IN THE MATTER OF	*	**BEFORE THE MARYLAND**
	*	**COMMISSIONER OF LABOR**
BETHLEHEM STEEL CORPORATION	*	**AND INDUSTRY**
	*	**MOSH No. V3564-023-99**
	*	**OAH No. DLR-MOSH-41-990000062**

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FINAL DECISION AND ORDER

This matter arose under 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 Bethlehem Steel Corporation (also called Bethlehem Steel or the Employer), alleging a violation of the general duty clause. Following an evidentiary hearing, Laurie Bennett, Hearing Examiner, issued a Proposed Decision affirming the citations.[1]

The Employer filed a request for review. The Commissioner of Labor and Industry (the Commissioner) held a hearing and heard argument from the parties on March 22, 2000. Based upon a review of the entire record and consideration of relevant law and the parties' arguments, the Commissioner has decided to affirm the Hearing Examiner's findings of fact[2] and to adopt her

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[1] Herein, the Hearing Examiner's Proposed Decision is referred to as "Proposed Decision"; the Hearing Examiner's Findings of Fact as "FF"; the transcript of the record before the Hearing Examiner as "T.___"; MOSH's exhibits as "MOSH Ex.___;" the Employer's exhibits as "Employer Ex.__;" and the transcript of the record for March 22, 2000, as "Rev. T. ___."

[2] At Finding of Fact 13, the Hearing Examiner found the subject vapor explosion at the slag-away area caused the windows of the slag bowl carrier to "shatter" and that hot slag and/or

conclusions of law, as modified.

CONCLUSIONS OF LAW

A brief review of the facts is warranted. Since 1992, steelworkers who are employed by Bethlehem Steel as part of its mobile equipment yard department, have operated the slag bowl carriers that transport molten slag from Bethlehem Steel's Basic Oxygen Furnace to the slag-away area where the slag is dumped. This case involves an injury sustained by a Bethlehem Steel slag bowl carrier operator from two steam explosions that occurred in a portion of the slag-away area called the knocking station. The explosion occurred when trapped molten slag came in contact with standing water. The Employer knew, or should have known, that there was a similar, but smaller explosion four years earlier, and a series of "pops" – very small explosions- over the years. FF 20. Further, the Employer acknowledges awareness of "the risk of explosion if molten steel or slag lands on water" and that grading is necessary to contain this hazard. Post-Hearing Brief of Respondent at 6.[3]

The slag-away area is operated 24 hours a day, 365 days a year, by Langenfelder & Son, Inc. (Langenfelder), pursuant to an agreement with Bethlehem Steel that has been periodically renewed

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glass caused injuries to the operator's leg. The record establishes that one of the windows of the cab cracked and that others blew out, but that there was no shattering of glass, and that the glass therefore, was not the cause of the operator's injury. Finding of Fact 13 is corrected accordingly. T.80, 99-112, 125, 153.

Concerning instances of past explosions, Finding of Fact 20 is supported by the record, and is adopted. Finding of Fact 16, which is inconsistent with Finding of Fact 20, and is not Adopted.

[3] Moreover, the steel industry in general has long recognized that the interaction of molten metal with water poses an explosion hazard. *EmpireDetroit Steel Division v. OSHRC,* 579 F.2d 378 (6th Cir. 1978); *Babcock & Wilcox Co. v. OSHRC,* 622 F.2d 1160 (3d Cir. 1980).

without relevant change since 1983. FF 2, 4. Bethlehem Steel employs the slag bowl carrier operators, pays their wages, and dictates their schedule. Langenfelder, in turn, is responsible for the day-to-day operation of the slag-away area, including the daily supervision of the slag bowl carrier operators. FF 5. Bethlehem Steel supervisors, however, do occasionally go through the slag-away area and monitor the operation. T. 26.

The agreement between Bethlehem Steel and Langenfelder provides, in pertinent part, that Langenfelder is required to "comply with the rules and regulations now or at any time hereafter promulgated by [Bethlehem Steel] for the safe, orderly and efficient conduct of operations…." in the slag-away area. FF 3; Employer Ex. 5 at 21. Consistent with the safety aspect of this provision, Bethlehem Steel, in 1994, developed a job safety analysis for slag bowl carrier operators, procedures designed to ensure the safe operation of the slag bowl carriers. FF 17; MOSH Ex. 8. These procedures address "potential accidents or hazards" and provide "recommended safe job procedures" specifically related to operations within the slag-away area. MOSH Ex. 8. The procedures do not mention the known hazards associated with molten slag coming in contact with water or recommend procedures to avoid such problems. *Id*.

At the hearing, Bethlehem Steel's mobile equipment department manager, Gary Roller, testified without contradiction, that in addition to the weekly and monthly safety meetings held in all respective areas, each spring he meets individually with the mobile equipment department employees, including the four slag bowl carrier operators, to discuss safety. T. 175-76. Roller testified that, during one of these one-on-one safety meetings, a slag bowl carrier operator complained about the condition of the vehicles used to transport to slag that Bethlehem Steel rented from Langenfelder, and requested Roller to intervene on their behalf. As a result, Roller contacted

Langenfelder, and successfully argued to upgrade the equipment. Roller testified, "its minor things like that come to my attention that I might discuss with Langenfelder…." T. 175-76; FF 6. Roller also denied that he had ever had a discussion with the slag bowl carrier operators or Langenfelder on the safety issues related to molten slag coming in contact with water. T. 177.

The Hearing Examiner applied what is commonly referred to as the *Anning-Johnson/ Grossman* rule,[4] used to assess responsibility in multi-employer work situations, and sustained the violation and the proposed penalty of $2,200. The Employer seeks reversal. The Employer contends that rather than applying the *Anning-Johnson/Grossman* rule to this non-construction industry case, the Hearing Examiner should have followed the analysis set forth in *Sasser Electric & Manufacturing Company*, 11 O.S.H.C. (BNA) 2133 (1984), and based on that decision found that Bethlehem Steel exercised reasonable diligence to safeguard its employees when it relied upon Langenfelder to detect and to remedy hazards in the slag-away area, and dismissed the citation.[5] Further, the Employer asserts, assuming arguendo that the *Anning-Johnson/Grossman* rule applies, the record establishes that Bethlehem Steel lacked actual control over the hazard, and the citation should therefore be dismissed. *See, e.g., IBP, Inc. v. Secretary of Labor*, 144 F.3d 861, 18 O.S.H.C.

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[4] *Anning-Johnson Company*, 4 O.S.H.C.(BNA) 1193 (1976); *Grossman Steel & Aluminum Corp.*, 4 O.S.H.C. (BNA) 1185 (1976).

[5] The agency's burden of proof in general duty violation cases is well settled. *St. Joes Lead Co. Smelting Division*, 9 O.S.H.C. (BNA) 1646, 1648 (8th Cir. 1981); *Tampa Shipyards, Inc.*, 15 O.S.H.C. (BNA) 1533, 1535 (R.C. 1992). The Employer's sole claim that MOSH failed to meet its burden rests in the contention that MOSH did not establish that the Employer knew, or in the exercise of reasonable diligence, should have known of the hazard. In this regard, the Employer contends that because it relied upon Langenfelder to detect and remedy the hazards in the slag-away area, it could not have known of the hazardous conditions and had no abatement responsibility. This contention is discussed, and rejected, *infra*.

(BNA) 1353 (1997). MOSH urges adoption of the Hearing Examiner's proposed decision.

The Commissioner finds no merit to the Employer's contention that *Sasser Electric & Mfg. Co.*, 11 O.S.H.C. (BNA) 2133 (1984), mandates dismissal of the citation. In *Sasser*, Federal OSHA cited an employer for a violation committed by a subcontractor that the employer had engaged to perform certain specialized work. The citation was dismissed by the OSHA Review Commission. While recognizing an employer's duty to protect its employees exposed to a hazard under the control of a separate company, the Review Commission described certain circumstances in which an employer would be justified in relying on a specialist to protect its employees. *Id*. at 2136. A specialist may be relied upon only where the hazard relates to the specialist's expertise, and then only if the "reliance is reasonable and the employer has no reason to foresee that the work will be performed unsafely." *Id.* Central to the disposition of *Sasser* is the fact that the cited employer had never performed the crane operations that it engaged the specialist to perform and that the crane was under the control of the specialist. Accordingly, the cited employer "could not have known the requirements of the cited standard would not be followed." *Id*. at 2135.

This simply is not the case here. This case does not involve a passing encounter between an unfamiliar company and a specialty subcontractor. Bethlehem Steel and Langenfelder have had an ongoing relationship for decades, and since 1992 have been jointly involved in the task of transporting molten slag from the Bethlehem Steel's Basic Oxygen Furnace and depositing it in the slag-away area. The Employer, itself engaged in the business of manufacturing steel, expressly acknowledges its familiarity with the hazards attendant thereto, including "the risk of explosion of molten steel or slag lands on water." Post-Hearing Brief of Respondent at 6. To protect the slag bowl carrier operators, Bethlehem Steel has for five years maintained a job safety analysis that

addresses safety issues at every phase of the transport operation, including those arising in the slag-away area. Given past incidents of explosions, albeit of a lesser magnitude, the Employer's knowledge of the need for grading, and the fact that at the time of the accident, Langenfelder had no written safety procedures regarding keeping the slag pits or the knocking station clear of water, the Employer did not exhibit reasonable diligence when it relied on Langenfelder to detect and remedy hazards faced by its employees in the slag-away area.[6] For all of these reasons, the Employer's situation bears little relationship to that addressed in *Sasser*.[7]

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[6] The Employer's adoption, by attachment, of Langenfelder's instructions to slag bowl carrier operators as part of the job safety analysis for the work they perform in the slag-away area is evidence that the Employer had access to and was aware of the limits of Langenfelder's instructions.

[7] In its brief before the Hearing Examiner, the Employer cited a long list of cases which it states are "to the same effect" as *Sasser*. Post-Hearing Brief of Respondent at 10. The first, *Marshall v. Cities Service Oil Co.*, 577 F.2d 126 (10th Cir. 1978), is clearly distinguishable. In that case, Cities was charged with a violation of the general duty clause for failing to have rescue equipment available to its employees who died trying to rescue an employee of a specialty contractor engaged to clean and install an anode in one of its tanks. The court affirmed the Review Commission's dismissal of the citation. Unlike the Employer in this case, Cities had a specific local safety rule addressing the recognized hazard of tank entry. Also, unlike the injured Bethlehem Steel employee who was performing his routine work at the time of the explosion, Cities' employees would not have been exposed to the hazard had it not been for their rescue attempt. Additionally, in other areas where Cities permitted tank entry, it required its employees to use protective equipment. This had also been the practice of the subcontractor's employee in the past. In contrast, neither Bethlehem Steel nor Langenfelder had written rules protecting employees from exposure to the explosion hazard in this case.

The Employer also relied upon *Micron Construction*, 18 O.S.H.C. (BNA) 1457 (1998) and *Summit Contractors*, 17 O.S.H.C. (BNA) 1854 (1996), unreviewed decisions of administrative law judges that are of no precedential value. *See Donovan v. Anheuser-Bush, Inc.*, 666 F.2d 315 (8th Cir. 1979) *Williamette Iron and Steel Co. v. Secretary of Labor*, 604 F.2d 1177, 1180 (9th Cir. 1970), *cert. Denied*, 445 U.S. 942 (1971). Also cited by the Employer, *MLB Industries*, 12 O.S.H.C. (BNA) 1525 (1985) concerns the existence of an employer-Employee relationship and has no relevance to this proceeding. The two remaining cases involve The application of the *Anning-Johnson/Grossman* rule and are inapposite. *See New England Telephone & Telegraph Co. v. Secretary of Labor*, 589 F.2d 81 (1st Cir. 1978)(reasonable

The Commissioner additionally finds without merit the Employer's contention that the Hearing Examiner erred in applying *Anning-Johnson/Grossman* defense in this case.[8]

> The fundamental purpose of this defense is common-sensical. Under MOSH regulations, and OSHA as well, an employer has an overriding responsibility to make the work place safe for its employees. Labor and Employment Article, § 5-104(a). In a multi-employer work site, the lines of responsibility often become blurred, and an employee can be exposed to a hazard not of the employer's making…. The end result is that, in a multi-employer work site, actions of one party may often make the work place unsafe for other parties.

Bragunier, 111 Md. App. 698, 171-18 (1996). Here, as noted by the Hearing Examiner, MOSH acknowledges that Bethlehem Steel did not create the hazard. The parties disagree however, on whether the Employer retained control. Proposed Decision at 9. Because of this disagreement regarding control, the Employer is entitled to assert the *Anning-Johnson/Grossman* defense. To establish this defense, the Employer must establish that it neither created nor controlled the hazard, and further must show "either that its exposed employees were protected by other realistic measures taken as an alternative to literal compliance with the cited standard or that it did not have, nor with the exercise of reasonable diligence could have had notice that the condition was hazardous." *Bragunier*, 111 Md. App. at 717.

The Employer argues that by virtue of its contract with Langenfelder to operate the slag-away

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diligence element of the *Anning-Johnson/Grossman* defense does not require a subcontractor to assume improper conduct by the general contractor or to make an agreement with the general contractor not to create unanticipated hazards); *Marshall v. Knutson Const. Co.*, 566 F.2d 596 (8th Cir. 1977)(general contractor, in its "supervisory capacity," is not required to load test the scaffolding of a subcontractor).

[8] The OSHA Review Commission does not limit multi-employer analysis to construction industry cases. *Harvey Workover, Inc.*, 7 O.S.H.C. (BNA) 1687, 1688-89 (1979); *Secretary of Labor v. Rockwell Corp.*, 17 O.S.H.C. (BNA) 1801, 1808, n. 11 (1996).

area, Langenfelder was responsible for the standard operating procedure of grading to keep water away from the molten slag. According to the Employer, because Langenfelder's employees perform the grading, the hazard is not within Bethlehem Steel's control. Review T. at 14. The Employer's argument must fail.

The Maryland Court of Special Appeals has held that even if an employer "had contracted responsibility for safety measures to another, it would have no bearing since 'an employer's statutory duty to protect the safety and health of its employees cannot be delegated to others by contractual arrangements."' *Bragunier*, 111 Md.App. at 718, citing *Anning-Johnson Co.*, 4 O.S.H.C. at 1198, n.13. Further, as the Hearing Examiner found, the same contract relied upon by the Employer to relieve it of responsibility, in fact preserves Bethlehem Steel's right to set safety standards. The contract also requires Langenfelder's compliance with Bethlehem Steel's safety standards.[9] As noted above, in furtherance of these provisions, the Employer maintains safety rules specifically addressing safety issues related to its employees' operation of the slag bowl carriers. These rules list "potential accidents and hazards" and "recommended safe job procedures" in all phases of the slag transport

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[9] The Employer mistakenly argues that *IBP, Inc.*, 144 F.3d 861, 18 O.S.H.C. (BNA) 1353 (D.C. Cir. 1998) requires dismissal of the citation. In that case, the Review Commission held IBP responsible for the failure of a cleaning subcontractor's employees to comply with certain procedures. The D.C. Circuit reversed, finding that the Review Commission had "taken the meaning of 'control' to an unacceptably high level of abstraction" when it found that IBP's general control over the subcontractor, because of its ability to terminate the contract, subsumed the power to discipline individual employees of the subcontractor. Unlike the situation in *IBP, Inc.*, Bethlehem Steel is being charged with responsibility for its own employees, not those of another employer. Additionally, the contract provision supporting a finding of control in this case specifically preserves for Bethlehem Steel the right to promulgate safety rules and regulations for safety in the slag-away area. Further, the record here, unlike that in *IBP, Inc.*, contains substantial evidence under the normal understanding of "control" to support the proposition that Bethlehem Steel had the authority to require Langenfelder to maintain a work environment free from recognized hazards.

operation, including those that take place in the slag-away area. These rules also give instructions to operators concerning who to contact should deficiencies in the slag-away area occur. MOSH Ex. 8. Without interfering with the grading procedures performed by Langenfelder under the contract, these rules could well have instructed the slag bowl carrier operators on the dangers associated with molten steel coming in contact with water and the precautions to follow if such conditions develop. The fact that Bethlehem Steel meets with the four slag bowl carrier operators concerning safety, and has effectively remedied their safety concerns with Langenfelder, is further evidence of Bethlehem Steel's ability to control safety in the slag-away area and to abate these hazards. On these facts, the Hearing Examiner correctly found that the Employer had the ability and expertise to abate the hazard. *Bragunier*, 111 Md. App. at 718.[10]

The second part of the *Anning-Johnson/Grossman* defense goes to the matter of reasonable efforts. Even "a non-creating and non-controlling employer must take reasonable measures to ensure the safety of its employees." *Bragunier*, 111 Md. App. at 720. In this case, Bethlehem Steel cannot be "permitted to close its eyes to hazards to which its employees are exposed, or to ignore hazards of which it has actual knowledge….each employer has primary responsibility for the safety of its own employees." *Grossman Steel & Aluminum Corp.*, 4 O.S.H.C. (BNA) at 1189. The record shows that Bethlehem Steel failed to take reasonable steps to ensure the safety of its employees. Despite the Employer's maintenance of safety rules for the slag bowl carrier operators, and its

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[10] The Employer excepts to the Hearing Examiner's alternative abatement of temporarily shutting down the slag-away area for serious inclement weather. The Employer attempts to discredit this alternative based on the fact that slag-away area is open around the clock every day of the year. However, since that the operation of the slag-away area is driven by the production of steel in Bethlehem Steel's BOF, a temporarily halt in the operation of the slag-away area, should conditions warrant such action, is well within the Employer's control. T.24.

knowledge of the hazards associated with molten slag coming in contact with water, the Hearing Examiner correctly found that the Employer "did not train its employees about the critical need to keep molten steel from coming into contact with water." FF 21. The safety rules for the slag bowl carrier operators established five years earlier, do not notify employees of this hazard. Nor do the safety rules recommend procedures to be followed by the slag bowl carrier operators should such conditions exist. MOSH Ex. 8. This is so despite explosions occurring in the slag-away area since the job safety analysis for slag bowl carrier operators was established and the fact that Bethlehem Steel's authority to control safety matters clearly contemplated the promulgation of new rules and regulations as they became necessary. FF 3; Employer Ex. 5 at 21. Furthermore, by its own admission, the Employer did not raise safety concerns related to molten slag coming in contact with water in its safety meetings with its slag bowl carrier operators or with Langenfelder. Yet, the evidence establishes that the Employer effectively communicated other slag-away area safety concerns to Langenfelder with a favorable resolution. Thus, the Employer possessed the authority to promulgate and enforce rules and regulations that would have addressed the sloping and grading standard necessary to protect its employees against the hazard of explosion in the slag-away area, but failed to exercise this authority.[11] In these circumstances, the Commissioner finds the Employer failed to take reasonable measures to safeguard its employees from a recognized hazard, and that the record supports the citation and the proposed penalty.

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[11] Contrary to the Employer's suggestion, MOSH is not requiring the Employer to assign its own supervisors in the slag-away area and "double up on supervision" to abate the violation. The Employer's establishment of additional safety rules for the slag bowl carrier operators designed to address the hazard at issue would be consistent with the normal working relationship between Bethlehem Steel and Langenfelder and would neither create confusion nor disrupt that relationship.

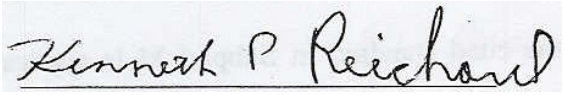
ORDER

For the foregoing reasons, the Commissioner of Labor and Industry, on the 21st day of November, 2000, hereby Orders:

1. Item No. 1 of Citation No. 1, alleging that Bethlehem Steel Corporation engaged in a serious violation of Labor and Employment Article, § 5-104, *Annotated Code of Maryland*, is AFFIRMED.

2. The penalty of $2,200.00 is AFFIRMED.

3. This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for judicial review in the appropriate circuit court. Consult Labor and Employment Article, § 5-215, *Annotated Code of Maryland*, and Maryland Rules, Title 7, Chapter 200.



KENNETH P. REICHARD
Commissioner of Labor and Industry