IN THE MATTER OF	*	**BEFORE THE**
	*	**COMMISSIONER OF LABOR**
COLEMAN AMERICAN MOVING	*	**AND INDUSTRY**
SERVICES, INC.	*	**MOSH CASE NO. M4276-030-04**
	*	**OAH CASE NO. DLR-MOSH-41-04-38266**

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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.* On March 22, 2004, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH") issued a citation to Coleman American Moving Services, Inc. ("Coleman" or "Employer"), alleging a violation of 29 CFR § 1910.136(a) for failing to require foot protection for its employees. The citation was assessed with a penalty amount of $3,150.00. A hearing was held on August 23, 2004, at which the parties introduced evidence, presented witnesses, and made arguments. Thereafter, Lorraine Ebert Fraser, Hearing Examiner ("HE"), issued a Proposed Decision recommending that the citation 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), ordered review. On October 6, 2005, the Commissioner of Labor and 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**.[1]

DISCUSSION

The Employer in this case is a moving and storage company whose employees pack customer's belongings into crates and transport the crates in trucks to the warehouse. FF 1; Tr. 12, 66. On January 21, 2004, pursuant to an employee complaint, Laura Irwin, Compliance Officer for MOSH, ("Inspector" or "MOSH Inspector") inspected the Employer's warehouse at 4715 Trident Court, Halethorpe, Maryland. FF 2; Tr. 11; MOSH Ex. 4. As a result of this inspection, MOSH issued three citations, two of which were resolved prior to the hearing. The only citation at issue before the Commissioner is a violation of 29 C.F.R. § 1910.136(a). That standard provides:

> Foot Protection.
> (a) General Requirements. The employer shall ensure that each affected employee uses protective footwear when working in areas where there is a danger of foot injuries due to falling or rolling objects, or objects piercing the sole, and where such employee's feet are exposed to electrical hazards.

The Employer contends on review that the standard does not apply because its employees were not exposed to the danger of foot injuries. MOSH counters that the employees were exposed to this hazard while moving heavy objects. 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 conditions; and (4) the

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[1] Herein, the HE's Findings of Fact are referred to as "FF", the transcript of the August 23, 2004 hearing as "Tr." and the transcript of the October 6, 2005 review hearing before the Commissioner as "Rev. Tr.".

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 substantial evidence in the record supports affirming Citation 1. Section 1910.136(a) ("the standard") applies where there is exposure to the hazard of foot injuries due to falling or rolling objects. The record is clear that Coleman's employees lift furniture and personal items weighing over 50 pounds. FF 1; Rev. Tr. 30; Tr. 12. Ms. Katheryn Grigsby, the Employer's Director of Safety and Risk Management, testified that the employees move items such as desks, televisions, washer/dryers and refrigerators from homes and offices of military personnel. Tr. 69. The Inspector testified that Coleman's employees told her that they regularly lift items weighing over 50 pounds. Tr. 17. Furthermore, the Employer's Injury Log reflects injuries that occurred while employees were "lifting heavy television", "carrying sofa", and "lifting, pushing, pulling over 100 lbs. up stairs". Employer Ex. 7. The MOSH Inspector reasonably concluded from this information that the hazard of foot injuries arising from falling or rolling objects exists for Coleman employees. To address this hazard and comply with the standard, the Employer was required to ensure that its employees wore protective footwear, in this case safety-toed shoes. Tr. 20, 22.

The Employer argues that there was no hazard of foot injuries due to the training it provided and the use of dollies by the employees. Tr. 70-72. However, the Commissioner concludes, as did the HE, that no amount of training can alleviate the risk of tripping or accidentally dropping a heavy object. *See* HE Proposed Decision, pg. 7. In addition, the employees were at risk of foot injuries resulting from rolling objects, such as loaded dollies; and these types of risks are also contemplated by the standard.

See 29 C.F.R. § 1910.136(a). Finally, the Commissioner notes that 29 CFR § 1910, Subpart I, App. B specifically lists "movers" among occupations for which foot protection should be routine. Tr. 83. Thus, the standard was correctly applied to the Employer, and its employees were exposed to a risk of foot injury by not being required to wear foot protection. Based upon her observations and discussions with employees, the MOSH Inspector also testified that Dennis Phillips, the Employer's general manager, had knowledge that only one employee was wearing safety-toed shoes (which that employee had purchased himself and had chosen to wear), and that the other employees were wearing sneakers. Tr. 16; MOSH Ex. 6, p. 2. Therefore, the Employer knew of the dangerous conditions yet failed to comply with the cited standard by ensuring that each employee was wearing safety shoes.

The Employer contends that the citation was inappropriate because the Employer's record of no previous foot injuries demonstrates that the employees were not in danger of foot injuries, and thus not subject to the standard. Rev. Tr. 9; Tr. 60. The Commissioner finds this argument unpersuasive for two reasons. First, a close review of the Employer's Injury Logs reveals injuries similar to foot injuries and injuries resulting from dropped or rolling objects that could have easily resulted in foot injuries. Rev. Tr. 38; Employer Exhibit 7. Specifically, the Injury Logs reveal injuries resulting from tripping while carrying a sofa and injuries from having a crate fall on an employee from a height of 15 feet. Employer Ex. 7. Second, because the very purpose of MOSH is to prevent injuries, the mere evidence of no previous injuries is not determinative. *See, e.g., OSHA v. Yellow Freight*, 2 O.S.H. Cas. (BNA) 1690 (1975) (holding that an absence a work-loss record merely establishes Employer's "good fortune to date"); *Ryder Truck*

Lines Inc. v. Brennan, 497 F.2d 230 (1974) (rejecting defense of few accidents because OSHA Standards are designed to prevent accidents).

The Employer also argues that the citation must be dismissed because purchasing safety shoes for all employees would be cost-prohibitive. Tr. 63, 85. In support, the Employer cites the number and transient nature of its employees. Tr. 63-68. To mount an affirmative defense of infeasibility, an Employer must do more than simply testify that compliance with the standard would be a financial hardship. *See, e.g., Hughes Brothers*, 6 O.S.H. Cas. (BNA) 1830 (1978). Rather, an employer must demonstrate that compliance is functionally or physically impossible. *See, e.g., M.J. Lee Construction Co.*, 7 O.S.H. Cas. (BNA) 1140 (1979). The Employer has failed to do so in this case. On the contrary, the Commissioner notes that compliance with the standard would not require the Employer to bear the full cost of the shoes. *See Budd Co. v Occupational Safety & Health Review Com*, 513 F.2d 201 (1975). Furthermore, it is possible that not all the employees would require shoes under the standard if the Employer reasonably finds that some, such as clerical workers, are not in danger of foot injuries. Thus, there is no evidence to support the Employer's assertion that compliance with this standard would be functionally impossible.

Penalty

MOSH assessed a penalty of $3,150.00, which the Commissioner finds to have been properly derived using the guidelines set forth in COMAR 09.12.20.12. The Employer has challenged MOSH's calculation of this penalty, specifically regarding the "Size Adjustment" and the "Good Faith Calculations." Rev. Tr. 14. The MOSH Inspector testified that she marked "251 or more employees" in the "Size Adjustment" category (resulting in no penalty adjustment) because the Employer told her that the company

employed about 300 people. Tr. 29, 44. While the Employer agreed at the hearing that the company employs over 300 people nationwide, it argues that that number is incorrect for this purpose because only 35 employees work at the Baltimore location. Rev. Tr. 14-15; Tr. 59. However, COMAR 09.12.20.12(H)(1) clearly states that the "size" must be interpreted as "peak employment at all of an employer's establishments and work locations." Therefore, by the Employer's own admission, 300 is the correct number for this penalty calculation, and thus MOSH appropriately gave no reduction based upon size. *See* COMAR 09.12.20.12(H)(2).

The Employer also challenges MOSH's calculation of the "Good Faith" reduction. However, the Commissioner finds that MOSH's determination of no "Good Faith" reduction was reasonable, appropriate, and properly determined under COMAR 09.12.20.12. In support of the Penalty Calculation Worksheets, the MOSH Inspector testified regarding her evaluation of the specific criteria required for a "Good Faith" reduction. Following the Penalty Calculation Worksheet, the MOSH Inspector testified that, while the Employer had a written safety and health program and training program that provided for "management commitment and employee involvement," the program did not satisfy three other specific criteria because it failed to identify the risk of heavy objects falling on employees' feet, failed to require safety shoes, and failed to require training in the use of safety shoes.[2] Tr. 30-31; MOSH Ex. 5 and 6. The MOSH Inspector further testified that the Employer did not demonstrate an "appropriate level of

[2] Specifically, the MOSH Inspector gave the Employer an "N" in the following categories: "Provides for worksite analysis and hazard identification", "Provides for hazard prevention and control", and "Provides for appropriate training/instructions for hazards of work being done." MOSH Ex. 5 and 6.

supervision, concern and knowledge about safety and health requirements" because "Mr. Phillips [Employer's General Manager] didn't know what a hazard assessment was, didn't know what type of . . . protection his employees should be using [and] didn't have any documentation that any type of hazard assessment had been done. . ." Tr. 33; MOSH Ex. 5.

The Employer challenges these findings by arguing that Mr. Phillips was new on the job and confused by the MOSH Inspector's terminology. The Employer also contends that the MOSH Inspector neglected to take into account a 1994 hazard assessment, which was produced at the informal hearing on April 27, 2004 to provide a basis for the dismissal of citations not at issue before the Commissioner. Tr. 47; Rev. Tr. 12-13, 19-20. The Commissioner finds that, despite the fact that the 1994 hazard assessment might have been sufficient to support the dismissal of other citations, it is not sufficient to support a "Good Faith" penalty adjustment for the citation at issue here. Despite any possible confusion regarding terminology and even with the 1994 hazard assessment in place, the Employer did not satisfy the criteria mandating that it "demonstrate the appropriate level of supervision, concern and knowledge about safety" because the hazard assessment failed to recognize employee exposure to falling or rolling objects that may damage the foot. Rev. Tr. 37; Tr. 47; Employer Ex. 1; MOSH Ex. 5. The Commissioner finds that the MOSH Inspector reasonably determined the "Good Faith" adjustment to be zero. The Commissioner also finds MOSH's determination of the rest of the penalty calculations to be reasonable and appropriate.

ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on the 6 day of JANUARY, 2006, hereby **ORDERS**:

1. Citation 1 for a serious violation of 29 CFR § 1910.136(a) with a penalty in the amount of $3,150.00 is **AFFIRMED**.

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.

Robert L. Lawson
Commissioner of Labor and Industry