IN THE MATTER OF	*	**BEFORE THE**
	*	**COMMISSIONER OF LABOR**
CHESAPEAKE STEEL	*	**AND INDUSTRY**
ERECTORS, INC.	*	**MOSH CASE NO. W6686-041-04**
	*	**OAH CASE NO. DLR-MOSH-41-04-39556**

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FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational Safety and Health Act, *Labor and Employment Article*, Title 5, *Annotated Code of Maryland*. Following a planned job site inspection on March 25, 2004, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH"), issued seven citations to Chesapeake Steel Erectors, Inc. ("Employer"), alleging various violations. A hearing was held on September 20, 2004, at which the parties introduced evidence, presented witnesses, and made arguments. Thereafter, Brian Zlotnick, Hearing Examiner ("HE"), issued a Proposed Decision recommending that all citations except one be affirmed.

The Employer filed a timely request for review and the Commissioner, exercising his authority pursuant to Labor and Employment Article, § 5-214(e), ordered review. On April 28, 2005, the Commissioner of Labor and Industry held a review hearing and heard argument from the parties. Based upon a review of the entire record and consideration of the relevant law and the positions of the parties, for the reasons set forth below, the HE's recommendations are AFFIRMED with the exception of Citation No. 5(1), which the Commissioner changes from a "serious" citation to an "other than serious" citation.

FINDINGS OF FACT

In March 2004, the Employer was engaged as a subcontractor to perform steel erection work at a construction site located at 606 Hoagie Drive in Forest Hill, Maryland. Work at the site involved construction of an Eckerd Drug Store. The Employer was engaged in securing the bar joists and steel tubing in place by welding. (FF 1; MOSH Ex. 4).

On the morning of March 25, 2004, a MOSH assigned Compliance Officer, David T. Thorsen ("MOSH Inspector" or "Inspector"), conducted a planned inspection of the site. He observed three of the Employer's employees performing steel erection work at the job site. Two were working on the steel decking approximately twenty-three feet above the ground. One was working while standing on the mid-rails of a scissors lift approximately sixteen feet above the ground. (MOSH Ex. 5, #1-10; Tr. 13-17, 32). The two employees who were working on the steel decking accessed this area from a ladder that extended no more than eighteen inches past the landing area. (FF 4; MOSH Ex. 5, #23-24; Tr. 39). The employees were not wearing fall protection. (FF 5; MOSH Ex. 5, #1-10; Tr. 13-17, 32).

After arriving at the site, the MOSH Inspector interviewed Ben Barron, who was working on the steel decking and was identified by himself and other employees as the foreman. (Tr. 17-18). The Inspector also interviewed other workers at the site, including Richard Huhra, superintendent for VMS Builders, the general contractor. (FF 8; Tr. 42). The MOSH Inspector conducted a closing conference with Scott S. Simmons, the owner and company safety officer, on March 31, 2004. (Tr. 39; MOSH Ex. 4).

DISCUSSION

Pursuant to the March 25, 2004 inspection, the Employer received seven citations. The Employer objected to six of those citations on various grounds, each of which will be addressed in turn.

Employer Knowledge

The Employer has alleged that MOSH failed to prove, with respect to each citation, that the Employer had knowledge of the violative conditions. The Commissioner finds that the Employer knew or should have known of the lack of fall protection based upon Simmons' testimony that he visited the job site daily, including the morning of the inspection. (Tr. 134, 148). When the Inspector arrived at 11:30 a.m., there was only one safety harness on site, and it was not being worn despite the fact that employees were working at heights that required fall protection. (Tr. 13, 32; MOSH Ex. 5, #1-10). The general contractor's superintendent told the MOSH Inspector that the employees had been on-site for about two weeks, and had been working at the 23-foot level during that time. (Tr. 42). Therefore, Simmons either knew or should have known that the employees were working at heights above 15 feet without the requisite fall protection on the day of the inspection.

The Commissioner further finds that foreman Barron's knowledge of the violations must be imputed to the Employer, Simmons. An employer can be charged with the knowledge of its supervisors. *See MCC of Florida,* 9 O.S.H. Cas. (BNA) 1895, 1898 (1981); *Georgia Electric Co.,* 5 O.S.H. Cas. (BNA) 1112, 1115 (1977), *aff'd,* 595 F.2d 209 (5th Cir. 1979). Barron clearly knew of the hazards since he was one of the employees working on the decking without fall protection and was working along side

the other, non-protected employees. (Tr. 17, 27). Barron is a supervisor for purposes of knowledge based upon the Inspector's testimony that, when asked to identify the foreman, the employees pointed to Barron and that Barron even identified himself as the foreman to the Inspector. (Tr. 18; 100-01).[1] With respect to the citations involving the non-secured ladder and the cut cable, both Simmons, with his daily site inspections, and Barron, working on site, either knew or should have known of the violations because they were in plain view.

Employee Misconduct

The Employer has also asserted the affirmative defense of employee misconduct to all citations. To support such an affirmation defense, the Employer must show that it has (1) established work rules to prevent the reckless behavior and/or unsafe condition from occurring; (2) adequately communicated the rules to its employees; (3) taken steps to discover incidents of noncompliance; and (4) effectively enforced the rules when transgressed by employees. *See Maryland Comm'r of Labor and Industry v. Cole Roofing Co., Inc.,* 368 Md. 459 (2002); *Secretary of Labor v. Jenson Construction Co.*, 7 O.S.H. Cas. (BNA) 1477 (1979); *Gioioso & Sons, Inc. v. Occupational Safety and Health Review Comm'n,* 115 F.3d 100, 109 (1st Cir. 1997). The Commissioner finds that, while

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[1]The Employer argued in the Review Hearing that MOSH's use of hearsay rather than calling Barron or other employees to testify inappropriately shifted the burden of proof to the Employer and should not have been admitted. (Rev. Tr. 5). However, evidence may not be excluded just because it is hearsay. *See* Section 10-213(c), *State Government Article, Annotated Code of Maryland.* In fact, not only is hearsay evidence admissible in a contested administrative hearing, but, "if credible and of sufficient probative force, may be the sole basis for the decision of the administrative body." *Fairchild Hiller Corp. v. Supervisor of Assmts.*, 267 Md. 519, 523 (1973). Furthermore, in order to challenge the use of hearsay, a party must object to the hearsay at the evidentiary hearing. *Ginn v. Farley*, 43 Md. App. 229 (1979). No objection was made when the evidence was presented.

the Employer had established work rules designed to prevent the violations and had adequately communicated those rules to the employees, the Employer failed to take reasonable steps to discover incidents of noncompliance. Little weight can be afforded to the Employer's assertion that one of the employees was subsequently fired for working with no fall protection because the discipline took place after the MOSH inspection. (Tr. 138, 147; Rev. Tr. 15-16). "While post-inspection actions may be evidence of a serious concern for safety, to establish a practice of compliance inspections and discipline of safety infractions under *Gioioso*, an employer must show that it has taken action to enforce its work rules *prior* to inspection by MOSH." (emphasis added). *In the Matter of Consolidated HVAC, Inc.*, MOSH Case No. S7556-022-02, Final Decision and Order (March 24, 2004), pg. 6, *citing Precast Services Inc.*, 17 O.S.H.Cas. (BNA) 1454, 1455-56 (1995).

Furthermore, the evidence shows that the Employer failed to work to discover incidents of noncompliance despite the fact that it should have reasonably known of safety violations prior to MOSH's inspection. The MOSH Inspector testified that the general contractor's superintendent, Mr. Huhra, had previously written up the Employer's employees for various safety violations, demonstrating that the safety violations had been ongoing. (Tr. 22-23). In addition, it is uncontested that, on the day of the inspection, the only safety harness on the job site was sitting unused in the Employer's truck. (Tr. 32, MOSH Ex. 5, #1-10). Thus, it would have been impossible for all employees to comply with the Employer's fall protection work rules, which require fall protection when working over six feet. (Employer Ex. 2). Simmons should have discovered the lack of adequate safety harnesses during his site visit on the day of the inspection but failed to

enforce the work rules. For these reasons and those set out by the HE (HE Proposed Decision, pp. 17-18), the Commissioner finds that the Employer's affirmative defense lacks merit.

Specific Citations

The Employer has raised defenses specific to the individual citations, each of which will be addressed in turn.

Citations 1 and 4 – Fall Protection

MOSH charged the Employer with violations of 29 CFR § 1926.760(a)(1) and 29 CFR § 1926.451(g)(1), which require that employees engaged in steel erection activity, who are on an unprotected side or edge more than 15 feet above a lower level, must use fall protection, and that employees on a scaffold more than 10 feet above a lower level shall be protected from falling to that level. (MOSH Ex. 1). The photographic and testimonial evidence in the record clearly shows, and the Employer has not disputed, that the employees were not using fall protection. (MOSH Ex. 5; Tr. 41-42).

The Employer's assertion that 29 CFR § 1926.760(a)(1) does not apply because the employees were engaged in connector work rather than steel erection work fails because the evidence in the record supports a finding that there was no hoisting equipment involved, which is required for work to constitute connecting work. *See* 29 CFR § 1926.751. (Tr. 101). The Employer has also alleged, without providing a legal basis, that the citations must be dismissed because MOSH did not use actual measurements or drawings to prove the heights at which the employees were working. (Rev. Tr. 6). MOSH admitted into evidence pictures of the work site that clearly demonstrate two employees working on decking at a height greater than 15 feet, and an

employee on scaffolding greater than 10 feet above the ground. (MOSH Ex. 5, #1-10). In addition, the MOSH Inspector testified that foreman Barron and other employees working on the decking told him that they were working approximately 23 feet above the ground and that, based upon his years of experience, this seemed accurate. (Tr. 20, 42; HE Proposed Decision p. 9). With respect to the employee working on the scaffolding, the MOSH Inspector testified that he estimated the distance for himself based upon the man's height. (Tr. 74). The Commissioner finds that the photographic evidence in conjunction with the MOSH Inspector's testimony demonstrate that MOSH has met its burden of proving that the standards were correctly applied.

Finally, the Employer challenges MOSH's characterization of Citation 1 as a repeat citation. In order to establish a repeat violation, MOSH must prove that "the *same* standard has been violated more than once, there is a substantial similarity of violative elements between the current and prior violations, and the prior citation on which the repeated violation is based has become the final order of the Commissioner." *Maryland Commissioner of Labor and Industry v. Cole Roofing Co., Inc.*, 368 Md. 459, 479 (2002). The Commissioner finds that in 2003 the Employer was cited for a violation of the same standard in a substantially similar circumstance. The 2003 citation was clearly within the previous three years. The facts surrounding that citation and this citation reflect substantial similarity of the violative elements – namely welding above 15 feet without fall protection. (Tr. 43; Rev. Tr. 17; MOSH Ex. 1, 8).[2]

[2] The first citation in this case states that "[t]wo employees welding bar joists and steel tubing in place, 23 feet above ground level, were not protected from falling." (MOSH Ex. 1). The prior citation states that "[e]mployee welding steel plates to columns and walking joist, 17' above floor level and 30' above ground level, was not protected from falling." (MOSH Ex. 8). Both citations cite violations of 29 CFR § 1926.760(a)(1).

The Employer has alleged, and MOSH has agreed, that the 2003 citation was followed by a formal settlement. However, the history of the citation, admitted into evidence as MOSH Exhibit 7, demonstrates that the settlement merely reduced the penalty amount but did not rescind the citation or prevent it from becoming a final order. (MOSH Ex. 7; FF 16; Rev. Tr. 19). Therefore, the evidence in the record supports the conclusion that Citation 1 is a repeat citation.

Citation 2

MOSH charged the Employer with a serious repeat violation of Section 5-408(a)(1), *Labor and Employment Article, Maryland Code Annotated*. Section 5-408(a)(1) requires an employer to provide a chemical information list to any other employer on a work site. While the Employer testified that Simmons provided the list to VMS Builders (Tr. 149), the MOSH Inspector testified that after a thorough search of the documents provided to VMS by the Employer, neither the Inspector nor Mr. Huhra, VMS's superintendent, could find a chemical list on site. (Tr. 61-62). When faced with this conflicting testimony, the HE determined that the Employer had failed to provide the list to VMS, and that the list was not in the possession of VMS on March 25, 2004. (HE Proposed Decision, pp. 11-12).

In assessing the credibility of a witness, the reviewing agency should give "appropriate deference to the opportunity of the examiner to observe the demeanor of the witnesses." *Anderson v. Dep't of Public Works*, 330 Md. 187, 216 (1993). "The presiding officer's findings as to credibility have almost conclusive force...[and] the reviewing authority has the power to reject credibility assessments only if it gives strong reasons for doing so." *Id.* When presented with conflicting testimony, the HE made a

credibility determination regarding the testimonies of the MOSH Inspector and the Employer's witnesses and determined that the list simply was not at the worksite.[3] Finding no strong reason to contest this credibility determination, the Commissioner affirms this citation.

For the same reasons cited regarding Citation 1, the Commissioner also affirms the classification of this citation as a repeat violation. This citation, issued on March 25, 2004, states that "[a] copy of the chemical information list was not provided to all other employers working at that workplace prior to the commencement of work…[t]he hazardous material observed included but is not limited to Acetylene and Oxygen." (MOSH Ex. 1). On April 24, 2003, the Employer was cited as follows: "[a] copy of the chemical information list was not provided to all other employers working at that workplace prior to the commencement of work…[t]he hazardous material observed included but is not limited to Acetylene." (MOSH Ex. 8). Both citations cite violations of Section 5-408(a)(1), *Labor and Employment Article*, *Annotated Code of Maryland*, were within three years, and involved substantially similar violative conditions. The record clearly demonstrates that MOSH carried its burden of proving the requisite elements. *Maryland Commissioner of Labor and Industry v. Cole Roofing Co., Inc.*, 368 Md. 459, 479 (2002). (MOSH Ex. 1, 8).

[3] The Employer challenged MOSH's use of hearsay to prove this citation, arguing that the HE erred by giving more credit to a hearsay declarant than a live witness. (Rev. Tr. 21-22). However, the Employer failed to object to the admission of the hearsay evidence at the evidentiary hearing and cannot do so at a later time. *See* FN 1. Furthermore, the Inspector testified that he searched for, and did not see, the list at the site. (Tr. 61-62). This testimony, deemed credible by the HE, rendered the hearsay reliable, and the HE did not err by giving it credit despite Simmons' contradictory testimony.

Citation 3

On review, the Employer challenges this citation for a serious violation of 29 CFR § 1926.351(b)(4) based on the grounds that the evidence presented by MOSH was "speculative and added later" and that the Employer had no knowledge of the violation. (Rev. Tr. 7). 29 CFR § 1926.351(b)(4) provides:

> Cables in need of repair shall not be used. When a cable, other than the cable lead referred to in paragraph (b)(2) of this section, becomes worn to the extent of exposing bare conductors, the portion thus exposed shall be protected by means of rubber and friction tape or other equivalent insulation.

29 CFR § 1926.351(b)(2) provides in relevant part:

> Only cable free from repair or splices for a minimum of 10 feet from the cable end to which the electrode holder is connected shall be used...

As proof of a violation of Section 351(b)(4), the MOSH Inspector testified that the cables had "various cuts throughout the length of them, but especially within 10 feet of the electrode holder," that these cuts were in plain view, and that the cables were in use on the morning of the inspection. (Tr. 65-67). MOSH also admitted photographic evidence of the worn cables within 10 feet from the cable end. (MOSH Ex. 5, #19-22). Because the cuts were in plain view and Simmons inspected the job site daily (Tr. 134, 148), the Employer must have known of the cuts. *See Secretary of Labor v. Kokosky Construction Co., Inc.*, 17 O.S.H. Cas. (BNA) 1869 (1996).

The Commissioner finds that Section 351(b)(4) must be read in conjunction with Section 351(b)(2), and that because MOSH has met its burden of proving the existence of slices in the cable within 10 feet of the cable end, as required by (b)(2), MOSH has proven that cables in need of repair were being used in violation of 29 CFR § 1926.351(b)(4). The Commissioner finds no merit to the Employer's claim that the

evidence was either "speculative" or "added later". Therefore, the Commissioner affirms Citation 3.

Citation 5(1)

MOSH charged the Employer with a serious violation of 29 CFR § 1926.752(b), requiring written notification regarding the strength of the concrete in the footing, piers and walls or the mortar in the masonry piers and walls. On review, the Employer challenged only the classification of this citation as "serious", arguing that there is no evidence in the record to show that the footings were unsafe or that there was a likelihood of serious death or injury resulting from the failure to get written, as opposed to verbal, notice. (Rev. Tr. 9-10). The Commissioner concludes that this standard applies to the Employer and was violated because no written notification was produced to the MOSH Inspector. However, the Commissioner finds that the Employer had received verbal notice regarding the structural integrity of the foundation, which reduced the potential likelihood of death or injury. (Tr. 141). In recognition of that fact, the Commissioner finds that the citation should be classified as "other than serious" rather than "serious".

Citation 5(2)

MOSH charged the Employer with a serious violation of 29 CFR § 1926.752(b), which requires that an employer provide a training program for all employees exposed to fall hazards. This citation was based upon statements by one employee to the Inspector that he had not received training. (Tr. 85). However, Simmons testified before the HE that he had met with the employee when he was hired and had him review safety procedures, which included a section on fall protection. (HE Proposed Decision, p. 15;

Tr. 124, 155; Employer Ex. 6). The Commissioner adopts the HE's determination that Simmons' testimony was credible, and dismisses this citation.

Citation 6.

MOSH charged the Employer with a serious violation of 29 CFR § 1926.1053(b)(1), which states:

> When portable ladders are used for access to an upper landing surface, that ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect and a grasping device, such as a grab rail, shall be provided...

(MOSH Ex. 1). The HE upheld this citation, finding that the ladder used by the employees extended only 18 inches above the surface and was not properly secured at the top. (HE Proposed Decision, p. 16). The MOSH Inspector testified that he estimated the height of the ladder above the landing by counting the rungs, which he knew to be 12 inches apart. (Tr. 87). Photographic evidence supports this assertion as well. (MOSH Ex. 5, #23, 24).

On review, the Employer asserts that the ladder was tied off at the top, referring to a wire on the right arm, and thus did not need to extend 3 feet above the landing. (Rev. Tr. 10, 23). The photographs admitted by MOSH clearly show that there was only one small wire attached to the right arm of the ladder and no grasping device. (MOSH Ex. 5, # 23, 24). The Commissioner finds, as did the HE, that this wire tie off was not sufficient to meet the requirement of securing the ladder to a "rigid support that will not deflect." Moreover, even if the wire were found to be a sufficient securing device, the Employer still violated the standard because there was no grasping device. The Commissioner affirms the citation.

Citation 7

MOSH charged the Employer with a serious violation of 29 CFR § 1926.1053(b)(1), which requires an employer to ensure that oxygen and fuel gas pressure regulators or their gauges are in proper working order. (MOSH Ex. 1). MOSH established through pictures and testimony that the gauges on the Employer's oxygen and acetylene cylinders were broken. (MOSH Ex. 5, #17, 18; Tr. 89). The Employer did not contest these findings on review, and the Commissioner affirms this citation.

ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on the 4th day of November, 2005, hereby **ORDERS**:

1. Citation 1, Item 1 for a repeat "serious" violation of 29 CFR § 1910.760(a)(1) and its accompanying penalty of $2,800, is **AFFIRMED**.

2. Citation 2, Item 1 for a repeat "serious" violation of Ms. Code Ann., Lab. & Empl. § 5-408(a)(1) (1999) and its accompanying penalty of $300, is **AFFIRMED**.

3. Citation 3, Item 1 for a "serious" violation of 29 CFR § 1926.351(b)(4) with its accompanying penalty of $1000 is **AFFIRMED**.

4. Citation 4, Item 1 for a "serious" violation of 29 CFR § 1926.451(g)(1) with its accompanying penalty of $700 is **AFFIRMED**.

5. Citation 5, Item 1 for a "serious" violation of 29 CFR § 1926.752(b) with its accompanying penalty of $1200 is **AMENDED** to an "other than serious" violation with no penalty.

6. Citation 5, Item 2 for a "serious" violation of 29 CFR § 1926.752(b) with its accompanying penalty of $1400 is **DISMISSED**.

7. Citation 6, Item 1 for a "serious" violation of 29 CFR § 1926.1053(b) (1) with its accompanying penalty of $1400 is **AFFIRMED**.

8. Citation 7, Item 1 for an "other than serious" violation of 29 CFR § 1926.350(h) is **AFFIRMED**.

This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for review in the appropriate circuit court. Consult *Labor and Employment Article*, § 5-215, *Annotated Code of Maryland*, and the Maryland Rules, Title 7, Chapter 200.

Robert L. Lawson
Commissioner of Labor and Industry