

**IN THE MATTER OF**

\*      **BEFORE THE**

\*      **COMMISSIONER OF LABOR**

**AND INDUSTRY**

**AMERICAN PAVING CORPORATION \***

\*      **MOSH CASE NO. V6519-025-09;**

**OAH CASE NO. DLR-MOSH-41-**

**09-12617**

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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 a job site inspection on January 7, 2009, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry (“MOSH”) issued citations to American Paving Corporation. (“Employer”), alleging various violations. A hearing was held on July 8, 2009, at which the parties introduced evidence, presented witnesses, and made arguments. Thereafter, Laurie Bennett, Administrative Law Judge sitting as the Hearing Examiner (“HE”), issued a Proposed Decision recommending that one of the four citations be dismissed and the remaining three citations be affirmed.<sup>1</sup>

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 February 2, 2010, the Commissioner of Labor and

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<sup>1</sup> In addition, the Employer stipulated to Citation 1, Item 3 for a violation of § 5-104, *Labor and Employment Article, Annotated Code of Maryland* with a penalty of \$1050.00. Administrative Law Judge Bennett issued an initial proposed decision on September 29, 2009 which did not include this citation, and then at the request of the parties issued an amended proposed decision on November 5, 2009 which included the violation of § 5-104.

Industry held a 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, for the reasons set forth below, the HE's recommendations are AFFIRMED in part, and REVERSED in part.

### **FINDINGS OF FACT**

On January 7, 2009, the Employer was working on storm drainage on a State Highway Administration project in Salisbury, Maryland. FF1. On that morning, a MOSH assigned Compliance Officer, Howard Bosworth ("MOSH Inspector" or "Inspector"), conducted a routine safety inspection of the site. During his inspection, the MOSH Inspector observed three of the Employer's employees working in a body of water. FF4. The employees were removing one hundred sandbags which each weighed fifty pounds that the Employer had placed several months prior. *Id.* The employees had formed a human chain from the water onto the land. *Id.* In addition to the employees in the water, there were several employees on the land. MOSH Ex. 4. When a sandbag was located, one employee would pass it to the next with the last employee placing the bag in a front end loader on the shore. *Id.* The Employer had installed a turbidity curtain so the area in which the employees were working was enclosed. FF 9.

### **DISCUSSION**

#### Citation 1, Item 1a

MOSH charged the Employer with a serious violation of 29 CFR §1926.20(b)(2), asserting that "frequent and regular inspections of the job sites , materials, and equipment were not made by a competent person(s) designated by the employer." The Hearing Examiner concluded that because the Employer's "safety man" was in Iraq at the time of

the inspection, and that the supervisor did not inspect the job site prior to the MOSH inspector's arrival, that the Employer violated the cite standard. The Commissioner reverses.

On the morning of the inspection, James Sargent, the field superintendent went to the worksite,<sup>2</sup> instructed the job foreman on the work to be performed, and to keep the employees inside the turbidity curtain. Tr. at 108-09. He then left to attend a job progress meeting with the State Highway Administration. Tr. at. 108. He testified that he was very familiar with the worksite as he had been there to install the turbidity curtain. Tr. at 111. At that time, he had assisted with pumping the worksite area dry and had examined the floor where the employees were working for holes or depressions. *Id.* He also stated that he was experienced with “marine and bulkhead work.” *Id.* He testified that he conducted daily safety inspections although he had not had the opportunity to do so yet on the morning of the inspection. Tr. at 115. Mr. Sargent had the authority to make changes and cease work for a potential safety violation. *Id.* The Commissioner finds that the evidence supports the finding that the Employer made regular inspections of the job site and that Mr. Sargent was a competent person as he was capable of identifying existing hazards with the authority to take prompt measures to eliminate them. Citation 1, Item 1 is dismissed.

#### Citation 1, Item 1b

MOSH cited the Employer with a serious violation of 29 CFR §1926.21(b)(2), which requires that the employer instruct employees in the recognition and avoidance of

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<sup>2</sup> Mr. Sargent was the field supervisor for the project which lasted approximately five months. Tr. at 106.

unsafe conditions. The Hearing Examiner found that there was no evidence to support the Employer's compliance with this requirement. The Commissioner affirms.

While the Employer had a safety program, the foreman at the time of the inspection stated that he was not familiar with the safety standards. Tr. at 68. The MOSH Inspector testified that the foreman, the company president and the field supervisor stated at the time of the inspection that they had not instructed the employees in the hazards of the job. *Id.*

MOSH classified this citation as a serious violation. A violation is serious if there is a substantial probability of death or serious physical harm. §5-809(a), *Labor and Employment Art. Annotated Code of Maryland*. MOSH identified hypothermia, drowning or death as the possible physical harm. MOSH Ex.9. While it is important to carefully examine the threat of drowning when work is to be performed in water, under the facts of this case, the HE correctly concluded that there was no drowning hazard. The work was being performed in water estimated to be three feet deep with no current due to the turbidity curtain. The employees were working in a human chain from the water to the land. Should one of the employees have slipped and fallen into the water, there were multiple employees within arms length to rescue that employee. With no threat of drowning, the facts do not support a hazard of death. In terms of hypothermia, while the employees were working in the water in the cold rain, in this case, this hazard does not rise to the level of serious physical harm. Given what the possible physical harm is in this case, the Commissioner finds the more appropriate classification of this citation would be

other than serious. Therefore, the Commissioner affirms a violation of Citation 1, Item 2 but reclassifies the violation to other than serious.<sup>3</sup>

Citation 1, Item 2a

MOSH cited Employer with an other than serious violation of 29 CFR §1926.106(a) for failure to have employees wear U.S. Coast Guard approved life jackets or buoyant work vests where there is a danger of drowning. The Hearing Examiner dismissed the citation concluding that there was no drowning hazard. Having reviewed the facts to support this determination, the Commissioner agrees and Citation 1, Item 2a is dismissed.

Citation 1, Item 2b and Citation 1, Item 2c

The Employer was cited for failure to provide a ring buoy for emergency rescue operations under 29 CFR §1926.106(c) and 29 CFR §1926.106(d) for failure to provide a lifesaving skiff. The Hearing Examiner affirmed both citations. On review, the Employer challenges the need for a ring buoy and a skiff, if there is no danger of drowning.

Neither Sections 106(c) nor Section 106(d) explicitly requires a finding of a danger of drowning. Rather, the clear intent of these provisions is to provide for the prompt rescue of an employee in need in the water. In this case, there were three employees working in the water close to the shore. The area where the employees were working was enclosed by a turbidity curtain. MOSH Ex. 4 at A-D. As discussed above, one employee was approximately 8 feet from the shoreline and the other employees were

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<sup>3</sup> In reclassifying this citation to other than serious, there is no penalty pursuant to MOSH policy on other than serious violations which provides that there is no penalty in cases with less than ten citations.

arms length away moving toward the shoreline. There were several employees on the shoreline. For the employees in the water, the photographic evidence shows that the water was up to the waist of one employee and up to the thighs for the other employees.

*Id.* The HE found that the water was about three feet deep. HE Decision at 9. Should one of the employees fall into the water and need to be rescued, another employee in the water or one of the 10 employees on the shoreline could drag that employee to safety faster than the time it would take to find a ring buoy (which can be stored up to 200 feet away) or mobilize a skiff for a rescue. Given the close proximity of the work to the shoreline, coupled with the fact that there is a human chain from the employee furthest out in the water to the shoreline and the shallow depth of the water, the Commissioner finds that ring buoys and a lifesaving skiff were not required under these facts. The Commissioner dismisses Citation 1, Items 2b and 2c.

For the foregoing reasons, the Commissioner of Labor and Industry on the \_\_\_\_ day of September, 2011, hereby **ORDERS**:

1. Citation 1, Item 1a for a serious violation of 29 CFR §1926.20(b)(2), is **DISMISSED**.
2. Citation 1, Item 1b for an other than serious violation of 29 CFR §1926.21(b)(2) is **AFFIRMED**.
3. Citation 1, Item 2a for a serious violation of 29 CFR §1926.106(a) is **DISMISSED**.
4. Citation 1, Item 2b for a serious violation of 29 CFR §1926.106(c) is **DISMISSED**.

5. Citation 1, Item 2c for a serious violation of 29 CFR §1926.106(d) is  
**DISMISSED.**

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.

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J. Ronald DeJuliis  
Commissioner of Labor and Industry