IN THE MATTER OF	*	**BEFORE THE**
WHITING-TURNER CONTRACTING COMPANY	* *	**COMMISSIONER OF LABOR AND INDUSTRY**
	*	**MOSH CASE NO. U2993-018-06**
		OAH CASE NO. 41-06-24727
	*	

* * * * * * * * * * * *

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*. Between December 15, 2005 and January 18, 2006, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH") conducted an investigation of a Whiting Turner Contracting Co. ("Whiting Turner" or "Employer") job site at the Thurgood Marshall Baltimore-Washington International Airport ("BWI"). At the conclusion of the investigation, MOSH issued citations for violations of 29 C.F.R. §1926.501(b)(1) and 29 C.F.R. §1926.502(d)(8) and (d)(15). Whiting Turner contested the citations and a hearing was held on November 29, 2006 and December 11, 2006, at which the parties introduced evidence, presented witnesses, and made arguments. Thereafter, Judith Jacobson, Administrative Law Judge sitting as the Hearing Examiner ("HE"), issued a Proposed Summary Decision in which she recommended that all three citations be dismissed.

The Commissioner of Labor and Industry ("the Commissioner"), exercising his authority pursuant to Labor and Employment Article, §5-214(e), *Annotated Code of Maryland,* ordered review of the proposed decision as to Citation 2, item 1(a), 29 C.F.R. §1926.502(d)(8) and Citation 2, item 1(b), 29 C.F.R. §1926.502(d)(15) only. On May 22, 2007, the Commissioner 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 recommendation as to Citation 2, item 1(a) is affirmed and the HE's recommendation as to Citation 2, item 1(b) is reversed.

THRESHOLD PROCEDURAL ISSUES

A threshold procedural question raised by MOSH at the review hearing, was whether the HE had the authority to grant the Employer "summary decision." Transcript of Review Hearing, May 22, 2007, p. 5-7 (hereinafter "Tr. III, p. __"). Pursuant to the Administrative Procedure Act ("APA"), *Md. Code Ann., State Gov't*, §§ 10-201 – 226, MOSH delegates its authority to conduct a contested hearing to the Office of Administrative Hearings ("OAH"). As such, the conduct of such hearings is governed by both the MOSH hearing regulations, Code of Maryland Regulations ("COMAR") 09.12.20.13 - .16, and by the Rules of Procedure of the Office of Administrative Hearings, COMAR 28.02.01 - .27.

MOSH's argument was that because the Commissioner delegates his fact finding authority to OAH, when a hearing examiner issues a summary decision without considering all evidence, he or she essentially fails to fulfill this fact finding function. Tr. III, p. 5. While the MOSH regulations do not contain any express prohibition on the issuance of summary or dispositive motions, the MOSH law and other DLLR regulations do lend some support to this argument.[1] It is not necessary, however, to resolve this issue in the case at hand. Regardless of whether HE had the authority to grant the Employer's motion, the HE did conduct a full

[1] The MOSH Act states that "when the Commissioner appoints a hearing examiner to hold a hearing under this section, *the examiner shall prepare a record that includes testimony*." Md. Code Ann., Lab. & Empl., § 5-214. The regulations governing contested cases delegated to OAH by other divisions of the Department of Labor, Licensing and Regulation specifically state that "a motion to dismiss or any other dispositive motion may not be granted…without the concurrence of all parties." *See, e.g.,* COMAR 09.01.03.05. In contrast, the OAH regulations contain specific provisions allowing for a "Motion for Summary Decision," and a "Motion for Judgment." COMAR 28.02.01.12(D) and (E).

evidentiary hearing over two days. She heard the Employer's arguments on what the Employer styled as a Motion to Dismiss at the close of MOSH's case, but chose to hold her ruling on that motion in abeyance until both parties had put forth their entire cases. *See* Transcript of OAH hearing, December 11, 2006, p. 85-86 (hereinafter "Tr. Vol. II, p. __"). Thus, the HE prepared a record that contains testimony, all of which may be reviewed in the Commissioner's discretion, regardless of whether the HE considered all of the evidence in reaching her decision. The Commissioner therefore finds that it is unnecessary to remand this case for further factual findings and that the interests of efficiency are better served by the Commissioner finding all additional facts that are necessary to reach a decision in this case.

FINDINGS OF FACT

The Employer was the contractor on a project to expand an elevated roadway bridge at BWI Airport. FF 1.[2] The elevated roadway bridge was constructed of precast concrete segments that were adhered to each other with epoxy cement. FF 3. Laborers working on the project were charged with setting up, mixing, and applying the epoxy, and keeping it warm. FF 4. The segments were then winched and jacked together by ironworkers. FF 5. The elevated bridge being constructed was approximately 18 feet above the roadway below. Transcript of OAH hearing, November 29, 2006, p. 42 (hereinafter "Tr. Vol. II, p. ___.)

On December 15, 2005, poor weather conditions, including sleet and freezing rain, made it very difficult to perform epoxy work on the concrete segments. FF 7. As such, the job supervisor determined that the open segments should be covered with blankets and left until later. FF 7. Milton Davis was one of the employees asked to cover the open segments with

[2] Herein the Hearing Examiner's findings of fact are referred to as "FF." The Commissioner's additional findings of fact based on the transcript of hearings held at OAH on November 29 and December 11, 2006 are referred to as "Tr. Vol. I" or "Tr. Vol. II."

blankets. He was crossing a scaffolding plank between two segments that had not yet been joined together when he fell into the gap and onto the roadway below and was seriously injured. FF 7-9, Tr. Vol. I, p. 34-35, 74, MOSH Ex. 11 & 12. MOSH was notified of the accident and did an initial inspection at the accident scene that same day. Tr. Vol. I, p. 27-28. MOSH returned to the work site a second time, approximately one week later. Tr. Vol. I, p. 58.

Mr. Davis was not attached to any form of fall protection at the time that he was injured. MOSH Ex. 13 - 16. Interviews with workers and photographs taken on the scene reveal that the Employer had established a controlled access zone in the bridge area where Mr. Davis was working. Tr. Vol. I, p. 79, Tr. Vol. II, p. 108, MOSH Ex. 7, Photo 13, MOSH Exs. 13-15. However, there was not a 100% "tie off" rule within the controlled access zone. Tr. Vol. II, p. 108, MOSH Exs. 13-15. Rather, workers entered the controlled access zone wearing a body harness, hard hat, safety glasses, and vest. Tr. I, p. 95-96, MOSH Exs. 13-16. There was a horizontal cable or "life line" on the last, or unattached concrete panel. MOSH Exs. 13-16. To reach that edge, or unattached concrete segment, workers had to walk across a plank, or "pick." *Id.* Once workers reached the unattached segment on the other side of the pick, they tied off to a horizontal life line system. Tr. Vol. I, p. 95-96, Tr. Vol. II, p. 109, MOSH Exs. 13-16. Interviews conducted during the course of the MOSH investigation established that between two and four employees were permitted to be tied off on the horizontal life line at the same time. Tr. Vol. I, p. 93-94, MOSH Exs. 13, 14.

Scott Peterson, a senior superintendent for the Employer, designed the horizontal life line system in conjunction with another colleague. Tr. Vol. II, 103, 115-17, 119. Mr. Peterson is not an engineer, but had past experience designing fall protection and life line systems. Tr. Vol. II p. 89-90, 116, 119. Mr. Peterson did not have any documentation concerning his design or testing

of the horizontal life line system prior to its use. Tr. Vol. II, p. 119-20. Mr. Peterson did not ask a structural engineer to check his scratch sheets or calculations prior to putting the horizontal life line system in use. Tr. Vol. II, p. 121. Mr. Peterson did not test the installed life lines and did not test the anchorages in shear prior to their use on the elevated roadway. Tr. Vol. II, p. 122-23. After the accident, the Employer contacted an outside engineering firm and an engineer named Thomas Watchinsky to obtain an opinion as to the capacity of the horizontal life line system and anchorages. Tr. Vol. I, p. 138-40, MOSH Ex. 17.

On March 24, 2006, MOSH issued three citations to the Employer. Citation 1 was for a serious violation of 29 C.F.R. § 1926.501(b)(1). This section requires that an employee working with an unprotected side and edge, more than 6 feet above a lower level, be protected "from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." Citation 2, item 1(a) was for a serious violation of 29 CFR §1926.502(d)(8), which requires that horizontal life lines be designed, installed and used under the supervision of a qualified person as part of a complete fall arrest system, which maintained a safety factor of at least two. Citation 2, item 1(b) was for a serious violation of 29 CFR §1926.502(d)(15), which requires that anchorages used for attachment of personal fall arrest equipment be "capable of supporting at least 5,000 pounds per employee attached" or "designed and installed as part of a complete personal fall arrest system which maintained a safety factor of at least two."

The Employer contested the citations, proposed penalties and abatement requirements and an administrative hearing was held at the Office of Administrative Hearings on November 29, 2006 and December 11, 2006. The HE heard the evidence and issued a written "Summary Decision" in favor of the Employer on Citations 1 and 2. Pursuant to his statutory authority, the

Commissioner chose to order review of the HE's determination as to Citation 2, items 1(a) and 1(b) only.

DISCUSSION

The HE found that the cited standards, 29 C.F.R. §502(d)(8) and 29 C.F.R. §502(d)(15), are "applicable only if a personal fall arrest system is required, and such a system is not a requirement for precast concrete erection." Proposed Decision, p. 10. She thus concluded that there was no genuine dispute of material fact, and that the Employer was entitled to prevail as a matter of law. Proposed Decision, p. 11. The HE erred in granting the Employer summary decision on this basis.

The violations described in Citation 2, items 1a and 1b were not for failure to use a personal fall arrest system, but rather for a failure to meet the requirements that apply to the design, installation and use of a personal fall arrest system when one is in use. The uncontroverted evidence put forth at the hearing established that within a portion of the controlled access zone, the Employer had installed, and workers were connecting to, a horizontal life line system. Thus, whether "such a system" is a "requirement for precast concrete erection" work was not a legal issue before the HE.[3] Rather, the legal issue before the HE, given that a horizontal life line system *was* in use, was: did MOSH prove that the personal fall arrest system in question violated the specific standards cited?

[3] The HE may have been correct that the Employer was not obligated to use horizontal life lines or other conventional forms of fall protection within the elevated roadway area. Section 1926.501(b)(12) delineates when there is a duty to use conventional fall protection in precast concrete erection work, and places the burden on the employer to demonstrate "that it is appropriate to implement a fall protection plan which complies with 1926.502(k) [i.e. a controlled access zone]" in lieu of implementing any of those [fall protection] systems." 29 C.F.R. § 1926.501(b)(12). However, despite this "explicit preference for the use of conventional fall protection," an OSHA interpretation letter from 1995 states that for precast concrete erection work, OSHA will permit employers to use the alternative fall protection without having to first justify that conventional methods were infeasible or created a greater hazard. OSHA Memorandum (Enforcement Policy) to Regional Administrators, issued by Deputy Assistant James Stanley, July 12, 1995 (the "Stanley Memo"); *see also*, Standard Interpretation Letter, Russell B. Swanson, Directorate of Construction, April 20, 2004.

I. CITATION 2, ITEM 1(a)

To fulfill its burden of proof, MOSH is required to prove by preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) an employee had access to the violative condition; and (4) the Employer knew or could have known of the condition in the exercise of reasonable diligence. *See, e.g., Astra Pharmaceutical Products, Inc*. 9 O.S.H.C. (BNA) 2126, 2129 (1981), *aff'd in part,* 681 F. 2d 69 (1st Cir. 1982).

A. The cited standards apply.

As discussed above, conventional fall protection in the form of a horizontal life line system was in use on a portion of the elevated roadway project.[4] Both the Employer's witness and MOSH's witness testified that the Employer had created a controlled access zone on the roadway bridge, with a tie-off to a horizontal life line for employees performing work on the last, unattached concrete segment. Tr. Vol. II, p. 108-109, Tr. Vol. I, p. 79. This testimony was consistent with statements made in interviews with employees and the job foreman. MOSH Exs. 13-16.

A worker attaching to a horizontal life line has an expectation that the life line has been designed, installed and can be used to safely hold him. The safety standards require this. Thus, regardless of whether the Employer was obligated to use a life line system or other conventional forms of fall protection (again, an issue not before the Commissioner or HE), because the Employer *did* in fact use one, there can be little doubt that the life lines and anchorages were subject to the design and safety requirements for all such systems. The cited standard applies.

[4] A horizontal life line is an anchoring cable rigged between two fixed anchorage points, to which a worker may attach a lanyard or retractable life line, allowing a worker to move horizontally without a fall danger.

B. MOSH did not prove a failure to comply with 29 C.F.R. § 1926.502(d)(8).

Citation 2, item 1(a) alleges that the Employer violated 29 C.F.R. § 1926.502(d)(8), which requires that horizontal life lines "be designed, installed and used, under the supervision of a qualified person, as part of a complete fall arrest system, which maintains a safety factor of at least two." At the hearing, MOSH contended that the life lines were not designed, installed, and used under the supervision of a qualified person, and that they did not maintain a safety factor of two.

1. Qualified Person

The fall protection standard does not define a "qualified person" for the purposes of section 1926.502. However, the standard OSHA definition of a qualified person is "one who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training or experience, has successfully demonstrated his/her ability to solve or resolve problems related to the subject matter, the work, or the project." *See, e.g.,* 29 C.F.R. §1926.450.

Scott Peterson, a senior superintendent for the Employer, designed the horizontal life line system. Tr. Vol. II, p. 103, 117. Mr. Peterson testified that he had worked for the Employer for 25 years and had been senior superintendent for 13 years. Tr. Vol. II, p. 88-89. He had experience designing numerous fall protection systems and had designed a horizontal life line system similar to the one in use on the elevated roadway project on approximately three other projects. Tr. Vol. II, p. 89, 116. Mr. Peterson also testified that he had taken courses in structural engineering, although he is not an engineer. Tr. Vol. II, p. 89-90, 116-17.

I find that Mr. Peterson was a qualified person to design or install the life line system. The OSHA definition of a "qualified person" is very broad and explicitly contemplates that

someone may be qualified on the basis of their experience and on-the-job training. Mr. Peterson, with his 25 years of job experience and 13 years as a senior superintendent, had precisely this kind of on-the-job experience.

2. Maintains a Safety Factor of Two

Whether the horizontal life line system Mr. Peterson designed maintained a safety factor of two is a more difficult question. Unlike the standards for vertical life lines or anchorages, the standard for horizontal life lines contained at 29 C.F.R. § 1926.502(d)(8) does not provide a default per-person weight which may be used to estimate the strength or capacity of the system if it is not specifically designed. This is likely because, as the guidance contained in Appendix C of the fall protection standard suggests, the capacity of a horizontal life line system is quite variable depending upon factors such as the number of workers to be tied off and the angle of sag in the line. *See 2*9 CFR §1926, Subpart M, Appendix C, Section II (h)(6).[5] Best's Safety Directory lists among factors to be considered in designing a horizontal life line: the number of workers that will use the line, the strength of the anchorage points, the degree of sag, and the possibility of multiple workers falling at once. MOSH Ex. 28. Seemingly, there is no one default or per person estimate that may be used given all of these factors.

Mr. Peterson did not specifically design the life line system for any particular employees and had no documentation or calculations showing his conclusions as to how much weight the system he designed would bear. Tr. Vol. II, p. 119-20. Mr. Peterson testified that he designed the system using an estimate of 1,800 pounds per person, which he took from 29 C.F.R.

[5] "Horizontal life lines may, depending on their geometry and angle of sag be subjected to greater loads than the impact load imposed by an attached component…Extreme care should be taken in considering a horizontal life line for multiple tie-offs. The reason for this is that in multiple tie-offs to a horizontal life line, if one employee falls, the movement of the falling employee and the horizontal life line during arrest of the fall may cause other employees to fall also….Testing of installed life lines and anchors prior to use is recommended." 29 C.F.R. §1926, Subpart M, Appendix C (II)(h)(6).

§1926.502(d)(16)(ii), and then doubled for a safety factor of two. Tr. Vol. II, p. 110-11, 124. Based on this figure, he concluded that the horizontal life line and anchorages could support three to four people at one time. Tr. Vol. II, p. 110-11. However, 29 C.F.R. §1926.502(d)(16)(ii) concerns the maximum allowable arresting force that may be imposed on an employee's body when falling -- a distinct requirement from amount of force or impact load that a falling employee may place on a life line without compromising the life line's safety. Thus, Mr. Peterson's testimony does not provide a reliable estimate of the horizontal life line system's capacity.

While MOSH pointed out the deficiencies in Mr. Peterson's analysis, MOSH also did not introduce any reliable evidence as to the capacity of the life line system or its compliance with the cited standard. MOSH's witness admitted that she was not qualified to assess whether the system maintained a safety factor of two. Tr. Vol. I, p. 86-87, Tr. Vol. II, p. 18-19. MOSH relied largely on the testimony of engineer Thomas Watchinsky, with whom the Employer consulted after the accident. Tr. Vol. I, p. 134-35, 139-40. Among other things, the Employer asked Mr. Watchinsky to evaluate how many 3,600 pound loads[6] and how many 5,000 pound loads[7] the system could withstand. Tr. Vol. I, p. 139-40, 154, MOSH Ex. 17. Based upon these figures, Mr. Watchinsky concluded that it could safely hold up to two 5,000 pound loads or up to three 3,600 pound personnel loads. Tr. Vol. I, p. 161, MOSH Ex. 17, p.7. However, Mr. Watchinsky had no particular basis for using either the 5,000 pound or the 3,600 pound figure, other than that these were the numbers the Employer had given him. Tr. Vol. I, p. 164, 166. He did not and could not evaluate if they were the correct estimations to use because, by his own

[6] This number presumably came from the 1,800 pound figure that Mr. Peterson borrowed from 29 C.F.R. § 1926.502(d)(16)(ii), doubled for a safety factor of two.
[7] This number was presumably borrowed from the standard for vertical life lines, 29 C.F.R. § 1926.502(d)(9) or for anchorages, 29 C.F.R. § 1926.502(d)(15).

testimony, he had no knowledge of the applicable safety standards. Tr. Vol. I, p. 164, 193. Moreover, he was not asked to consider the other factors that might be relevant to the overall safety of the life line design such as the ability of workers to move across the line, or the possibility of more than one worker falling at once. Tr. Vol. I, p. 85-86. Without more definitive evidence as to the actual capacity of the life line system, MOSH cannot prove that the system failed to maintain a safety factor of two.

Because MOSH failed to fulfill its burden on the second prong, it is unnecessary to examine the third and fourth parts of the conjunctive test for Citation 2, item 1(a). The HE's recommendations as to Citation 2, Item 1(a) are affirmed.

II. CITATION 2, ITEM 1(b)

Citation 2, Item 1(b) was for a violation of 29 C.F.R. §1926.502(d)(15) which requires that anchorages used for attachment of personal fall arrest systems be capable of supporting a load of 5,000 pounds per employee attached, or designed, installed, and used as part of a complete personal fall arrest system that maintains a safety factor of two. As with Citation 2, Item 1(a), MOSH must prove by preponderance of the evidence that: 1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) an employee had access to the violative condition; and (4) the Employer knew or could have known of the condition in the exercise of reasonable diligence. *Astra Pharmaceutical Products,* 9 O.S.H.C. at 2129.

A. The cited standards apply.

There is no question that a personal fall arrest system in the form of a horizontal life line was in use in this case, as was discussed above. The life line in use was connected to the elevated roadway bridge by two anchorages. Thus, the standards applicable to such systems, including 29 C.F.R. §1926.502(d)(15), are applicable here.

B. MOSH proved a failure to comply with the cited standards.

In contrast to the standard for horizontal life lines, the cited standard for anchorages does provide a per-person default weight to be used. The standard requires that anchorages used to support a personal fall arrest system either "be capable of supporting at least 5,000 pounds per employee attached" or "shall be designed, installed, and used…as part of a complete fall arrest system which (i) maintains a safety factor of at least two; and (ii) under the supervision of a qualified person." 29 C.F.R. §1926.502(d)(15). As discussed above in relation to Citation 2, item 1(a), MOSH can not show that Scott Peterson was not qualified to design a horizontal life line system. However, MOSH did put forth sufficient evidence to prove that, as used, the anchorages did not comply with the cited standard because they were not capable of supporting 5,000 pounds per employee attached and did not maintain a safety factor of two.

As has been discussed previously, the Employer consulted with an engineering firm after the accident to determine how much weight the horizontal life line system, including the number 5 rebar lugs that the Employer had used for anchorages, could withstand. Tr. Vol. I, p. 134-35, 139-40. Thomas Watchinsky is a structural engineer who performed this analysis, along with a colleague. Tr. Vol. I, p. 134-35, 146-47. At the hearing, MOSH moved to have Mr. Watchinsky admitted as an expert in the field of structural engineering and he was duly admitted as such. Tr. Vol. I, p. 188. Mr. Watchinsky testified that he and his colleague had concluded that each lug or anchorage in the horizontal life line system was capable of supporting 9,300 pounds or one 5,000 pound hanging load. Tr. Vol. I, p. 147, 151, 163, MOSH Ex. 17, fax transmissions of 12/20/05 and 1/16/06. Mr. Watchinsky concluded that the yield stress of the system (i.e. the point at which the anchorages would become compromised) was 18,600 pounds (9,300 pounds x 2),

assuming that the weights were spread out evenly. Tr. Vol. I, p. 195, MOSH Ex. 17, fax transmission of 1/16/06.

MOSH's investigation revealed that between two to four employees were connected to the horizontal life line system (and thus the anchorages) at one time. Tr. Vol. I, p. 93-94, MOSH Exs. 13, 14. This evidence was not controverted by the Employer, who admitted that there may have been times when up to four laborers were placed on the horizontal life line while applying the epoxy. Tr. Vol. II, p. 131-32.

Crediting Mr. Watchinsky's calculations, the Employer's use of the anchorages violated the cited standard. The cited standard requires that anchorages be capable of supporting 5,000 pounds per employee. Because the anchorages had a yield stress of 18,600 pounds, the Employer exceeded this 5,000 pound per employee capacity and violated the standard when it placed four employees (or 20,000 pounds) on the line. The cited standard also requires that the anchorages maintain a safety factor of two. Given that each anchorage was capable of supporting 9,300 pounds, each anchorage could only hold one 5,000 pound personnel load, or a total of two employees on the system, while maintaining a safety factor of two. Tr. Vol. I, p. 151, 163, MOSH Ex. 17.

At the review hearing, the Employer highlighted Mr. Watchinsky's testimony that because the rebar lug was embedded in concrete, it probably would not break apart unless about 27,000 pounds were applied to it. Tr. Vol. III, p. 30. But the cited standard does not allow the Employer to load an anchorage to its breaking point -- the standard requires 5,000 pounds per employee and a safety factor of two -- and the testimony in this case clearly establishes that the anchorages in use did not meet either of these criteria.

C. Employees had access to the violative condition.

Employees in this case had access to the violative condition. Employee interviews conducted by MOSH, as well as testimony by the Employer's representative, Mr. Peterson, established that employees did tie-off to the horizontal life line system whenever they were working on an unattached panel of the roadway. Mr. Peterson estimated that at the time of the accident, "right around 85 to 90 percent of the work" had been completed, meaning that 85 to 90 percent of the panels had been attached to form the roadway. Tr. Vol. II, p. 92. Thus, employees had significant exposure to the life line system.

D. The Employer knew or should have known of the condition.

The fourth element that MOSH must prove is that the Employer had actual or constructive knowledge of the violation. The actual or constructive knowledge of a supervisor may be imputed to an employer. *N & N Contractors, Inc*., 18 O.S.H.C (BNA) 2121, 2123 (2000), *aff'd,* 255 F. 3d 122 (4th Cir. 2001). MOSH put forth no evidence to suggest that the Employer had actual knowledge that the anchorages used violated the standard.

Constructive knowledge "is established where the evidence shows that the Employer could have known about the cited condition with the exercise of reasonable diligence." *Greenleaf Motor Express, Inc*., 21 O.S.H.C. (BNA) 1872, 1874 (2007), *quoting Hamilton Fixture,* 16 O.S.H.C. (BNA) 1073, 1087 (1993), *aff'd without published opinion,* 28 F. 3d 1213 (6th Cir. 1994). Among other commonly cited factors, reasonable diligence "requires an employer to…anticipate hazards to which employees may be exposed, and take measures to prevent the occurrence of violations." *Pride Oil Well Service,* 15 O.S.H.C. (BNA) 1809, 1814 (1992). Reasonable diligence "implies effort, attention, and action; not mere reliance upon another to make violations known." *N & N Contractors, Inc*. 18 O.S.H.C. at 2124.

Here, the evidence showed that the asked senior superintendent Scott Peterson to design a fall protection system but Mr. Peterson, by his own testimony, did not perform any testing of the anchorages in shear prior to their use to determine what kind of falling weight they could withstand. Tr. Vol. II, p. 123. The evidence also clearly established that the Employer did not consult with any outside engineer to determine the strength or capacity of the anchorages prior to their use. Tr. Vol. II, p. 119-21. In exercising reasonable diligence, the Employer had an obligation to ensure that the horizontal life line system complied with all applicable safety standards and to anticipate the hazard that might result from placing employees on it. This is particularly true given the fall protection guidelines, which specifically emphasize the "extreme care" that should be taken in designing horizontal life lines. 29 C.F.R. §1926 Subpart M, Appendix C (II)(h)(6). Yet, the Employer failed to exercise reasonable diligence as the untested anchorages were in plain view, and the Employer failed to take reasonable steps to discover their hazards.

Because MOSH can prove all four prongs on Citation 1, item 1(b), the HE's recommendations as to this citation are vacated and reversed.

E. <u>The violation was serious.</u>

The Employer argues that even if there was a violation of the cited standard, it should be considered a *de minimus* violation. A *de minimus* violation is one that "has no direct or immediate relationship to safety or health." *Md. Code Ann., Lab. & Empl.*, §5-212 (d). The Employer asserts that a *de minimus* violation is appropriate here because MOSH cannot demonstrate a "substantial probability" that the life line or anchor could have failed. However, it is well established that the 'substantial probability' portion of the statute 'refers not to the probability that an accident will occur but to the probability that, an accident having occurred,

death or serious injury could result,' even in those cases in which an accident has not occurred or, in fact, is not likely to occur." *Secretary of Labor v. Trinity Industries, Inc.* 21 O.S.H.C. 2161, 2163 (3rd Cir. 2007)(*quoting Ill. Power Co. v. OSHRC*, 632 F.2d 25, 28, 8 O.S.H.C. 1512 (7th Cir. 1980)). This is because, "Congress could not have intended to encourage employers to guess at the probability of an accident in deciding whether to obey the regulation." *Id*.

In this case, even if the likelihood that one of the anchorages would have bent or snapped may have been relatively remote, such a compromise or failure of the system would have exposed employees to a fall of approximately 18 feet, and the strong possibility of death or serious injury. Accordingly, the Commissioner finds that MOSH established its burden of proof concerning Citation 2, Item 1(b) and affirms this as a serious violation.

ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on this ____ day of October, 2011, hereby ORDERS:

1. Citation 2, item 1(a) alleging a serious violation of 29 CFR §1926.502(d)(8) and its accompanying proposed penalty of $4,000 is VACATED;

2. Citation 2, item 1(b) alleging a serious violation of 29 CFR §1926.502(d)(15) and its accompanying proposed penalty of $4,000 is AFFIRMED;

3. 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, 5-212, *Annotated Code of Maryland*, and the Maryland Rules, Title 7, Chapter 200.

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J. Ronald DeJuliis
Commissioner of Labor and Industry