

IN THE MATTER OF

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BEFORE THE

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COMMISSIONER OF LABOR

R.E. MICHEL COMPANY

*

AND INDUSTRY

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MOSH CASE NO. K9319-002-05; OAH
CASE NO. DLR-MOSH-41-
05-14323

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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 accident on August 26, 2004 involving an employee of R.E. Michel Co. ("Employer"), MOSH Compliance Officer Christopher L. Miller conducted an inspection of the job site. On February 8, 2005, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH") issued two citations to the Employer, alleging various violations. A hearing was held on September 29, 2005, at which the parties introduced evidence, presented witnesses, and made arguments. Thereafter, Thomas G. Welshko, Administrative Law Judge sitting as the Hearing Examiner ("HE"), issued a Proposed Decision recommending that one of the two citations 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. On May 8, 2006, the Commissioner of Labor and Industry¹ held a review hearing and heard arguments from the parties. 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 in part and VACATED in part.

FINDINGS OF FACT

The Employer is a wholesale distributor of heating and air conditioning equipment, parts, and supplies. Tr. 143; Rev. Tr. 4-5.² The Employer operates a 340,000 square foot warehouse in Glen Burnie, Maryland. The Employer uses this warehouse as a collection point for equipment, parts and supplies before shipping those items to its customers. Inside the warehouse, the Employer uses forklifts to load pallets containing products for delivery onto its trucks. Tr. 146-52. As of August 26, 2004, the date of the accident described below, the Employer had a written safety program and provided safety training to employees on a regular basis. MOSH Exhibit 5; Rev. Tr. 5-6. At that time, the Employer's work rules did not require forklift operators to wear seat belts while performing forklift operations. Tr. 228, 256.

On August 26, 2004, Patrick Craig, a warehouseman and forklift operator, was loading an outbound shipment into a straight truck from a loading dock of the Employer's warehouse. Tr. 32; MOSH Exhibits 4 and 5. The truck's handbrake was inoperable and the truck was not secured with a wheel chock. Tr. 35; MOSH Exhibit 5; Rev. Tr. 7-8. Mr. Craig was not wearing a seatbelt, although the forklift he was operating did have a seat belt in it. MOSH Exhibit 5.

¹ At the time of the hearing, Robert L. Lawson was serving as the Commissioner of Labor and Industry and presided over the hearing. J. Ronald DeJulius, the current Commissioner of Labor and Industry, has reviewed the record thoroughly and issues this decision.

² Herein, the transcript of the September 29, 2005 hearing will be referred to as "Tr." and the transcript of the May 8, 2006 review hearing before the Commissioner as "Rev. Tr."

While Mr. Craig was loading a pallet onto the truck, the truck began moving forward, which caused the dock bridge to fail and to fall down after the front wheels of the forklift had crossed into the truck bed. *Id.* The rear wheels of the forklift remained on the dock. *Id.* When Mr. Craig noticed that the forklift was falling, he tried to stop it but could not. *Id.* The rear wheels fell off the dock, which in turn accelerated the forward movement of the truck. *Id.* The front wheels of the forklift slipped on the tailgate of the truck, and the forklift slammed to the ground. *Id.* Mr. Craig was ejected through the left-side rollover protection opening. *Id.* He was rendered briefly unconscious by the impact and suffered a two-inch forehead laceration when he struck the ground, along with a contusion on the basal skull area and other minor abrasions and contusions. MOSH Exhibit 5; Rev. Tr. 7-8.

Following the accident, on August 27, 2004, MOSH Compliance Officer Christopher L. Miller conducted an inspection of the job site. MOSH Exhibit 5. Pursuant to that inspection, on February 8, 2005, MOSH issued two citations against the Employer, each of which was appealed. MOSH Exhibit 1. The HE vacated Citation 1, Item 1 and the accompanying penalties and affirmed Citation 2, Item 1. On review, the Employer objects to Citation 2, Item 1.

DISCUSSION

Citation 2, Item 1

MOSH charged the Employer with a serious violation of 29 CFR § 1910.132(a), which requires that

[p]rotective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation, or physical contact.

MOSH Exhibit 1. On review before the Commissioner, the Employer did not contest the HE's finding that the employee at issue was not wearing a seatbelt; and it is uncontested that the Employer's work rules at that time did not require forklift operators to wear seatbelts. Tr. 228, 256; Rev. Tr. 5-6, 18-19.

In order 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 condition; 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 Commissioner finds that, while the Employer should have been on notice of the hazard created by not requiring employees to wear seat belts, MOSH has failed to demonstrate that the cited standard applies in this case. The Review Commission has applied the cited standard, 29 CFR § 1910.132(a), to the use of seatbelts in the logging industry. *See Ed Cheff d/b/a/ Ed Cheff Logging*, 9 O.S.H. Cas. (BNA) 1883, 1888 (1981). However, more recent publications from OSHA have created legitimate confusion regarding its application to the use of seatbelts while operating forklifts. *See Directive Number CPL 2-1.28*, issued August 11, 2000.³ OSHA has indicated that it no longer interprets 29 CFR § 1910.132(a) to apply to the use of seat belts on lifting equipment, but instead cites such situations under the General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act. While the State of Maryland operates under an OSHA-approved State plan and is not directly bound by the OSHA interpretations, the

³ The Commissioner is taking judicial notice of Directive Number CPL 2-1.28, issued August 11, 2000. Judicial notice is appropriate where a fact is "capable of immediate and certain verification by resort to sources whose accuracy is beyond dispute." *Faya v. Almaraz*, 329 Md. 436, 447 (1993).

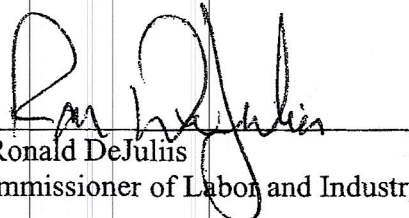
Commissioner finds that MOSH has failed to demonstrate that the Standard at issue applies in this case. Accordingly, there is no need to address the issues of knowledge or compliance.

ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on the 16th day of September, 2008, hereby **ORDERS**:

1. Citation 1, Item 1 for a serious violation of Md. Code Ann., Lab. & Empl. § 5-104(a) with a proposed penalty of \$3,850.00 is **VACATED**.
2. Citation 1, Item 2 for a serious violation of 29 CFR § 1910.132(a) and its accompanying penalty of \$2,850.00 is **VACATED**.

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 DeJulius
Commissioner of Labor and Industry