IN THE MATTER OF	*	**BEFORE THE**
	*	
WILLIAMS STEEL ERECTION	*	**COMMISSIONER OF LABOR**
	*	
COMPANY, INC.	*	**MOSH CASE NO.A8711-016-97**
	*	
	*	**OAH CASE NO. 97-DLR-MOSH-41**
	*	**024625**
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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 a citation to Williams Steel Erection Company, Inc. ("Williams Steel" or Employer"), alleging certain violations. A hearing was held at which the parties stipulated to the facts and evidence, presented no witnesses, and filed post-hearing briefs. Thereafter, Bruce T. Cooper, Hearing Examiner, issued a Proposed Decision recommending dismissal of the citation.

Thereafter, by Order dated September 25, 1998, pursuant to Labor and Employment Article, § 5-214(e), Annotated Code of Maryland, the Commissioner of Labor and Industry ("Commissioner") ordered review. On September 29, 1998, the Employer filed a Petition for Partial Review. On June 8, 1998, the Commissioner held the 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, the Commissioner has decided to reverse the hearing examiner and affirm the citation as a serious violation.

BACKGROUND

An inspection was conducted at a construction site of a three tiered skeleton steel structure. FF2. The photographs of the construction site reflect that the metal decking was complete. MOSH Ex. 9 at 1. The Employer was the steel erection subcontractor on the site with the responsibility for installing the metal decking and the structural steel erection. FF3. The MOSH Inspector observed two employees on the first level of the structure, at the edge of the metal decking, 10 ½ feet above the lower level. FF5. Pursuant to instructions from their foreman, the employees were on the deck to retrieve materials to use as barriers for the elevator shafts. FF6. The employees were not wearing fall protection and guardrails and nets had not been installed. FF7. MOSH Inspector also observed an unguarded floor hole with the dimensions of 8 feet by 10 feet, 10 ½ feet above the lower level that was used by the employees to access the first tier. FF8. MOSH cited the Employer for two serious violations, 29 CFR 1926.501(b)(1),[1] and 29 CFR 1926.501(b)(4)(i).[2] The Hearing Examiner found that MOSH satisfied all criteria for a violation of Section 1926.501(b)(1), including that the standard was applicable, but dismissed the citation on the grounds that MOSH failed to show that employee misconduct was reasonably foreseeable. The Hearing Examiner also dismissed the citation under Section 1926.501(b)(4)(i), concluding that the cited standard did not apply.

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[1] 1926.501(b)(1) provides that "[e]ach employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personnel fall arrest system."

[2] 1926.501(b)(4)(i) provides that "[e]ach employee on walking/working surfaces shall be protected from falling through holes (including skylights) more that 6 feet (1.8m) above lower levels, by personal fall arrest systems, covers, or guardrails systems erected around such holes."

DISCUSSION

I. 29 CFR 1926.501(b)(1) – Subpart M

The fall protection requirements for construction worksites are set forth in 29 C.F.R. 1926.500-503 which comprise Subpart M of Part 1926. Subpart M, subject to certain exceptions including steel erection work, sets forth the requirements and criteria for "fall protection in construction workplaces." 29 CFR 1926.500(a)(1). The Hearing Examiner found that the construction of barriers for elevator shafts being performed by employees in this case does not constitute steel erection work, and therefore, that the cited standard applies. The Employer excepts, arguing that the citation under Section 1926.501(b)(1) should be dismissed on the grounds that the employees were performing steel erection work, that the fall protection standards for steel erection are exclusively contained in 29 C.F.R. 1926.750, Subpart R, and that Section 1926.501(b)(1) therefore does not apply. The Employer also contends that because there is no definition of what constitutes steel erection, it would be a denial of due process to apply any standard other than the steel erection standard. The Employer agrees with the Hearing Examiner that MOSH failed to establish that employee misconduct was foreseeable or preventable. MOSH urges reversal of the Hearing Examiner's finding with respect to the burden of proof regarding employee misconduct.

The plain language of the steel erection standard, referred to as Subpart R, states that it applies to "skeleton steel construction." *See* 29 C.F.R. 1926.750. Applying the plain language of the standard to the facts of this case, the retrieval of materials from a completed metal deck for use as barriers for an elevator shaft is not "skeletal steel construction." *See Sec of Labor v. Kiewit Western Co.*, 16 O.S.H.C. (BNA) 1689, 1693 (1994) (starting point for interpreting applicability of standard is plain text of standard). Unlike metal decking which is a basic skeletal

steel component, the retrieval of materials for use as barriers for the elevator shaft cannot reasonably be considered a fundamental steel component of the building.

This interpretation is consistent with the Federal Occupational Safety and Health Administration's explanation of activities that constitute "steel erection." (hereinafter "Stanley Memorandum"). The Stanley Memorandum states that the term "steel erection activities" means:

> [T]he movement and erection of skeleton steel members (structural steel) in or on buildings or non-building structures. It includes the initial connecting of steel, employees moving point-to-point, installing metal flooring or roof decking, welding, bolting, and similar activities.

The Stanley Memorandum further provides that steel erection does not include:

> [T]he erection of steel members such as lintels, stairs, railings, curtainwalls, windows, architectural metalwork, column covers, catwalks, and similar non-skeletal items or the placement of reinforcing rods in concrete structures.

The Hearing Examiner properly found that the retrieval of guards for the elevator is analogous to non-skeletal items that are not included in the Stanley Memorandum definition of "steel erection activities."

On review, the Employer challenges the Hearing Examiner's reliance on the Stanley Memorandum on the grounds that it was never adopted by MOSH. A review of the regulatory history of Subpart M reveals otherwise. At the time that Subpart M was adopted as a final rule, OSHA stated in the Federal Register that the definition for the term "steel erection activities" that OSHA would follow was the previously issued definition of steel erection activities set forth in the Stanley Memorandum. 60 FR 39254 (August 2, 1995). OSHA's notice of final action is clear that "the enforcement policy on fall protection during steel erection is the policy outlined in Deputy Assistant Secretary Stanley's July 10, 1995 memorandum to the Office of Field

Programs." *Id.* MOSH adopted these amendments and revisions to subpart M by incorporation by reference soon after their promulgation. See COMAR .09.12.31Z-1; 23:1 Md. R. 24. There is nothing in the MOSH regulations suggesting that the Stanley Memorandum was to be excluded from the incorporation by reference. Based upon this regulatory history, the Commissioner concludes that MOSH adopted the Stanley Memorandum through its incorporation by reference. See *Nooter Constr.,Co.,* 16 O.S.H.C. (BNA) 1572, 1574 (1994) (case law has established that the legislative history of a standard can assist in determining its meaning).

The Employer additionally argues that the Hearing Examiner's reliance on the Stanley Memorandum is a denial of due process. The Commissioner finds no merit to the Employer's due process claim given that the regulatory history of Subpart M put the Employer on notice that the incorporation by reference of this subpart in Maryland included the Stanley Memorandum definition of steel erection. *See Sec. of Labor v. Southern Nuclear Operating Co. Inc.,* 18 O.S.H.C. (BNA) 1871, 1873 (1999) (standard provides fair notice despite broad nature). Moreover, in its post-hearing brief before the Hearing Examiner, the Employer cited to the Stanley Memorandum. The Employer cannot prevail on a due process claim simply because the Hearing Examiner relied upon the same document to reach a result unfavorable to the Employer.

The Commissioner concludes that Section 500(a)(1) is applicable, and affirms the Hearing Examiner's conclusion that MOSH has met its *prima facie* burden.

The Hearing Examiner nonetheless dismissed the citation on the grounds that MOSH failed to show that the employee's failure to wear fall protection was foreseeable or preventable. The Hearing Examiner's reliance on *L.R. Willson and Sons, Inc. v Occupational Safety and Health Review Commission,* 143 F.3d 1235 (4th Cir. 1998) was misplaced.

The Commissioner has repeatedly held over the years that the employer has the burden to plead and prove employee misconduct as an affirmative defense.[3] Consistent with Section 10-214 of the State Government Article requiring the Office of Administrative Hearings to be bound by an agency's prior adjudication of an issue,[4] the Hearing Examiner erred in failing to adhere to the Commissioner's settled policy that an employer bears the burden of proving the affirmative defense of employee misconduct. Moreover, the Maryland Court of Appeals recently affirmed the Commissioner's position that employee misconduct is an affirmative defense which the employer must plead and prove. *See Commissioner of Labor and Industry v. Cole Roofing*, 368 Md. 459 (2002). Properly assigning the burden of proof to the Employer in this case, the record reveals that the Employer has failed to provide any evidence that it had an established work rule relating to fall protection that was communicated to employees and enforced by the Employer.

Having concluded that MOSH satisfied its burden of proving its *prima facie* elements, and that the Employer has failed to prove employee misconduct, the Commissioner affirms Citation 1, Item 1, for a violation of 1926.501(b)(1).

II. 29 C.F.R. 1926.501(b)(4)(i) – Subpart M

The Hearing Examiner dismissed the citation for failing to protect employees from falling through the opening in the floor, concluding that MOSH failed to prove that Subpart M,

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[3] *See Explosive Experts, Inc.* MOSH Case No. V2246-027-93, slip op. at 3 (1994) (unforeseeable employee misconduct is an affirmative defense which must be proven by the employer); *Flippo Construction Co., Inc.*, MOSH Case No. V2246-047-92, slip op. at 2-3 (March 9, 1993)(same); *Cranford Contractors, Inc.*, MOSH Case No. C3811-022-92, slip op. at 4-5 (February 26, 1993)(same).

[4] Although at the time of the proposed decision the Fourth Circuit Court of Appeals had held that OSHA bears the burden of proving employee misconduct (*see L. R. Willson & Sons, Inc.*), Maryland courts are not bound by the decisions of the Fourth Circuit. *See Penhollow v. Cecil County*, 116 Md. App. 265, 281 (1997).

1926.501(b)(4)(i), is applicable. Instead, the Hearing Examiner found the requirements of Subpart X, Stairways and Ladders apply. On review, MOSH argues that the Hearing Examiner's decision should be reversed because the employees were not working on the ladder, and therefore, Subpart M is the standard that applies.

Subpart M states that it establishes fall protection for construction workplaces except that fall protection requirements for employees "working on stairways and ladders are provided for in Subpart X." 29 C.F.R. 1926.500(a)(1). Subpart X in turn states that it applies to all stairways and ladders. 29 C.F.R. 1926.1050(a). Applying the plain language of the cited standard to the facts of this case, the employees were working on the metal decking that contained an 8x10 foot opening. Subpart M defines hole as a "gap or void of 2 inches . . . in a floor, roof, or other walking/working surface." The metal decking is a walking/working surface. There is no evidence in the record that the employees were "working on" the ladder or stairway at the time the citations were issued. To the contrary, the stipulated facts establish that the ladder was simply used by employees to "ascend and descend" from the first floor, and that the employees were "working on the first level of the structure." FF8 & FF5. Therefore, the Commissioner concludes that the cited standard in Subpart M is applicable because the hazard, which the standard addresses, is falling through a hole in a walking/working surface.

Turning to the remaining *prima facie* elements, the photographic evidence demonstrates that the employees were exposed to the hazard of a fall through the hole while working on the first floor tier of the structure where the hole was located, more than 6 feet above the lower level. The employees were not wearing fall protection and no guardrails or nets were installed. *See* MOSH Ex. 9. Since the Employer's foreman was on the worksite and the hole was in plain view, the Employer had knowledge of the violate condition. *Kokosing Constru. Co*., 17

O.S.H.C. (BNA) 1869 (1996). On these stipulated facts, the Commissioner finds that MOSH established the *prima facie* elements of the Section 500(b)(4)(i) violation. The Commissioner concludes that the Employer violated Section 500(b)(4)(i) as alleged.

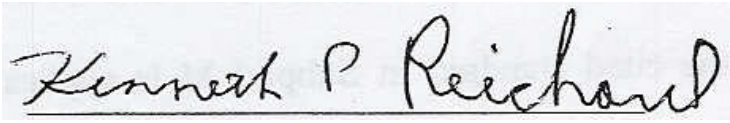
ORDER

For the foregoing reasons, the Commissioner of Labor and Industry, on the 18th day of November, 2002, hereby ORDERS:

1. Citation 1, Item 1, alleging a serious violation of 29 CFR 1926.500(b)(1) with a proposed penalty of $1375.00 be AFFIRMED.

2. Citation 1, Item 2, alleging a serious violation of 29 CFR 1926.500(b)(4)(i) with a proposed penalty of $1375.00 be AFFIRMED.

3. 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.



Kenneth P. Reichard
Commissioner of Labor and Industry