

IN THE MATTER OF

* BEFORE THE DEPUTY
* COMMISSIONER OF LABOR AND
* INDUSTRY

EMAR BANDEL

* HEARING DETERMINATION
* No. 00-01
* MOSH CASE No. H1442-034-98
* OAH CASE No. 98-DLR-MOSH-41-
* 004804

* * * * *

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 Emar Bandel (“Employer”), alleging violations of various safety standards. Following an evidentiary hearing, Hearing Examiner T. Austin Murphy issued a decision affirming the citation.

The Employer filed a request for review. The Deputy Commissioner of Labor and Industry (“Deputy Commissioner”) held a hearing, and heard argument from the parties. Based upon a review of the entire record, consideration of relevant law, and the parties’ arguments, the Deputy Commissioner affirms the Hearing Examiner’s disposition of this matter.

FINDINGS OF FACT

The Hearing Examiner's findings of fact are supported by the record, and, as such, are affirmed.

CONCLUSIONS OF LAW

The only issue on review is whether the individuals working at the site of the excavation were employees of the Employer or independent contractors. Mr. Bandel contends that they were independent contractors, and accordingly, that he is not responsible for the violative conditions. On review, Mr. Bandel makes several arguments in support of this position.

Mr. Bandel argues that he is not an employer, and that he therefore has no responsibility under the MOSH law. Mr. Bandel also asserts that he often provides equipment to the employees of large contractors performing work on his property, and that the provision of such equipment does not make the contractor's employees his employees. Under this principle, Mr. Bandel argues that his providing a rented back hoe and wood for shoring did not transform Mr. Green and Mr. Berger, the two individuals performing the work on his property, into his employees. Finally, Mr. Bandel points to the two sworn affidavits of Mr. Green and Mr. Berger which state that these individuals consider themselves independent contractors.

Mr. Bandel is in the business of managing rental property. T.at 55; 79. Inherent to the management of the business of rental properties is the maintenance of that property.

When a person is engaged in the business of managing property, and the related work of maintaining that property, and that person hires an individual to perform the maintenance work, under certain circumstances, that the person may be an employer under the MOSH law. The employment status of the individuals performing the type of maintenance work at issue in this citation, trenching, must be evaluated on a “case by case basis” by considering the “economic realities of the situation and the remedial purposes” of the MOSH law. Case law has established the “economic realities test” to apply in making this determination. *See Del-Mont Construc. Co.*, 9 O.S.H.C. 1703, 1706 (1981).¹ Contrary to Mr. Bandel’s contention, the issue of control of the equipment is but one factor to consider in evaluating the “economic realities test.” *Id.*

As the Hearing Examiner properly concluded, Mr. Bandel established the compensation of Mr. Green, provided the backhoe and shoring, visited the work site, and ordered Mr. Green and Mr. Berger to place caution tape around the ditch. Findings of Fact 8,10, and 11; Hearing Examiner’s Decision at 8. As to the sworn affidavits of Mr. Green and Mr. Berger regarding their employment status, there is conflicting evidence. Although Mr. Berger states in his affidavit that he believes that he is a independent

¹ The “economic realities test” considers the following factors: (1) whom the employee considers to be his or her employer; (2) who pays the employee’s wages; (3) who is responsible for controlling the employee’s activities; (4) who has the power, as opposed to the responsibility, to control the employee; and (5) who has the power to fire the employee or to modify the employee’s employment conditions. *See Del-Mont Constuc. Co.*, 9 O.S.H.C. 1703, 1706 (1981); *see also Griffin & Brand of McAllen, Inc.*, 6 O.S.H.C. 1702 (1978).

Contractor, there is also testimony from the day of the inspection in which Mr. Berger, when asked by the MOSH Inspector who his employer was, replied “Mr. Bandel.” T. at 16. The Deputy Commissioner concludes that the evidence on this particular factor is not conclusive with respect to Mr. Berger. However, the Deputy Commissioner finds that the Hearing Examiner properly applied the “economic realities test,” and that the weight of the evidence supports the conclusion that Mr. Bandel was an employer under the MOSH law.

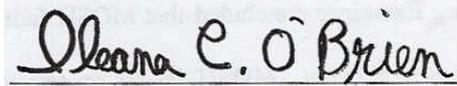
With regard to the Employer’s contention that it is inappropriate to issue this citation because the Employer did not have any knowledge of the law’s requirements, “ignorance of the law does not excuse non-compliance.” *See Allen v. Tittsworth*, 269 Md. 677, 686, 309 A.2d 476, 481 (1973) (presumption that every person knows the law). Finally, the Deputy Commissioner affirms the Hearing Examiner’s conclusion that MOSH met its prima facie case as to this citation.

ORDER

The Deputy Commissioner of Labor and Industry hereby ORDERS, this 2nd day of February, 2000 that:

1. Citation 1, Item 1 alleging a SERIOUS violation of MOSH Standard 29 C.F.R. 1926.651(j)(2), is AFFIRMED, together with a penalty of \$500.00;
2. Citation 1, Item 2 alleging a SERIOUS violation of MOSH Standard 29 C.F.R. 1926.652(a)(1), is AFFIRMED together with a penalty of \$1,000.00;

3. This Order becomes final 15 days after its issuance. Judicial review may be requested by filing a petition for judicial review in the appropriate circuit Court. *See Labor and Employment Article, § 5-215, Annotated Code of Maryland, and Maryland Rules, Title 7, Chapter 200.*

A handwritten signature in black ink on a light-colored background. The signature reads "Ileana C. O'Brien" in a cursive script.

Ileana C. O'Brien
Deputy Commissioner of Labor
And Industry