DLLR
DEPARTMENT OF LABOR, LICENSING AND REGULATION

DIVISION OF LABOR AND INDUSTRY
Matthew Helminiak, Commissioner
1100 N. Eutaw Street, Room 600
Baltimore, MD 21201

June 11, 2019

Christina Donald
Donald Excavating, Inc.
7831 Philadelphia Road
Rosedale, Maryland 21237

RE: Donald Excavating, Inc.
MOSH No.: J0460-033-18
OAH No.: DLR-MOSH-41-18-25718

Dear Ms. Donald:

Enclosed is the Final Decision and Order of the Commissioner of Labor and Industry issued today in the above-captioned manner.

Sincerely yours,

Christina Schaefer
Administrative Officer
Division of Labor and Industry

Enclosure

cc: Jenny Baker/Sarah Harlan, Assistant Attorneys General
Hilary Baker, MOSH Assistant Attorney General
Judge Jana Burch, Office of Administrative Hearings
MOSH Office of Review

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

STATE OF MARYLAND
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IN THE MATTER OF	*	**BEFORE THE**
	*	**COMMISSIONER OF LABOR**
DONALD EXCAVATING, INC.	*	
	*	**AND INDUSTRY**
	*	**MOSH CASE NO. J0460-033-18** **OAH CASE NO. 41-18-25718**
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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*. The Maryland Occupational Safety and Health Unit ("MOSH") issued a citation to Donald Excavating, Inc. ("Donald Excavating" or "Employer") following an inspection at a work site in Towson, Maryland. Donald Excavating contested the citation and a hearing was held at the Office of Administrative Hearings in Hunt Valley, Maryland. William F. Burnham, Administrative Law Judge presided as the Hearing Examiner ("HE"). The citation was for a serious violation of 29 C.F.R. §1926.100(a) and 29 C.F.R. §1926.651(j)(2).[1] The HE issued a proposed decision recommending that the citation and proposed penalty be affirmed. Donald Excavating requested review and a review hearing was held before the Commissioner of Labor and Industry on April 17, 2019. Based upon a thorough review of the factual record, and the arguments made by both parties, the Commissioner affirms the citation.

[1] Donald Excavating also was cited under 29 C.F.R. §1926.651(e) but MOSH rescinded this violation prior to the hearing.

FINDINGS OF FACT

This matter arises out of an investigation after MOSH compliance inspectors observed excavating work being performed by Donald Excavating in Towson, Maryland. Donald Excavating was in the process of removing a tank and underground pipes using a track hoe and a back hoe. FF 3. The MOSH compliance officers parked across the street and observed the work being performed and took photographs to document their observations. Tr. at 26 & MOSH Ex. 4. MOSH Compliance Officer Levi Lundell ("Inspector Lundell") testified that he observed a Donald's Excavating employee without a hard hat walking with a back hoe while it was moving including seeing the bucket of the back hoe above the employee's head. Tr. at 106. He also testified that he observed a Donald's Excavating employee standing in an excavation beneath a spoil pile while refueling without a helmet. Tr. at 27. He testified that the spoil pile that this employee was standing next to was sloped directly against the trench with little space between the spoil pile and the back hoe. Tr. at 71 & MOSH Ex. 4 at 15.

DISCUSSION

On review, the Employer asserts the same arguments for both violations: that the cited regulations do not apply; that the employer did not violate the regulation; that the Employer's employees were not exposed, and that MOSH has failed to prove a substantial probability of death or serious harm. MOSH in response argues that it has met its burden of proof as to all elements for both violations.

Turning first to the hard hat violation under 29 C.F.R. §1926 100(a), the Employer argues that the employee who was not wearing a hard hat was doing so while refueling so there is no violation. The Employer also contends that there is no credible evidence that the employee was

under the equipment while it was in operation or that the employee was exposed to a hazard while refueling. MOSH argues that the evidence demonstrates that a Donald Excavating employee was exposed to the danger of a head injury due to no protective helmet based on two conditions: a back hoe was observed over a Donald Excavating employee's head and an employee was working within two feet of a 13 foot spoil pile.

The cited standard, 29 C.F.R. §1926.100(a), provides:

> Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock or burns, shall be protected by protective helmets.

Case law has established this standard applies to an employee who has access to a hazard and that actual exposure is not necessary. *See Donovan v, Adams Steel Erection,* 766 F.2d 804 (3d Cir. 1984) (access not exposure to danger is proper test). The courts applying this standard have examined whether an employee was in the "zone of danger." *Id.*

Looking first at the bucket of the back hoe over the employee's head, the MOSH Compliance Officer testified that he observed an employee, without a helmet, following a back hoe as it was backing out of the excavation. Tr. at 106. He noted that the back hoe was moving, and at one point the bucket was over the employee's head. Tr. at 105 & 106; MOSH Ex. 4 at 12. This testimony was not refuted. Inspector Lundell documented this condition in his photographs. MOSH Ex. 4 at 12. On review, the Employer argues that the Commissioner should not rely on the photographic evidence because the MOSH Inspector took the pictures across the street so the photographs do not accurately depict the condition. The photographs show the bucket in the air in close proximity to a Donald Excavating employee who is not wearing a helmet. *Id.* Inspector Lundell acknowledged that the photographs do not depict the condition as clearly as they could

due to the fact that the excavator was moving while he was taking the pictures. Tr. at 86. However, Inspector Lundell testified that he observed the bucket over the employee's head and the Hearing Examiner found this testimony to be credible despite the fact that it was observed from across the street. The Commissioner finds that Inspector Lundell's unrefuted testimony coupled with the photographs provide substantial evidence to conclude that the Donald Excavation employee was not protected from head injury. The evidence in the record shows that the employee clearly had access to the hazard and was in the zone of danger.

The Commissioner also finds that the weight of the evidence supports classifying this violation as serious given the possible danger of head injury. Under Section 5-809(a)(1) of the Labor and Employment Article, a violation is considered serious if "there is a substantial probability that death or serious physical harm could result from a condition that exists or a practice, means, operation or process that has been adopted or is in use...". It is well established in case law that a serious violation refers not to the probability that a violation will occur but rather the probability that if an accident occurs a serious injury or death could occur. *See Sec. of Labor v. Trinity Industries, Inc.*, 504 F.3d 397 (3d Cir. 2007).[2] Inspector Lundell testified that this condition was serious due to the fact that the bucket was moving and through operator error or hydraulic failure the bucket could strike the employee. Tr. at 109. The employee was under the bucket of a moving back hoe with no head protection. An inadvertent move by the operator could result in the bucket striking the employee. Alternatively, a hydraulic failure could cause the

[2] On review, the Employer argues that the Commissioner should rely on *Pratt & Whitney Aircraft v. Secretary of Labor,* 649 F.2d 96 (2d Cir. 1981) in evaluating whether the violation is serious. However, *Pratt & Whitney Aircraft* does not apply as it addresses whether there was a significant risk of harm under a cited standard and does not analyze whether the violation in the case was serious.

bucket to suddenly drop hitting the employee with the weight of the metal bucket. There is a substantial probability of serious physical harm including head trauma or broken bones or death from being struck by the bucket of a back hoe.

As to the helmetless employee standing in the excavation while refueling the back hoe, the Employer argues that a helmet was not necessary during refueling and that there was no hazard from the spoil pile because it was sloped. MOSH counters that a helmet was required because of the possibility of excavated material striking the employee. The fact that the employee was refueling does not negate the obligation for the employee to be protected from the possible danger of head injury. As noted previously, MOSH must prove that an employee had access to an area of potential danger. *See Donovan*, 766 F.2d at 806. It is unrefuted that on the side that the employee was standing to refuel, the employee stood approximately two feet from the edge of the excavation. Tr. at 56 & 92. It is also undisputed that the spoil pile was 13 feet in height and comprised of slabs of rock and other debris. Tr. at 53 & MOSH Ex. 9. The spoil pile was made from disturbed soil which Inspector Lundell noted has a higher likelihood of collapsing. Tr. at 72. He testified that the hazard posed was being struck in the head or body by falling soil and debris. The cited standard requires head protection when there is possible danger of head injury. Here, the employee was in close proximity to a spoil pile containing recently disturbed soil that, as characterized by the Hearing Examiner, was "towering" above him. OAH Proposed Decision at 11. The photographic evidence shows that the spoil pile contained large rocks and slabs of debris. As acknowledged by the Employer's expert, there is always a risk of spoil rolling off a spoil pile. Tr. at 161. The helmetless employee was in the direct path of the rolling spoil. The Commissioner finds that the citation was properly classified as serious

because an employee struck by a slab of debris could be knocked down. The Commissioner finds that there is substantial evidence to support a violation of the cited standard.[3]

As to the violation of 29 C.F.R. §1926.651(j)(2), the Employer argues that the cited standard does not apply because the employee was on a ramp, and not in an excavation. The Employer asserts that because the employees were on a ramp, the requirement that a spoil pile be two feet from the edge of the ramp is not applicable. The Employer also argues that even if the standard was applicable, the employees were not exposed to a hazard with substantial probability of serious physical harm. MOSH argues that the Employer did not raise the ramp argument below, and, therefore, is precluded from raising it for the first time on review. MOSH also argues that the Hearing Examiner correctly held that MOSH satisfied its burden of proof as to a serious violation of 29 C.F.R. §1926.651(j)(2).

Looking first at the Employer's argument that the cited standard does not apply, this argument was not raised at the administrative hearing. While the term "ramp" may have been used during testimony interchangeably with the terms excavation and trench,[4] the Employer never argued that the cited standard, 29 C.F.R. §1926.651(j)(2) did not apply and that an alternative standard 29 C.F.R. §1926.652(a) was applicable. Because the employer failed to raise this argument below, MOSH has not had an opportunity to respond and the Hearing Examiner did not have the opportunity to evaluate the merits of the argument. Even if the Commissioner were to consider the Employer's argument, the Commissioner finds that it is without merit.

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[3] The Commissioner affirms the Hearing Examiner's conclusion that the cited standard applies and that a Donald Excavating employee was exposed to the hazard.

[4] As the Hearing Examiner properly noted, the definition of an excavation includes a trench. While the parties intermittently referred to an excavation as a ramp, the language in the citations and worksheets refers to an excavation.

Under 29 C.F.R. §1926.651, the scope section provides that "all surface encumbrances that are located so as to create a hazard to employees should be removed or supported, as necessary to safeguard employees." In contrast, the scope section of 29 C.F.R. §1926.652 provides that "each employee in an excavation shall be protected from cave-ins by an adequate protective system designed" in accordance with the section. Section 652 goes on to exempt excavations made entirely of rock and excavations that are less than five feet in depth that are examined by a competent person who determines there is no indication of potential cave-in. 29 C.F.R. §1926.652(a)(1). The Employer argues that the excavation was less than 5 feet in depth and, therefore, an exception to Section 652 applies. However, the exception under Section 652(a)(1) applies to adequate protective systems that have been evaluated by a competent person who has determined there is no indication of a potential cave-in. Here, however, MOSH has never asserted that the Employer failed to provide an adequate protection system to prevent a cave-in.[5] Rather, MOSH asserts that the 13 foot spoil pile at the edge of the excavation constituted a hazard and that the Employer was required to ensure that this surface encumbrance was removed to a safe distance to safeguard the employees. 29 C.F.R. §1926.651(j)(2), the cited standard, addresses this hazard. Accordingly, the Commissioner finds that the proper standard was cited.

Turning to the cited standard,[6] 29 C.F.R. §1926.651(j)(2) provides:

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[5] The Employer's witness asserted that the spoil pile was sloped such that it did not produce a danger to anyone in the excavation. Yet, he also acknowledged that there is always a risk of material rolling off a spoil pile. Tr. at 140 & 161. On review, the Employer assets that Hearing Examiner failed to consider the slope of the spoil pile and argues the slope of the spoil pile was inclined to prevent a cave-in. While certain sloping can be an adequate protective system under 29 C.F.R. 1926.652, this is not the standard under which the Employer was cited.

[6] The Commissioner finds there is substantial evidence to support the Hearing Examiner's conclusion that the Employer violated this standard and that Donald Excavation employees were exposed to the hazard from material and debris less than 2 feet from the edge of the excavation.

> Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

The Employer on review argues that the employee was not exposed to a hazard with substantial probability of physical harm. As noted previously, for a hazard to be serious, it is necessary for MOSH to demonstrate that an accident is possible and if an accident were to occur, the probability of serious injury or death could occur. *See Sec. of Labor v Trinity Industrie Industries, Inc.,* 504 F.3d 397 (#d Cir. 2007). Inspector Lundell testified that the spoil pile was flush with the excavation. Tr. at 71. As has been noted, the spoil pile was 13 feet high and contained recently disturbed soil including slabs of debris. Inspector Lundell testified that the space between the spoil pile and the equipment where the employee was standing to refuel was approximately 2 feet. Tr. at 119.[7] Both of the Employer's witnesses and Inspector Lundell testified that there is always a risk of debris rolling down a spoil pile. Inspector Lundell testified that the employee stood in the excavated area to refuel for approximately 8 minutes. MOSH Ex. 8. During this time, there was vehicular traffic in close proximity from which there could be vibrations resulting in movement in the spoil pile. Additionally, it was an active worksite with multiple pieces of equipment and employees moving about which could impact the loose materials and debris in the spoil pile. If material were to roll off the spoil pile, the employee would have been in its direct path and could have been struck by a slab of debris. This could

[7] While the Employer's witness speculated on the size of the distance between the spoil pile and the equipment, he was not at the worksite on the day of the inspection so he did not observe the work conditions first hand.

result in injuries to the employee including laerations and broken bones. The Commissioner finds that there is substantial evidence to conclude that there is a substantial probability of serious injury or death if the employee had been struck by a slab of debris from the spoil pile.

ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on this 11 day of June, 2019, hereby ORDERS:

Citation 1, Item 1 alleging a serious violation of 29 C.F.R. §1926.100(a) and Citation 1, Item 2(b) alleging a serious violation of 29 C.F.R. §1926.651(j)(2) with a proposed penalty of $450.00 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.

Matthew Helminiak
Commissioner of Labor and Industry