington State Legislature revising safety standards governing flaggers were written in coordination with the Washington Department of Transportation (WDOT), including the setting of what the distances should be between advance warning signage, and between the signage and flaggers. As Mr. McMurdie explained, the **dual** purpose of warning signs **from the perspective of the WDOT** is to protect traffic users of the road (drivers, pedestrians, bicyclists) to get them through a work zone with the least convenience, as well as to protect the safety and health of those in the work zone. But the **singular** purpose of the Department of Labor and Industries is ensuring the safety of the workers in the work zone. As pointed out by Mr. McMurdie, the better the warning that the motorist has, the safer the work zone will be for the employee, and then both purposes can be achieved. Thus, both state agencies adopted the table set forth in WAC 296-155-350(8) (c) and WAC 468-95-300.

Under Section (1) (a) of WAC 296-155-305, the temporary traffic controls set forth in WAC 296-155-305 take precedence over the temporary traffic control recommendations contained in the MUTCD. Employers must first apply the requirements of the WAC, and then set up and use

temporary traffic controls according to the **recommendations** in Part VI of the MUTCD. There is no conflict between MUTCD and the WISHA regulation.

Whether this was a mobile operation pursuant to WAC 296-155-305(8)(c)?

WAC 296-155-305(8)(c) requires employers to provide a three-sign advance warning sequence on all roadways with a speed limit below 45 mph and a four-sign sequence on roadways with a 45 mph or higher, and to follow Table 1 for the spacing of the advance warning sign placement. Table 1 has an exemption that reads as follows:

> In a mobile flagging operation, as defined by the MUTCD when the flagger is moving with the operation, the "flagger ahead (symbol or text)" sign must be: Within 1,500 feet of the flagger; AND the flagger station must be seen from the sign.

The regulation also notes that if the terrain does not allow the motorist to see the flagger from the "flagger ahead" sign, the distance between the flagger and the sign must be shortened to allow visual contact, but in no case can the distance be less than the distance specified in Table 1, Advance Warning Sign Spacing.

Hawkeye argues that the WAC requirement for advance signage spacing is inherently contrary to the MUTCD requirements and must, therefore, be "declared" invalid. We disagree with the employer's argument. The Department of Labor and Industries is required by statute to issue regulations that help protect the safety of workers. MUTCD provides guidelines for the advance placement signage distances, but WISHA has concluded that in order to protect the safety of the workers who are working on a roadway, the advance warning system be within sight of the sign. WISHA is stricter than the MUTCD guidelines, and we see no inherent conflict and conclude that WISHA has the regulatory authority to use its judgment to make stricter requirements for employers in order to ensure worker safety. There is no conflict between the state and the federal laws because compliance with both is possible, and because WISHA does not prevent accomplishing the full purpose of MUTCD.

Hawkeye further argues that this operation was not a mobile flagging operation as defined by MUTCD because the worksite was actually a "short duration" operation. A mobile operation is defined in MUTCD as work that moves intermittently or continuously. MUTCD 6G.02. The worksite that is the subject of this citation involved a group of Hawkeye employees installing anchors on poles along the roadway. The workers had begun their day close to where the advance warning signage had been placed, but had to move down the road to avoid some spraying being done on

some nearby farmland. When the workers moved, they left the advance signage in place. The work operation consisting of employees working in a bucket of a truck, blocked a lane of traffic on a two lane, 35 mile per hour road, and along with the flaggers, moved from pole to pole along the roadway approximately every 45 to 50 minutes, getting closer and closer to one end of the advance warning signage that had been placed earlier that day. At the time of the citation, the workers were still approximately 1.1 miles from the last advance warning sign at one end. While the work was not moving continuously, it **was** moving intermittently, **and the flaggers were moving with the operation**. If the flaggers were moving with the operation, then the "flagger ahead" signage needed to be moved along with the operation so as to be within 1500 feet **and** within visual contact of the flaggers. Rodger Lawson, the foreman of the Hawkeye work crew, admitted that he was not surprised to learn that the advance warning signage needed to be dragged behind them as their work progressed down the road. This situation fell within MUTCD's definition of a mobile operation that included flaggers. The preponderance of the evidence establishes that this was a mobile operation, involving flaggers who moved intermittently along the roadway, and, therefore, the advance warning signage that included the "flagger ahead" signage needed to be within 1,500 feet of the flagger and the flagger needed to be seen from the sign. The evidence shows that Hawkeye was in violation of the safety standard contained in WAC 296-155-305(8)(c).

The Department cited Hawkeye with a violation of a **specific** health and safety standard, and must, therefore, prove: (1) that the cited standard applies; (2) that the requirements of the standard were not met; (3) that the employees were exposed to or had access to the violative condition; and, (4) that the employer knew or through the exercise of reasonable diligence could have known of the violative conditions. In an alleged violation of a specific health and safety standard, the Department is **not** required to prove that a hazard exists, just that the specific standard was violated. It is here that our industrial appeals judge erred in his analysis. Each time that the Department enforces a specific safety standard, there is no requirement to prove what the Legislature has already determined by creating the standard . . . that the standard is a valid approach to making a hazardous situation less hazardous for workers. *Supervalu, Inc. v. Department of Labor and Indus.,* 158 Wash. 2d (2006) at 433, 434. Only where the Department has cited the employer with a violation of a **general duty clause**, must the Department prove the existence of a recognized hazard that caused or was likely to cause serious injury or death. Here, the Department cited a specific standard, WAC 296-155-350(8)(c). Evidence shows that Hawkeye employees were exposed to the hazardous condition because the evidence shows that

the "flagger ahead" advance warning signage was not within view of, and was greater than 1,500 feet from where the workers were working in the middle of the traveled roadway.

We conclude that the Department has met all necessary elements of proving Hawkeye's violation of the safety standard contained in WAC 296-155-350(8)(c). This standard applied to this work operation as the work crew consisting of linemen and flaggers was moving from pole to pole along a roadway, and had a flagger to provide temporary traffic control. The requirements of the standard were not met in that the advance warning signage, specifically the "flagger ahead" signage was greater than 1,500 feet from where the crew was working, and the flagger was not within sight of the advance warning sign. Employees of Hawkeye were exposed to the violative condition, and Hawkeye's foreman was aware of or should have been aware of the violative condition.

Hawkeye argues that there was adequate signage, and other methods of warning such as the truck with lights on, so that even with the advance warning signage that was greater than a mile from the workers, it was not probable that the employees would have been struck by a motorist and injured, so that the improper placement of the signage was merely a technical violation. The contention is that because other warning precautions were present, there was not substantial probability that serious physical harm or death could result. However, that is not the test for what constitutes a serious violation. "(T)he statute's 'substantial probability' language refers to the likelihood that, should harm result from the violation, that harm could be death or serious physical harm." *Lee Cook Trucking & Logging v. Department of Labor and Indus.,* 109 Wn. App. 471, 482 (2001). This record establishes that the potential of workers being struck by vehicles approaching at 35 mph would undeniably result in serious physical harm or death to the workers. The Department has shown that there was substantial probability that serious physical harm would result from the violation. This was appropriately designated as a serious violation of the safety standard.

In calculating the amount of the penalty, the Department determined that the severity of any injury on a scale of 1 to 6, as a 6 because any injury resulting from being run into by a motorist could result in death or permanent injury. WAC 296-900-14010. Table 3. The Department then determined that the probability of injury occurring should be a 2. The employer, however, produced evidence that the probability should be the very lowest because the road was not busy; the weather conditions were good; the six employees exposed were only exposed for a short period of time; and other mitigating factors such as other warning signals where the flagger stood consisting of a truck

with a rotating light; the fact that the signs were up, but too far away from the mobile operation and flagger; the fact that road construction with other employers' signage was present to warn motorists to be on the alert; and lastly that the road construction had been going on for some time and most residents who might be traversing the roadway were alerted to be careful. We believe the record supports a probability factor of 1. That would make the gravity 6 (probability times severity) for a base penalty amount of $1,000. Table 4. Adjustments to the base penalty amount were correctly applied by the Department per Table 5, a reduction for "good" good faith effort of 20 percent or $200, and a reduction for size of workforce of 40 percent or $400, no adjustment for an average history, for a total penalty amount of $400. We, therefore, conclude that the citation should be affirmed with the total penalty amount modified from $1,200 to $400.

FINDINGS OF FACT

1. On April 13, 2006, a safety compliance officer employed by the Department of Labor and Industries inspected a jobsite of Hawkeye Construction, Inc., (Hawkeye) located at Green Avenue in Manson, Washington. On June 2, 2006, the Department issued Citation and Notice No. 309876795, in which it alleged the employer committed one serious violation of WAC 296-155-305(8)(c) and imposed a total penalty of $1,200. Hawkeye filed an appeal of the citation with the Department's Safety Division on June 14, 2006. On August 2, 2006, the Department transmitted the appeal and its file to the Board of Industrial Insurance Appeals. The Board assigned Docket No. 06 W1072 to the appeal, issued the Notice of Filing of Appeal on August 2, 2006, and ordered that further proceedings be held in the matter.

2. On April 13, 2006, a Department of Labor and Industries safety and health inspector came upon a Hawkeye worksite located along Green Avenue in Manson, Washington. The inspector observed a total of six workers using a bucket to work on poles, blocking one lane of the road, with a flagger standing off to the side of the other lane. Hawkeye was using one flagger as part of its temporary traffic control (TTC), and had TTC signage consisting of three advance signs.

3. The Hawkeye workers were intermittently proceeding along Green Avenue from pole to pole, securing anchors. The work operation was "mobile" in that the work intermittently moved from pole to pole and the flagger moved with the mobile operation.

4. The TTC "flagger ahead" advance warning signage was more than 1,500 feet from the flagger and the work operation, and the work operation was not within sight of the "flagger ahead" sign. On April 13, 2006, Hawkeye's foreman at the worksite was fully cognizant of the safety requirement of having proper advance warning signage within 1,500 feet and within sight of the flagger and the other workers, and was fully aware that the signage should be moved along with the mobile operation.

5. The operation placed Hawkeye workers at serious risk of being struck by a motorist traveling at speeds up to 35 mph. Probability of the hazard was low because of good weather conditions, the mitigating steps the employer had taken by placing advance warning signage and the truck with rotating light at the work operation, and the short time the six employees were exposed to the hazard. The employer's size included between 26 and 100 employees. The employer demonstrated "good" good faith by making efforts to comply with safety standards before the inspection, by cooperating with the inspection, and by making overall attempts to implement safety and health in the workplace. Hawkeye had an average history of injuries and inspections. Based on the penalty factors already considered by the Department, the appropriate penalty for the serious violation of WAC 296-155-305(8)(c) should be calculated using a severity of 6 and a probability of 1 for a gravity rating of "6," for a base penalty amount of $1,000. Deductions from the base penalty amount for size and good faith are $400 and $200, respectively. The penalty is appropriately calculated as $400.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. The Department of Labor and Industries has the authority to promulgate rules and regulations concerning the health and safety of flaggers and others working along Washington State roadways.

3. On April 13, 2006, Hawkeye Construction, Inc., committed a serious violation of WAC 296-155-305(8)(c).

4. Citation and Notice No 309876795 dated June 2, 2006, is modified with the total penalty amount reduced from $1,200 to $400.

It is **ORDERED**.

Dated: December 19, 2007.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
CALHOUN DICKINSON Member