IN THE MATTER OF	*	BEFORE THE
	*	
SUPERIOR STEEL ERECTORS, INC.	*	COMMISSIONER OF LABOR
	*	AND INDUSTRY
	*	
	*	MOSH CASE NO. 04798-037-95
	*	
	*	OAH CASE NO. 95-DLR-MOSH-
	*	41-008701

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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 an inspection, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH"), issued two citations to Superior Steel Erectors, Inc. ("Employer"), alleging violations of various safety standards. Following an evidentiary hearing, Hearing Examiner Thomas G. Welshko issued a decision affirming the citations but reduced Citation 1 from willful and egregious to willful.

The Employer filed a request for review. The Commissioner of Labor and Industry ("Commissioner"), held a hearing and heard argument from the parties. Based upon a review of the entire record, consideration of relevant law, and the parties' arguments, the Commissioner affirms the Hearing Examiner's disposition of this matter with the exception that the Commissioner modifies the Hearing Examiner's characterization of Citation 1 from willful to willful and egregious.

FINDINGS OF FACT

The Commissioner affirms the Hearing Examiner's findings of fact.

CONCLUSIONS OF LAW

This case arises from the following facts. An employee was working on a 8"-10" wide steel girder ("I Beam"). MOSH Ex.7, 8 ,11 &12. Another employee was standing on a roof level that was decked. *Id*. The employees were positioning bar joists onto the supporting members at specified distances. T1 at 33-36; T2 at 97.[1] The bar joists were being lowered to the employees by a crane. *Id*. The employees were exposed to a fall hazard of 20 feet above a concrete floor. MOSH Ex. 20. Because there was a gap in a portion of the concrete flooring below the area where the employees were working, the employees were at times also exposed to a fall hazard of 30 feet. MOSH Ex. 21; FF 5. The two employees were not wearing safety belts and lanyards. T1 at 33-36; T2 at 97. On review, the Employer raises several challenges to the Hearing Examiner's decision to which the Commissioner now turns.

Applicability of Section 28(a)

The Hearing Examiner concluded that the Employer violated 29 C.F.R. § 1926.28(a).[2] On review, the Employer contends that it is improper to cite to Section

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[1] The administrative hearing in this matter was conducted on February 27, 1996 and June 11, 1996. The February hearing will be referred to as T1 and the June hearing as T2.

[2] Section 28(a) provides as follows:
The employer is responsible for requiring the wearing of appropriate protective equipment in all operations where there is an exposure to hazardous conditions or where

28(a) because the fall protection requirements for the steel erection industry are contained in 29 C.F.R. § 1926, Subpart R. The Employer also asserts that regulatory changes occurring around the time that the citations were issued reinforce its position. In addition, the Employer argues that it is unfair for MOSH to issued this citation because it will penalize the Employer for conduct that, because of subsequent changes in the law, is no longer a violation.[3]

The law regarding whether a steel erector is required to have employees wear safety belts and lanyards while working at a height of 20 feet is far more settled than the Employer suggests. For over twenty years, the courts have interpreted 1926.28(a) as applicable to the steel erection industry, and to falls from heights of less than 20 feet. *See Bristol Steel & Iron Works, Inc. v. OSHRC*, 7 OSHC (BNA) 1462, 1463-65 (4th Cir. 1979); *L.R. Willson and Sons, Inc. v. OSHRC*, 11 OSHC (BNA) 1097, 1099-1100 (D.C. Cir. 1983). In February of 1995, there was no provision in Subpart R (Steel Erection) or Subpart M (Fall Protection) that specified the abatement required for the hazard in this case.[4] At the time that this citation was issued, both the courts and the Commissioner had

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this part indicates the need for using such equipment to reduce the hazards to the employees.

[3] While there is evidence in the record indicating that at the time that the citations were issued, efforts were underway to clarify issues relating to steel erection activities, (*see, e.g.*, Exhibit 1, July 1995 OSHA Memorandum, Employer's Post-Hearing Brief), these efforts had not culminated in an official rule or policy that had been adopted in Maryland. *See* T2 at 133.

[4] Given the Commissioner's reaffirmation of the principle that Subpart R does not preempt Section 28(a), a discussion of whether the work being performed constitutes "steel erection" is unnecessary. *See In the Matter of L.R. Willson & Sons*, MOSH Case No. M7987-

made it clear that 1926.28(a) supplemented the requirements of Subpart R. *See In the Matter of L.R. Willson & Sons*, MOSH Case No. M7987-053-90, Hearing Determination No. 91-21; *L.R. Willson and Sons, Inc. v. OSHRC*, 11 OSHC (BNA) at 1099-1100; *see also* T2 at 116-24.

The Employer's reliance on recent regulatory action by OSHA relating to fall protection and steel erection to somehow demonstrate that there is uncertainty as to the fall protection requirements for steel erection is not supported by the regulatory history.[5] Similarly, the Employer's contention that OSHA's regulatory action makes this citation unfair is without merit. The law that is applicable to the Commissioner's review of this citation is the law that was in effect at the time of the citation. *See Sec. of Labor v.*

053-90, Hearing Determination No. 91-21; *L.R. Willson and Sons, Inc. v. OSHRC*, 11 OSHC (BNA) at 1099-1100.

[5] A review of the relevant regulations during the period at issue demonstrates that the regulatory action does not lend support to the Employer's position. The citation in this case was issued on February 22, 1995. In August of 1994, OSHA issued the "Safety Standards for Fall Protection in the Construction Industry." *See* 59 FR 40672 (August 9, 1994). These safety standards were scheduled to become effective on February 6, 1995. However, because of confusion as to their applicability to the steel erection industry, OSHA granted an administrative stay, and delayed the effective date of the revisions to the extent that they applied to steel erection. *See* 60 FR5131 (January 26, 1995). At the time that the citations were issued, therefore, there had been no change in the fall protection requirements or the applicability of Section 28(a) to fall hazards of 20 feet. *See In the Matter of L.R. Willson & Sons*, MOSH Case No. M7987-053-90, Hearing Determination No. 91-21; *L.R. Willson and Sons, Inc. v. OSHRC*, 11 OSHC (BNA) at 1099-1100. In August of 1995, almost six months after the instant citation was issued, OSHA amended subpart M to provide that the "[r]equirements relating to fall protection for employees performing steel erection work are provided in Section 1926.105 and in subpart R of this part. See 60 FR 39255 (August 2, 1995). Taking into consideration the relevant period of time for this citation, and the regulatory action during that period, there was no specific standard adopted by OSHA or MOSH to protect employees from the hazard posed in this case.

Waldon Healthcare Center, 16 OSHC (BNA) 1052, 1053 n.1. (1992). Amendments to regulations issued after the citation are not the applicable law in reviewing this citation. *Id.*; *see also Delmarva Power and Light Company*, MOSH Case No. D5945-032-93 (1998)(standards implemented after the issuance of citation not applicable standards in review). The fact that a workplace occurrence constitutes a violation of a safety standard at one point in time, and the law subsequently changes, does not undermine the validity of the violation. Rather, a citation must be issued and reviewed under the applicable law in effect at the time of the citation.

Based upon the foregoing, the Commissioner affirms the Hearing Examiner's conclusion that MOSH properly cited the Employer for a violation of Section 28(a).[6]

Admissibility of Evidence

On review, the Employer asserts that the Hearing Examiner erred in allowing the admission of evidence that was obtained prior to the MOSH Inspectors' presentation of credentials. The record establishes that the inspection was a general schedule inspection. T1 at 24. Prior to contacting the site superintendent, the MOSH Inspectors took two photographs to show the fall exposure of two employees. T1 at 33. These photographs were taken from the public section of the parking lot. MOSH Ex. 12.

The Occupational Safety and Health Review Commission has held that for "observations [that are] made from an area easily accessible and visible to the general

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[6] With regard to the citation under Section 105(a), the Commissioner has reviewed the Hearing Examiner's analysis of this citation, and affirms his conclusions.

Public, Fourth Amendment protections do not apply. *See Sec. of Labor v. Well Solutions, Inc.*, 15 OSHC (BNA), 1718, 1721 (1992). There is no reasonable expectation of privacy where the work site is observed from a public thoroughfare, open to public view. *See, e.g., Secretary of Labor v. GEM Industrial, Inc.*, 17 OSHC (BNA) 1184, 1186-87 (1995)(no reasonable expectation of privacy where violative condition observed from parking lot next to Employer work site). The case law is clear that "where a work site is visible from a public roadway, photographs taken from that location prior to the presentation of credentials are admissible." *Laclede Gas Company*, 7 OSHC (BNA) 1874, 1877 (1979). The record establishes that the MOSH Inspectors were sitting in the public section of the parking lot. *See* MOSH Ex. 12. The Commissioner concludes that the evidence obtained prior to the presentation of credentials was properly admitted.

Regulation Regarding Submission of Affidavits.

On review, the Employer challenges MOSH's regulation requiring the parties to agree to the admission of affidavits in lieu of testimony. See COMAR .09.12.20.15(A)(2)(g).[7] When the Hearing Examiner refused to admit the affidavits of four Superior Steel Erector employees over MOSH's objection, the Employer contends it was denied due process.

[7] Section 15(A)(2)(g) provides that the hearing examiner may "[a]dmit an affidavit as evidence in place of testimony, if the matters in the affidavit are otherwise admissible and if all parties agree to its admission."

During the hearing, the Employer's counsel represented that these employee affidavits would demonstrate that "these individuals are not the people that MOSH identified or MOSH claims were exposed to these alleged hazards on the job." T1 at 5-6. The Hearing Examiner excluded the affidavits upon MOSH's objection, but the Employer was permitted to submit evidence, through the direct testimony of its president, as to the testimony of each of the affiants. T2 at 154.

The record demonstrates no denial of due process. The president claimed that he interviewed each of the affiants, and was present when each of the affidavits was executed. T2 at 146-47. The president testified as follows: "I interviewed each of the four [employees] and, you know, I got the same answer from each of the four, at no time were they not using fall protection." T2 at 157. The president also testified that he showed each of the affiants the photographs taken by MOSH reflecting employees exposed to a fall hazard while installing bar joists, and each affiant responded that he was not in the photograph. T2 at 159-63. The president's testimony presented the identical evidence that the Employer sought to introduce through the affidavits. Given the admission of this evidence through direct testimony, which included the opportunity for cross-examination, the Commissioner finds that there was no denial of due process to the Employer.

Employee Exposure

On review, the Employer contends that there is a lack of reliable evidence to show that employees of Superior Steel Erectors were exposed to the cited fall hazard. At the outset, it is useful to set forth the burden of proof on exposure. It is not necessary for MOSH to establish the personal identity of an employee exposed to a hazard. *See R. Colwill Excavating Co.*, 5 OSHC (BNA) 1984, 1986 (1987). Rather, to sustain its burden, MOSH must demonstrate that the exposed workers are Superior Steel Erector employees. The Commissioner affirms the Hearing Examiner's conclusion that MOSH met this burden.

The record demonstrates that the MOSH Inspectors saw two employees exposed to a fall hazard while installing bar joists. MOSH Ex. 8. Both MOSH Inspectors testified that these same two employees refused to talk to them, climbed into a truck with "Superior Steel Erectors" emblem, and drove away from the work site. T1 at 95, 99; T2 at 98; FF 6. Supporting this testimony is the fact that the site superintendent informed MOSH that Superior Steel Erector's employees were responsible for installing bar joists on the day of the inspection. T2 at 62 & 100. In addition, Superior Steel Erectors' daily time sheet for the date of the inspection reflects that there were four employees at the work site at various times during the day of the inspection, including at the time that the MOSH Inspectors observed the alleged fall hazard. MOSH Exhibit 9, 19, & 21. The Hearing Examiner credited the testimony of the MOSH Inspectors over the assertions of

the president that its employees were not installing bar joists or working without fall protection. The Commissioner does not find strong reasons to overrule the Hearing Examiner's credibility determination. *Anderson v. Department of Public Safety & Corrections Servs.*, 330 Md. 187, 216-17 (1993). Further, the Employer presented no evidence that employees of other employers are permitted to use its trucks. The Commissioner affirms the Hearing Examiner's conclusion that MOSH satisfied its burden as to employee exposure. *Compare Donovan v. A.A. Beiro Construction Co., Inc.*, 12 OSHC (BNA) 1017, 1024 (D.C. Cir. 1984) (agency failed to prove Beiro employee exposure based upon sighting of an employee wearing a blue safety helmet where record demonstrated that non-Beiro employees were wearing blue safety helmets).

Penalty Amounts Are Unconstitutional

The Employer contends that because the penalty exceeds $10,000, this matter is more analogous to a criminal proceeding rather than an administrative proceeding, and that it is therefore, unconstitutional to rely on hearsay to support the citations. The Commissioner does not agree.

Principles of procedural due process require that administrative agencies observe basic principles of fairness. *See Maryland State Police v. Zeigler*, 330 Md. 540, 559 (1993). Maryland law is clear that hearsay is admissible if it is found to be credible and probative. *See Kade v. Hickey School*, 80 Md. App. 721 (1989). Having reviewed the record in its entirety, the Commissioner concludes that hearsay relied upon by the

Hearing Examiner in reaching his conclusions on these violations was properly admitted in this proceeding consistent with Maryland law.

Further, the penalty provisions of the Maryland Occupational Safety and Health Act are clear that the penalties are civil. *See §§ 5-809 et seq.; see also Long v. American Legion*, 117 Md. App. 18, 25 (1997)(legislative intent and statutory scheme determine if a sanction is civil or criminal). Moreover, the "deterrent nature of financial assessments does not render them criminal." *Blocksom and Co.*, 6 OSHC (BNA) 1001, 1017 (1977). Accordingly, the Commissioner rejects the Employer's contention regarding the penalty amounts.

Hearing Examiner Bias

The Employer argues that the Hearing Examiner's decision is biased and prejudiced in favor of MOSH. The Employer does not cite to any specific rulings to support this allegation. Rather, the Employer asserts that its investigation of this Hearing Examiner's decisions demonstrates a propensity to adopt MOSH's position.

"An administrative official is presumed to be objective and 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" *United Steelworkers of America v. Marshall*, 8 OSHC (BNA) 1810, 1818 (1980), quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941). The General Assembly's objective in creating the Office of Administrative Hearings was to provide an impartial hearing officer in contested cases. *See Anderson v. Department of Public Safety*, 330 Md. 187 (1993). A

hearing officer from an independent agency removes any "appearance of inherent unfairness or bias against the aggrieved." *Id.* at 214. In this case, the administrative proceeding was conducted by a hearing examiner of the Office of Administrative Hearings. There is nothing in this record to demonstrate that Hearing Examiner Welshko exhibited a lack of fairness or impartiality. Moreover, there is no authority that would require the inference that his past findings on behalf of MOSH would cast doubt on his impartiality in this proceeding. Based upon a careful review of the entire record in this case, the Commissioner finds no merit to the Employer's assertion of bias or prejudice by the Hearing Examiner.

Characterization of Penalty

The Hearing Examiner concluded that the violations of Sections 29(a) and 105(a) were willful. A violation is willful if the employer took the action at issue with either intentional disregard for a safety standard or plain indifference to the safety of employees. *Secretary of Labor v. Trinity Industries, Inc.,* 16 OSHC (BNA) 1670 (11th Cir. 1994); *Intercounty Construct. Co. v. OSHRC,* 3 OSHC (BNA) 1337, 1339-40 (4th Cir 1975). The Employer has been cited on prior occasions for violating the same standards that are cited in this case. This fact, coupled with the Company's safety policy of requiring fall protection for fall hazards over 10 feet, and at lower heights when necessary, support the characterization of these citations as willful. These facts demonstrate that the Employer knew of the applicable standards, and consciously

disregarded these standards. In addition, MOSH characterized Citation 1 under Section 28(a) as egregious. The Hearing Examiner disagreed. The Commissioner reverses the Hearing Examiner, and in addition to finding the violations willful, finds them to be egregious.

In the case of an egregious citation, each instance of noncompliance is considered a separate violation, and a penalty is applied separately. *See Secretary of Labor v. Caterpillar Inc.*, 15 OSHC (BNA) 2153, 2170 (1993). A case is egregious where it is found that it is "willful," "repeated," and there is a "high gravity serious and failure to abate." *Id.* The primary basis cited by the Hearing Examiner in rejecting the violation as egregious was the fact that the Employer did not "steadfastly resist" the abatement. He reached this conclusion based upon the fact that the day after the cited violation, the employees were using fall protection. The Hearing Examiner's reliance on abatement alone failed to give proper weight to the other factors that must be considered, namely, the repeat nature and seriousness of the violation. The Employer has been cited on numerous occasions for lack of fall protection including citations involving serious injury and even death. *See* FF 11; MOSH Ex. 14-18. The gravity of the harm from the lack of fall protection is self-evident from these citations. Given the Employer's repeat offense in this case with its extensive history of prior violations, coupled with the gravity of these violations, the Commissioner finds that the Employer has intentionally disregarded its safety and health responsibilities. Under these circumstances, the

Commissioner finds that MOSH has met its burden of demonstrating that this violation of Section 28(a) is properly characterized as willful and egregious.

Finally, MOSH cited the Employer with four separate willful and egregious violations of Section 28(a) based upon its conclusion that there were four employees on the job site. While the Employer's records demonstrate that there were four employees present at the worksite on the day of the inspection, the evidence proves that only two employees were exposed to a fall hazard. *See* Hearing Examiner's Decision at 18. The Commissioner, therefore, affirms the Hearing Examiner's conclusion that MOSH has met its burden as to the exposure of two employees only.

ORDER

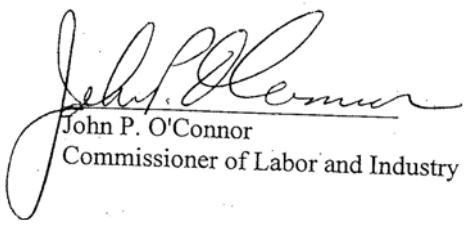
The Commissioner of Labor and Industry hereby **ORDERS**, this 3rd day of August, 1999, that:

1. Citation 1, alleging a WILLFUL and EGREGIOUS violation of MOSH Standard 29 C.F.R. 1926.28(a), is **AFFIRMED** with a modified penalty of $28,000;

2. Citation 2, alleging a WILLFUL violation of MOSH Standard 29 C.F.R. 1926.105(a), is **AFFIRMED** with a penalty of $14,000;

3. This Order becomes final 15 days after its issuance. Judicial review may be requested by filing a petition for judicial review in the appropriate circuit court. *See*

Labor and Employment Article, § 5-215, *Annotated Code of Maryland*, and Maryland Rules, Title 7 Chapter 200.


John P. O'Connor
Commissioner of Labor and Industry