

IN THE MATTER OF

**OWINGS MILLS BAKING
COMPANY, INC.**

* * * * *

* **BEFORE THE DEPUTY COMMISSIONER
OF LABOR AND INDUSTRY**

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* **HEARING DETERMINATION NO. 99-11
MOSH CASE. NO. C119200299
OAH NO. DLR-MOSH-41-990000013**

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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 Occupational Safety and Health Unit of the Division of Labor and Industry (“MOSH”) issued a citation to the Owing Mill Baking Company, Inc. (“the Employer”) alleging the Employer failed to completely enclose certain bakery machinery in violation of MOSH safety standards. The Employer contested the citation. Following an evidentiary hearing, Hearing Examiner Michael J. Wallace issued a Proposed Decision dismissing the citation. The Deputy Commissioner of Labor and Industry ordered review of the Hearing Examiner’s decision. Based upon a review of the entire record and consideration of the relevant law, the Deputy Commissioner affirms the Hearing Examiner’s findings of fact and conclusion that the citation should be dismissed.¹

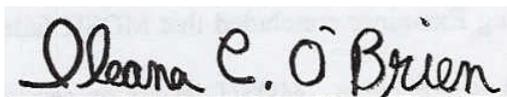
¹ As found by the Hearing Examiner, it is well settled that in order to prove the violation of a specific standard, MOSH must establish 1) the applicability of the standard, 2) the existence of noncomplying conditions, 3) employee exposure, and 4) that the employer knew or with the exercise of reasonable diligence could have known of the violative conduct. *Dun-Par Engineered Form Co.*, 12 OSHC 1962, 1965 (1986). The last element of MOSH’s proof, employer knowledge, is the major issue in this case. Having carefully reviewed the record, the Deputy Commissioner agrees with the Hearing Examiner’s finding that “it was not determined nor established by MOSH that the guard was in fact off of the machine and could have been observed by anyone prior to the time that the employee went to that specific area and was injured.” See Proposed Decision at 11. The Deputy Commissioner adopts the Hearing Examiner’s conclusion that MOSH failed to establish, by a preponderance of the evidence, that the Employer had actual or constructive knowledge of the hazardous condition and that the citation should therefore be dismissed. See *L.M. Sessler Excavating & Wrecking, Inc.*, 11 OSHC

ORDER

The Deputy Commissioner of Labor and Industry hereby ORDERS, this 15th day of November, 1999, that:

1. Citation 1, Item 1, alleging a SERIOUS violation of MOSH Standard 29 C.F.R. 1910.263(c)(3), is DISMISSED;

2. 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.*



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

2007, 2008 (1984)(employer knowledge not established and citation vacated where there was no evidence when the employee subject to a fall hazard removed his safety belt or that the supervisor failed to check whether the employee was wearing his belt).

With respect to the issue of unforeseeable and unpredictable employee misconduct, the Deputy Commissioner adheres to the analysis set forth in *Cole Roofing Co., Inc.*, MOSH No. A5478-006-98, OAH. No. 98-DLR-MOSH-41-006282 (December 4, 1998). In this case, given MOSH's failure to establish a *prima facie* case, the Deputy Commissioner finds it unnecessary to reach or comment on the Hearing Examiner's discussion concerning employee misconduct.