
November 21, 2019

Edward Cimino, Safety Director
Cameron Insulation, LLC
7085 Dorsey Run Road
Elkridge MD, 20175


RE: Cameron Insulation, LLC

MOSH No.: F7721-037-18

Dear Mr. Cimino:

Enclosed is the Final Decision and Order of the Deputy 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
Catherine Bellinger, MOSH Assistant Attorney General
Judge Jana Burch, Office of Administrative Hearings
MOSH Office of Review

REGULAR & CERTIFIED MAIL – RETURN RECEIPT REQUESTED

IN THE MATTER OF

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BEFORE THE

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COMMISSIONER OF LABOR

CAMERON INSULATION, INC.

*

AND INDUSTRY

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MOSH CASE NO. F7721-037-18

OAH CASE NO. 41-18-34316

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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 three citations to Cameron Insulation, LLC (“Cameron Insulation” or “Employer”) following an accident investigation at a work site in White Plains, Maryland. The first citation was for a serious violation of 29 C.F.R. §1926.451(f)(3) for failing to have a competent person inspect scaffold and scaffold components for visible defects. The second citation was for a serious violation of 29 C.F.R. §1926.451(g)(1)(i) through (g)(1)(iv) for failing to protect an employee from falling to a lower level by the use of personal fall arrest systems or guardrail systems. The third citation was for a serious violation of 29 C.F.R. §1926.454(a) for failing to train employees to recognize and avoid hazards associated with the usage of mast climbing scaffolds. MOSH assessed a penalty of \$2,575.00 for each violation for a total penalty of \$7,725.00. Cameron Insulation contested the citations and a hearing was held at the Office of Administrative Hearings in Hunt Valley, Maryland before Geraldine A. Klauber, Administrative Law Judge (“ALJ”). The ALJ issued a proposed decision recommending that the

citations and proposed penalties be affirmed. Cameron Insulation requested review and a review hearing was held before the Deputy Commissioner of Labor and Industry on July 24, 2019. The employer submitted a written position statement in support of its request for review. Based upon a thorough review of the factual record, the position statement and the arguments made by both parties, the Deputy Commissioner affirms the three citations and the penalties.

FINDINGS OF FACT

On May 14, 2018, two employees of Cameron Insulation were working on an elementary school that was under construction at 10065 Billingsly Road in White Plains, Maryland. Cameron Insulation was a subcontractor on the project. The two employees, Elder Contreras ("Contreras") and Lisandro Perez ("Perez"), were applying foam insulation from the bottom of the building to the top. Mr. Perez was the foreman on the jobsite. (Tr. 39.) The scaffolding on the job site was the property of another subcontractor, KaRon Masonry. (Tr. 212.) The scaffolds were mast scaffolds which are power driven to elevate by climbing a vertical mast. Cameron's Superintendent, Jonathan Copenhaver, was at the jobsite in the morning. He would typically visit several job sites over the course of a day. He confirmed with the KaRon foreman that the Cameron employees could use the scaffolding when the masonry employees were finished. (Tr. 215.) When he left, the KaRon employees were still on the scaffolding. (Tr. 216.) After the KaRon employees finished with the scaffolding, Mr. Perez and Mr. Contreras began to use it. Mr. Perez noticed that the scaffolding did not have any stickers affixed to it indicating that it had been inspected and approved for use. (MOSH Ex. 7.) Additionally, guardrails were missing from the ends of one scaffold. Nevertheless, Mr. Perez and Mr. Contreras used the scaffolding to apply the foam insulation. While on the scaffolding, Mr. Perez and Mr. Contreras were at least

twenty feet above compacted soil. The two workers had fall arrest equipment with them but they did not use it on the day in question. While working on the scaffolding, Mr. Perez fell to the ground and broke several ribs and fractured his vertebrae. Following the accident, MOSH initiated an investigation which resulted in the three citations.

DISCUSSION

To establish a violation of a specific standard of the occupational safety and health law, MOSH must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) that employee(s) were exposed to or had access to the violative condition; and (4) that the Employer knew or could have known of the conditions with the exercise of reasonable diligence. *Dun Par Engineered Form Co.*, 12 O.S.H. Cas. (BNA) 1962 (1986); *Astra Pharmaceutical Products, Inc.* 9 O.S.H. Cas. (BNA) 2126 (1981), affirmed in part, remanded in part, 681 F.2d 69 (1st Cir. 1982).

Citation 1, Item 1

Citation 1, Item 1 was for a serious violation of 29 CFR §1926.451(f)(3) which provides that:

scaffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity.

As part of the investigation, the Maryland Occupational Safety and Health compliance officer ("compliance officer") interviewed Mr. Perez and Mr. Contreras. Neither gentleman speaks English. When he initially attempted to interview Mr. Perez, the compliance officer used a translation line. However, the compliance officer had difficulty understanding the interpreter so he cancelled the first translation line and requested another. (Tr. 52.) When he called the translation line a second time, he was connected to an interpreter that he was able to understand.

Id. The compliance officer transcribed his interview with Mr. Perez. (MOSH Ex. 7.) When asked during the interview about his scaffold training, Mr. Perez responded that they are told to check the scaffold to see if it is okay to use it. A green sticker means it is okay to use and red sticker means it is not okay to use. Mr. Perez stated that he did “not know who checks the scaffolds and determines if they are ok to use.” *Id.* The scaffold at issue did not have any stickers on it at all. When asked why he proceeded to use the scaffold when it did not have a sticker on it, Mr. Perez responded that he didn’t want to lose a day of work. He also stated that there had been situations in the past where he had used scaffolding that did not have any stickers on it. *Id.* Mr. Perez told the compliance officer that he had noticed that the scaffold did not have stickers and was missing pieces for about a week. *Id.* During the course of the interview, the compliance officer asked Mr. Perez some questions about the scaffolding. The compliance officer testified that Mr. Perez was unable to answer basic questions about scaffold safety including the height at which fall protection is required. The compliance officer also interviewed Mr. Contreras. During the course of the interview, Mr. Contreras stated that he noticed that the railings were missing from both ends of the scaffolding. (MOSH Ex. 8.) He also stated that he did not know whether the scaffold had been inspected before he and Mr. Perez began working on it. *Id.*

The Employer argues that it did not violate the standard because Mr. Perez was a competent person and was trained to visually inspect scaffolding and assess its suitability for use. The Employer further argues that the statements given by the employees to the compliance officer may not be entirely accurate because there is a language barrier and the employees may not have fully understood the questions they were asked. Finally, the Employer argues that Mr.

Perez “evaluated the scaffold, acknowledged the missing guardrail, and in an isolated and idiosyncratic instance of employee misconduct” proceeded to use the scaffold. (Employer Memorandum p. 4.)

The Deputy Commissioner finds that MOSH has met its burden of establishing that Mr. Perez was not a competent person and that the scaffold was not properly inspected. There is no dispute that the scaffold in question had a plainly visible defect--it was missing guardrails. Mr. Perez told the compliance officer that he did not know who was responsible for inspecting the scaffolding and determining whether it was appropriate to use. (MOSH Ex. 7.) Mr. Perez stated that the extent of his examination of the scaffold was to determine whether there was a red or green sticker on it and even after he saw that there wasn't a sticker and the scaffold was missing parts, he nevertheless used it to avoid missing a day of work. The Employer's suggestion that the term “inspection” has a different meaning in Spanish is not compelling. Mr. Perez's statement clearly indicates that the entirety of his “inspection” was looking at the scaffold to determine whether a red or green sticker was attached. This coupled with Mr. Pererz's inability to answer basic safety questions about scaffolding and his decision to use the scaffolding in the face of visible defects indicates that Mr. Perez was not a competent person and no meaningful inspection of the scaffolding was performed after KaRon turned it over to the Cameron employees.

In order to establish a defense of unforeseeable employee misconduct, an employer must establish that (1) it had an established work rule to prevent the reckless behavior or unsafe condition from occurring; (2) the work rule had been been clearly communicated to the employees; (3) the employer had taken steps to ensure that the work rule was obeyed and to

discover violations of it; and (4) the employer enforced the rule whenever employees transgressed it. *Comm'r of Labor and Industry v. Cole Roofing, Co., Inc.*, 368 Md. 459 (2002). The standard requires that a competent person inspect scaffold and scaffold components for visible defects prior to each shift. The Deputy Commissioner finds that the defense of unforeseeable misconduct does not apply in the context of this citation because the issue is whether a competent person inspected the scaffold and the evidence is clear that Mr. Perez was not a competent person.

Citation 1, Item 2

Citation 1, Item 2 was for a serious violation of 29 CFR §1926.451(g)(1)(vii) which provides that

For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

The uncontroverted evidence established that on May 14, 2018, Mr. Perez and Mr. Contreras were working on a mast scaffold that was more than 10 feet above hard packed soil and they were not protected by personal fall arrest systems or guardrail systems. The compliance officer testified that the type of scaffolding used by the employees was not one covered by another subsection of the standard and the employer did not dispute that the cited standard applies. On review, the Employer argues that the citation should be vacated because the employees engaged in unpreventable employee misconduct. The burden of establishing unpreventable employee misconduct rests with the employer. To prevail on the defense, the employer must establish the four factors set forth by the Court of Appeals in the *Cole Roofing* case that were noted above. The employer did have a rule requiring that employees utilize fall protection and the rule was communicated to the employees. However, the undersigned finds that the employer failed to

meet its burden with regard to taking steps to ensure that the work rule was obeyed and enforced. The Employer had a disciplinary policy for violations of safety rules. The policy provided that for the first offense, the employee may be cited with a written warning; for the second offense, the employee may be sent home for two days without pay; and for the third offense, the employee may be terminated. The policy also provided that for the first and second offenses, the violator may be subject to a more stringent penalty depending upon the severity of the violation. The Employer also demonstrated that it had disciplined the employee for fall protection violations. In December of 2015, Mr. Perez was issued a written warning and a one day suspension. In March of 2016, Mr. Perez was again found not to be protected from falling while working from scaffold. He was removed from the job site and retrained the same day but there were no additional consequences. Two years later, Mr. Perez was caught sitting on a parapet wall situated eight feet above a lower roof without fall protection. In that case, the employer only issued a written warning.

The undersigned agrees with the employer that, depending on the circumstances, there may be some discretion on the part of the employer when applying a disciplinary policy. However, when the employer has a disciplinary policy it must demonstrate that application of the policy is effective. In this case, it was not. The Employer acknowledged that fall protection violations are one of the most serious safety violations that an employee can commit. (Tr. 200.) Mr. Perez had three separate instances where he was written up for his failure to utilize fall protection yet he continued to disregard the requirement which ultimately resulted in serious injury. Mr. Perez' continued failure to utilize fall protection should have been particularly concerning to the employer because Mr. Perez was a foreman and, thus, should have been both

setting an example as well as enforcing safety rules for the employees who worked for him. In addition to the prior write-ups, the Employer acknowledged that it was aware of Mr. Perez's propensity to not utilize fall protection. Superintendent Jonathan Copenhaver testified that another contractor reported to him that Mr. Perez wasn't wearing fall protection but he claimed that he couldn't "catch him red-handed." (Tr. 218.) Despite the Employer's contention that it couldn't catch Mr. Perez "red handed", the Employer still had an obligation to ensure that the application of its disciplinary policy was an effective. Mr. Perez' repeated fall protection violations along with reports of Mr. Perez' non compliance, particularly given Mr. Perez's status as a foreman, demonstrate that it was not. Additionally, as a foreman on the job site, Mr. Perez's actions could be imputed to the employer. *Quinlan v. Secretary of Labor*, 812 F.3rd 832 (11th Cir. 2016).

Citation 1, Item 3

Citation 1, Item 3 was for a serious violation of 29 CFR § 1926.454(a) that provides:

The employer shall have each employee who performs work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards...

MOSH argues that the employer violated the standard because it failed to have a qualified person train the employees on the mast type of scaffold being used on the job site. The employer argues that it did train the employees and while the training was not specific to a mast scaffold, the hazards are the same for most types of scaffold.

The Employer cites to evidence in the record that it did provide fall protection training to Mr. Perez and Mr. Contreras (MOSH Ex. 13; MOSH Ex. 15; Empl. Ex. 2; Empl. Ex. 7). In May of 2014, Mr. Perez was administered an examination to test his knowledge of the safety

requirements associated with scaffolding. (Empl. Ex. 2) Unfortunately, the examination was in Spanish so the undersigned is not able to determine the precise questions that Mr. Perez was asked, however, the undersigned accepts the Employer's representation that Mr. Perez answered all of the questions correctly.

The United States Court of Appeals for the District of Columbia has held that an employer's obligation is not just to provide safety training but to make sure the employees understand it. *Millard Refrigerated Services, Inc. v. Secretary of Labor*, 718 F.3d 892 (D.C. Cir 2013). The evidence in this case indicates that while the Employer did provide training on the hazards associated with scaffolding but it was not sufficient because did not resonate with the employees. The employer has acknowledged that failing to utilize appropriate fall protection is one of the most serious safety hazards. On three separate occasions after taking the scaffolding examination, Mr. Perez was cited for not utilizing fall protection. (Employer Ex. 4). On one occasion (March 2016), he was on a mast scaffold. Moreover, other contractors even reported to the Employer that Mr. Perez was not utilizing fall protection. It seems clear that Mr. Perez did not have a meaningful understanding of the safety training that had been provided to him by the Employer.

Penalties

In addition to requesting that the Deputy Commissioner vacate the citations, the Employer has also requested that the Deputy Commissioner use his discretion to modify the penalties. The Employer does not take issue with MOSH's methodology in calculating the penalties. The Deputy Commissioner finds that the factors considered by MOSH when calculating the penalties was appropriate and affirms the penalties.

ORDER

For the foregoing reasons, the Deputy Commissioner of Labor and Industry on this 21st day of November 2019, hereby ORDERS:

Citation 1, Item 1 alleging a serious violation of 29 CFR §1926.451(f)(3) with a proposed penalty of \$2,575.00 is AFFIRMED;

Citation 1, Item 2 alleging a serious violation of 29 CFR §1926.451(g)(1)(vii) with a proposed penalty of \$2,575.00 is AFFIRMED;

Citation 1, Item 3 alleging a serious violation of 29 CFR §1926.454(a) with a proposed penalty of \$2,575.00 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.



Steven S. Lakin
Deputy Commissioner of Labor and Industry

