IN THE MATTER OF	*	**BEFORE THE DEPUTY COMMISSIONER**
J.D. LONG MASONRY, INC.	*	**OF LABOR AND INDUSTRY**
	*	**MOSH CASE NO. V3564-02-98** **OAH CASE NO. 98-DLR-MOSH-41-018876**

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

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 J.D. Long Masonry, Inc. ("J.D. Long" or "Employer"), alleging a violation. A hearing was held at which the parties stipulated to certain facts, introduced exhibits and testimony of witnesses, and filed post-hearing briefs. Thereafter, on February 1, 1999, [1] Neile S. Friedman, Hearing Examiner, issued a Proposed Decision recommending dismissal of the citation.

Thereafter, by Order dated March 26, pursuant to Labor and Employment Article, §5-214(e), *Annotated Code of Maryland*, the Deputy Commissioner of Labor and Industry ("Deputy Commissioner") ordered review. On September 25, the Deputy Commissioner held the 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, the proposed decision of the Hearing Examiner is affirmed, and the citation is DISMISSED.

[1] All dates herein are in 1999.

DISCUSSION

I. Procedural Issues

On review, the Employer challenges the authority of the Commissioner of Labor and Industry ("Commissioner") to review this case. This challenge is based, in part, upon service of the proposed decision. For this reason, it is beneficial to start with a chronology of events.

On February 1, Hearing Examiner Neile Friedman issued her proposed decision. The cover letter to the proposed decision indicates that the decision was mailed to the Employer's counsel and counsel for Maryland Occupational Safety and Health ("MOSH") and "cc" to the Commissioner, the Deputy Commissioner, and J.D. Long. On March 10, the Deputy Commissioner wrote to Administrative Law Judge James Murray, Director of Operations for the Office of Administrative Hearings ("OAH"), to inform him that a copy of the proposed decision had not been received by the Commissioner or the Deputy Commissioner and to request that the decision be reissued.

On March 12, the Employer's counsel wrote to Judge Murray objecting to the reissuance of the proposed decision. In response to the Employer's letter, on March 18, counsel for the Commissioner wrote to Judge Murray asserting that reissuance was appropriate under the relevant statutory and regulatory provisions, and attached an affidavit from the Deputy Commissioner attesting to the fact that neither the Commissioner nor the Deputy Commissioner were served copies of the proposed decision. On March 23, counsel for the Employer responded reiterating the reasons why reissuance would be inappropriate. On March 26, the Deputy Commissioner ordered review. On April 1, Hearing Examiner Friedman reissued the proposed decision finding

that the Commissioner, who was a party to the case, did not receive service of the decision as required by regulation. On review, the Employer challenges the reissuance claiming lack of jurisdiction and abuse of hearing examiner discretion, and additionally asserts that it was denied due process because the review order failed to specify the issues to be reviewed.

A proposed decision of a hearing examiner becomes a final order of the Commissioner within fifteen work days after service of the decision unless, "the Commissioner orders a review of the proceeding" or "an employee, representative of an employee, or an employer whom the report affects submits to the Commissioner a written request for a review of the proceeding." Labor and Employment Article, § 5-214(e), *Annotated Code of Maryland*. The regulations of both MOSH and OAH provide that a copy of a decision shall be served on each party. *See* COMAR .09.12.20.16(a)(2) and 28.02.01.22(b)(1). In instances such as this case where OAH is not the final decision-maker, OAH's regulations also specifically provide that a copy of the proposed decision shall be served on the final decision-maker. COMAR 28.02.01.22(b)(1).

In this case, there is a sworn statement attesting to the fact that neither the Commissioner nor the Deputy Commissioner ever received the original proposed decision. The Commissioner as both a party and the final decision-maker should have been served, and received, a copy of the proposed decision along with the rest of the

parties. Without the notice entitled to him under COMAR,[2] the Commissioner was obviously unable to invoke his right to order review during the original 15-day statutory appeal period. Given this lack of service, the Hearing Examiner properly concluded that OAH retained jurisdiction until the regulatory service requirements were satisfied.

On the facts of this case, the Hearing Examiner did not abuse her discretion in reissuing the proposed decision. As noted above, the regulations charge OAH with the responsibility of serving each party and the final decision-maker with the proposed decision. The Hearing Examiner provided a detailed discussion of the factual circumstances related to service and carefully examined these facts against the backdrop of OAH's service obligations before making her decision to reissue the proposed decision. By reissuing the proposed decision, the Hearing Examiner was not favoring the Commissioner by expanding the appeal date as the Employer suggests. Rather, she was simply ensuring compliance with statutory due process. The reissuance was an exercise of sound administrative discretion.

The Employer asserts that it was denied due process because the Deputy

[2] On review, the Employer reiterates the assertion made before the Hearing Examiner that notice to MOSH's counsel constitutes notice to the Commissioner, and therefore, because MOSH's counsel received the February 1, proposed decision shortly after its issuance, this notice should be imputed to the Commissioner. The Hearing Examiner properly framed the matter at hand in recognizing that service of the proposed decision is the issue. As the Hearing Examiner concluded, if service to MOSH's counsel constituted service to the Commissioner, a party and the final decision-maker, the regulations would have so provided, and they do not.

Commissioner's order failed to "define" the issues on review. The Employer relies upon *Bragunier v. Commissioner of Labor and Industry,* 111 Md. 698 (1996). In *Bragunier*, the Court of Appeals addressed, among other issues, whether there was a lack of due process when the Commissioner reviewed a finding of a hearing examiner that was not expressly specified for review by either party. The court found that there was no due process violation where the employer had full opportunity to argue all aspects of the findings before the hearing examiner, and the Commissioner relied upon that record in reaching his own conclusions. In this case, the Employer had a full opportunity to address all issues before the Hearing Examiner. This review does not involve consideration of new charges or new evidence. Rather, it is limited exclusively to the record that was developed before the Hearing Examiner. Consistent with the principles of due process, the Deputy Commissioner's order of review afforded the Employer the necessary notice to fully and fairly participate in the review process.

II. Citation 1: 29 CFR §1926.200(g)(1)

The Hearing Examiner concluded that MOSH failed in its burden of proving that the cited standard is applicable. MOSH asserts on review, as it did before the Hearing Examiner, that the plain language of Section 200(g)(1) supports its applicability to the facts of this case.

For the reasons set forth by the Hearing Examiner, the Deputy Commissioner concludes that the related subsections in 200(g)(2) and 200(f) provide context for interpreting 200(g)(1) as not applying to a private road on a construction site. While an agency's interpretation is customarily afforded deference, the Hearing Examiner's rejection of MOSH's reliance on 29 CFR 1926.200(g)(1) in this case is supported by

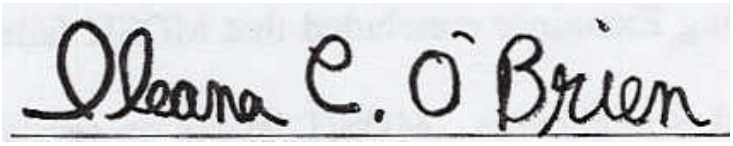
MOSH's stipulation admitting that this regulation has never been applied to a construction site on private property by MOSH or by any other occupational safety and health enforcement agency. Accordingly, the Hearing Examiner's conclusion that MOSH has failed to meet its burden of proving that the cited standard applies is adopted. Citation 1, Item 1 is therefore, dismissed.

ORDER

For the foregoing reasons, on the 17th day of June 2003, it is hereby ORDERED that:

1. Citation 1, Item 1, alleging a serious violation of 29 CFR 1926.200(g)(1) with a proposed penalty of $3000.00 is **DISMISSED**.

2. The 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.



ILEANA C. O'BRIEN
Department of Labor, Licensing and Regulation