

IN THE MATTER OF

BRAGUNIER MASONRY

CONTRACTORS, INC.

BEFORE THE

COMMISSIONER OF LABOR

AND INDUSTRY

MOSH CASE NO. U2506-028-08;
OAH CASE NO. DLR-MOSH-41-
08-19272

* * * * *

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 accident on January 5, 2008 involving an employee of Bragunier Masonry Contractors, Inc. ("Employer"), MOSH Inspector Lee Durfee conducted an inspection of the job site. On March 14, 2008, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH") issued one repeat serious citation to the Employer, alleging a violation of 29 C.F.R. § 1926.454(b). A hearing was held on September 3, 2008, at which the parties introduced evidence, presented witnesses, and made arguments. Thereafter, Louis N. Hurwitz, Administrative Law Judge sitting as the Hearing Examiner ("HE"), issued a Proposed Decision recommending that the citation 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), *Annotated Code of*

Maryland, ordered review. Both parties submitted memoranda to the Commissioner pursuant to a briefing schedule. 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.

FINDINGS OF FACT

The Employer was a subcontractor for the masonry and brick work on the Pangborn Elementary School job site in Hagerstown, Maryland. The Employer utilizes Firstline as a safety advisory firm. On January 5, 2008, Paul Chaney, employed by the Employer, was involved in an on-the-job accident wherein he fell approximately 20 feet from a scaffold to a surface of compacted soil. The scaffold was fabricated frame scaffolding, which Mr. Chaney was in the process of disassembling when he fell. MOSH Inspector Lee Durfree conducted an inspection of the accident location on January 7, 2008. By that time, the scaffolding had been disassembled. Proposed Decision, at 4-5. As part of the investigation, Mr. Durfree questioned the foreman about the accident and about the training received by Mr. Chaney. Tr. 69-70. Pursuant to MOSH's request, on January 14, 15 and 16, 2008, Firstline provided MOSH with the Employer's scaffolding and other training records. Proposed Decision, at 5.

On June 1, 2006, MOSH issued the Employer a citation (#C687207006) arising out of a MOSH inspection conducted on April 19, 2006. The citation, which became final on December 12, 2006, was under the same standard for which the Employer was cited in this case (29 C.F.R. § 1926.454(b)) and for a substantially similar violation (having an employee disassembling a fabricated frame scaffold without being trained in safe work practices in disassembly, moving, operating, repairing, maintaining or

inspecting scaffold systems). MOSH Exhibit 11; Tr. 89-94. Based upon this previous citation and the severity of the hazard created, MOSH determined that the citation at issue must be classified as a repeat serious citation. MOSH Exhibit 11; Tr. 78-79. The Employer has not contested either the "repeat" or the "serious" classification of the citation, but has asked for a review of the HE's determination that MOSH proved by a preponderance of the evidence that the employee did not receive the required training. (Employer's memorandum).

DISCUSSION

At issue in this case is whether the employee received the appropriate training, as required by 29 C.F.R. § 1926.454(b). Specifically, 29 C.F.R. § 1926.454(b) provides that an employer must

...have each employee, who is involved in erecting, disassembling, moving, operating, repairing, maintaining, or inspecting scaffold trained by a competent person to recognize any hazards associated with the work in question.

To uphold the citation, the Commissioner must find that MOSH has demonstrated by a preponderance of the evidence that: (1) the standard at issue applies; (2) the Employer failed to comply with the standard; (3) employees were exposed to the violative conditions; and (4) the Employer knew or with the exercise of reasonable diligence should have known of the condition. *See, e.g., Astra Pharmaceutical Products, Inc.*, 9 O.S.H. Cas. (BNA) 2126 (R.C. 1981), *aff'd in part* 681 F.2d 69 (1st Cir. 1982). The Employer argues that MOSH has failed to demonstrate by a preponderance of the evidence that the employee did not receive the required training. MOSH argues that the preponderance of the evidence presented before the HE demonstrated that the employee did not receive the training required by 29 C.F.R. § 1926.454(b). The Commissioner

finds that the HE correctly found that preponderance of the evidence presented supports MOSH's determination that the employee did not receive the training required by 29 C.F.R. § 1926.454(b).

The Employer asserted in its memorandum to the Commissioner that MOSH failed to uphold its burden of proving lack of training and that the evidence presented by MOSH at the hearing demonstrated such training. Specifically, the Employer pointed to the employee's signature on a few toolbox safety sessions and referenced, in general, sworn testimony at the hearing. Employer's Memorandum at 2-3. The documents referenced by the Employer were those submitted into evidence by MOSH. The MOSH Inspector testified that he recognized that these documents demonstrated that the employee took part in some safety training. Tr. 64. However, the MOSH Inspector also testified that, after he and his supervisor carefully reviewed the documents, they came to the conclusion that the referenced training sessions did not satisfy the requirements of Section 454(b) because the sessions were not directly related to the disassembling of scaffolding. Tr. 63-65.

Regarding the testimony presented relating to training, the employee testified that he received unspecified daily on-the-job training. Tr. 121-125; Proposed Decision, at 8. The Employer did not present any direct testimony that the employee received training by a competent person regarding erecting or disassembling scaffolding as required by the standard. Tr. 69. On the contrary, MOSH presented testimony that the foreman on the job site, Mr. House, who was present at many of the toolbox sessions attended by the employee, specifically told the MOSH Inspector that he did not know if the employee had received training regarding scaffolding. Tr. 52-53, 69. In fact, there was credible

testimony that no one from Bragunier Masonry ever told the MOSH Inspector that Mr. Chaney was trained but that there just wasn't any paperwork to document the training. Tr. 69. The MOSH Inspector testified that, after receiving some general training records, he repeatedly asked both the Employer and Firstline for documentation on training more specific to scaffolding but received nothing further pertaining to safety in scaffolding. Tr. 60-63. The HE weighed the testimony presented regarding training and found that the preponderance of the evidence supported MOSH's conclusion that the training received by the employee did not satisfy the requirements of 29 C.F.R. § 1926.454(d). Proposed Decision, at 8.

In order to satisfy the "preponderance of the evidence standard," MOSH must show that it is more likely than not that the employee did not receive the training required by the Standard.¹ The Commissioner finds that MOSH has met this burden. The preponderance of the evidence presented before the HE supports the conclusion that it is more likely than not that the employee did not receive the required training. The Employer has not contested the classification of this citation as a serious repeat citation. Nor has the Employer contested the penalty amount.²

¹ According to the Maryland Pattern Jury Instructions as follows, "[t]o prove by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces in your minds a belief that it is more likely true than not true." MPJI 1:7 (3d ed. 2000).

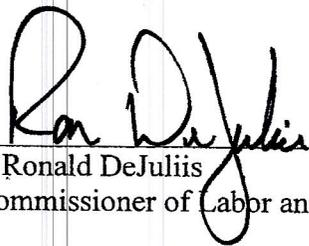
² MOSH acknowledged at the hearing that it had erred in calculating the proposed penalty by scoring the gravity of the violation as an eight rather than a seven. Accordingly, MOSH indicated that its proposed penalty should be \$6,600 rather than \$7,400 as originally assessed.

Therefore on the 27th day of July, 2009, the Commissioner hereby

ORDERS:

1. Citation 1, Item 1 for a repeat serious violation of 29 C.F.R. ss. 1926.454(d), with a proposed penalty of \$6,600 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.



J. Ronald DeJuliis
Commissioner of Labor and Industry