IN THE MATTER OF	*	**BEFORE THE**
	*	**COMMISSIONER OF LABOR**
PHOENIX STEEL ERECTORS	*	**AND INDUSTRY**
	*	**MOSH CASE NO. Q5117-056-13** **OAH CASE NO. 41-14-05953**
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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 June 13, 2013, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH") issued four citations to Phoenix Steel Erectors ("Phoenix" or "Employer"). Citation 1, Item 1 was for a violation of 29 CFR 1926.1412(e)(1) for failing to include level position, ground conditions and wire rope as part of the monthly inspection report; Citation 1, Item 2 was for a violation of 29 CFR 1926.1412(e)(3)(i)(A) for failing to include the results of the inspection on the monthly inspection documentation; Citation 1, Item 3 was for a violation of 29 CFR 1926.1412(e)(3)(i)(B) for failing to include the signature of the person conducting the inspection on the inspection document; Citation 1 Item 4 was for a violation of 29 CFR 1926.1428(a)(3) for failing to include the type of training the signal person had received. All four citations were classified as other than serious and no penalties were assessed.

Phoenix contested the citations and a hearing was held on May 14, 2014 at the Office of Administrative Hearings in Hunt Valley, Maryland. Richard O'Connor,

Administrative Law Judge, presided as the Hearing Examiner ("HE"). The HE then issued a proposed decision recommending that the citations be affirmed.

Phoenix requested review and a review hearing was held before the Commissioner of Labor and Industry.[1] Based upon a thorough review of the factual record, the relevant law, and the arguments made by both parties, the Commissioner reclassifies Citation 1, Items 2 and 3 from "other than serious" to "de minimis" and affirms Citation 1, Items 1 and 4 as "other than serious."

FINDINGS OF FACT

On June 4, 2013, MOSH Compliance Officer Josh Price conducted an inspection of a jobsite in Southern Maryland. The project was a building at the College of Southern Maryland and Phoenix Steel Erectors was setting the structural steel for the building. As part of that steel erection process, Phoenix employees were using a Manitowoc lattice boom crane. Initially, the Compliance Officer walked around the jobsite and did not observe any safety hazards related to the crane. (Tr. 1[2] 36-39.) As part of the inspection, the Compliance Officer inquired about whether annual and monthly inspections had been performed on the crane. He reviewed a monthly inspection checklist for the crane dated May 22, 2013 and noted three deficiencies related to the checklist. Namely, that the inspection checklist (1) did not include ground conditions, level position and wire rope; (2) only included an "X" next to each item inspected but did not expressly state the result of the inspection; (3) had the names but not the signature of the individuals performing

[1] The hearing was heard before then Commissioner Ronald DeJuliis. Mr. DeJuliis is no longer Commissioner of Labor and Industry. Accordingly, this decision is issued by current Commissioner Thomas J. Meighen.

[2] "Tr. 1" refers to the transcript of the hearing before the HE. "Tr. 2" refers to the transcript of the hearing before the Commissioner.

the inspection. In addition to reviewing the crane inspection documentation, the Compliance Officer also reviewed employee training documentation and found that it did not specify the type of signal training that the riggers and signalmen working on the site had received. At the conclusion of the inspection, four "other than serious" citations were issued.

DISCUSSION

In order to uphold the citations, 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 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).

Before addressing each of the citation items in question, the Employer argues as a preliminary matter that MOSH has violated its own policies by failing to issue "de minimis" notices in this case and, therefore, the citations must be vacated. The Commissioner disagrees. COMAR 09.12.20.07 provides that if the Commissioner "is of the opinion that the employer has violated a provision of the Act.....the Commissioner...shall issue to the employer either (1) a citation; or (2) for a violation which has no direct or immediate relationship to safety or health, a notice of de minimis violations." The regulation in question is premised upon "the opinion" of the Commissioner or his designee. Because reasoning minds may differ as to whether a violation bears a direct relationship to safety or health, it is squarely within the discretion

of the Commissioner or his designee to determine whether a citation or notice of de minimis violation should be issued.

With regard to Citation 1, Item 1, Phoenix argues that MOSH failed to meet its burden because it contends that inspection of the ground conditions, wire rope and level position occurred but were simply not set forth on the inspection form. The Commissioner disagrees. The requirement is not simply that the inspection of those items occurred but also that it is documented in the monthly inspection form itself. 29 CFR 1926.1412(e)(1) provides that "each month the equipment is in service it must be inspected in accordance with paragraph (d) of this section." Paragraph (d) specifically lists wire rope, level position and ground conditions as items that must be inspected. 29 CFR 1926.1412(e)(2) then requires that the items subject to inspection "must be documented and maintained by the employer." Here, the Employer failed to document as required.

Alternatively, Phoenix argues that the failure to include the items in the monthly check list should have been classified as a "de minimis" violation. The Commissioner disagrees. The Employer acknowledged that "these [ground condition, wire rope and level position] are the kinds of things you check whether it's on a form or not because they are important things." (Tr. 2 p. 6.) The purpose of including them in the inspection report is to make sure that they are inspected. Given that these items are fundamental to safely operating a crane, the Commissioner does not find the failure to include them in the check list as "de minimis" and affirms the citation.

Citation 1, Item 2 was for failure to include the results of the inspection in the monthly inspection report. The Employer argues that specifically noting the results on

the inspection report would have been superfluous in this case because the report has check boxes and, if the box was checked, it means the item in question was inspected and it passed inspection. The Commissioner agrees. In reviewing the inspection report, one can infer that the items were inspected and the results were satisfactory. (MOSH Ex. 5.) This finding is based solely on the facts in this particular case. There may be many instances when the failure to expound on the results of an inspection beyond simply checking the box could be more than a "de minimis" violation, but not in this case.

Citation 1, Item 3 was for failure to include the signature of the person conducting the inspection on the form. The Employer argues that this would have been superfluous because the names of the individuals who conducted the inspection are clearly written on the form and there is no certification or attestation associated with the signature. In this case, the Commissioner agrees. Again, there may be many other instances whether the lack of a signature is more than simply a "de minimis" violation.

Citation 1, Item 4 was for failing to specify the type of signaling for which the signal person was qualified. More specifically, the training documentation did not specify whether the signal person was trained in hand signals, radio signals or both. Again, the employer argues that this should be reclassified as a "de minimis" notice. The Commissioner disagrees. The type of signal training provided to riggers and signalman bears a direct relationship to safety and health. There is no question that proper signaling in the context of crane operation is critical. The rule requires not simply that the employee receive the signal training but that the training documentation itself reflect the type of training. The documentation requirement is important so that anyone examining

it knows the type and extent of the person's expertise. Accordingly, Citation 1, Item 4 is affirmed.

Therefore, on this 29th day of October 2015, the Commissioner hereby ORDERS:

1. Citation 1, Item 1 for an Other than Serious violation 29 CFR 1926.1412(e)(1) is AFFIRMED
2. Citation 1, Item 2 for an Other than Serious violation of 29 CFR 1926.1412(e)(3)(i)(A) is RECLASSIFIED to a DE MINIMIS Notice.
3. Citation 1, Item 3 for an Other than Serious violation of 29 CFR 1926.1412(e)(3)(i)(B) is RECLASSIFIED to a DE MINIMIS Notice.
4. Citation 1 Item 4 for an Other than Serious violation of 29 CFR 1926.1428(a)(3) 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.

Thomas J. Meighen
Commissioner of Labor and Industry