IN THE MATTER OF	*	BEFORE THE COMMISSIONER
	*	OF LABOR AND INDUSTRY
CHEROKEE SANFORD		
	*	HEARING DETERMINATION NO.
GROUP, LLC	*	MOSH NO.: C4369-001-01
	*	OAH NO.: DLR-MOSH-41-200000096

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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 Cherokee Sanford Group, LLC (also called the Employer), alleging certain violations and penalties. Following an evidentiary hearing, James W. Power, Hearing Examiner, issued a Proposed Decision dismissing the citations.

Thereafter, by Order dated June 1, 2001, pursuant to Labor and Employment Article, §5-214(e), Annotated Code of Maryland, the Commissioner of Labor and Industry (the Commissioner) ordered review. On September 19, 2001, the Commissioner held the review hearing and heard argument from the parties. Based upon a review of the entire record[1] and consideration of relevant law and the positions of the parties, the Commissioner has decided to affirm the Hearing Examiner's findings of fact and to adopt his conclusion of law as modified herein.

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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 for the evidentiary hearing as "OAH T.____"; MOSH exhibits as "MOSH Ex.____;" Employer's exhibits as "Employer Ex.___;" and the transcript of the hearing on review, as "Rev.T.___."

DISCUSSION

To establish the violation of a specific standard, MOSH has the burden of proving by a preponderance of the evidence: the applicability of the standard; the employer's noncompliance with the standard; employee access to the violative condition; and the employer's actual or constructive knowledge of the violation (i.e., the employer either knew or, with the exercise of reasonable diligence, could have known of the violative conditions). *Atlantic Battery Co.*, 16 OSHC 2131, 2138 (1994). In this case, MOSH has failed to meet its burden of proving all four of these elements with respect to two of the three citations.

Concerning Citation 1, Item 1, alleging that material stored was not stacked, interlocked, or limited in height so that it was stable and secure against sliding and collapse in violation of 29 C.F.R. 1910.176(b), the Commission agrees with the Hearing Examiner's finding that because the Employer's method of stacking and storing bricks did not expose employees to the sliding or collapsing of bricks, MOSH failed to prove that employees were exposed to the hazard alleged. Accordingly, the Commissioner adopts the Hearing Examiner's recommendation to dismiss of Citation 1, Item 1. In reaching this conclusion, the Commissioner finds it unnecessary to pass upon the Hearing Examiner's conclusion that the cited standard does not apply because bricks in the manufacturing cycle are not stored materials. Proposed Decision at 12-13.

Concerning Citation 2, Item 1, alleging unguarded floor holes into which a person could accidentally walk in violation of 29 C.F.R. 1910.23(a), the Commissioner finds that the record fails to prove that while unloading bricks from the rail cars, employees walked on the surface of the railcars where the alleged unguarded holes are located, and that MOSH therefore failed to

prove employee exposure to the hazard alleged. Accordingly, the Commissioner adopts the Hearing Examiner's recommendation to dismiss Citation 2, Item 1. In reaching this conclusion, the Hearing Examiner finds it unnecessary to pass upon the Hearing Examiner's findings that, within the meaning of the cited standard, the stacking surface of the railcar was not a "floor" and openings in the stacking surface do not constitute "holes" because they "form an integral basis of the manufacturing process." Proposed Decision at 14.

Concerning Citation 2, Item 2, alleging that fixed stairs were not provided for access from one structure level to another where operations necessitated travel regularly, daily, or at each shift in violation of 29 C.F.R. 1910.24(b), the Commissioner disagrees with the Hearing Examiner's recommendation to dismiss this allegation. As noted by the Hearing Examiner, this violations relates to the 26-inch distance from the plant floor to the monorail level on which employees stand to unload bricks from railcars. The Hearing Examiner found that employees do not "regularly travel between the plant floor and the monorail level." Proposed Decision at 15. In reaching this conclusion, the Hearing Examiner found that employees move from the plant floor to the monorail platform "at the start or end of their shift, or for some reason unrelated to the performance of their work as "dehackers." FF 20. However, focusing on the fact that employees do not move from the monorail platform to the plant floor during the off-loading process, the Hearing Examiner found that "the 26 inch measurement from the factory floor to the monorail level is not significant." The Commissioner finds that the Hearing Examiner's focus is too narrow, and loses sight of the standard's objectives.

Standard 29 C.F.R. 1910.24, contains "specifications for the safe design and construction of fixed general industrial stairs, including interior and exterior stairs around machinery, tanks,

and other equipment, and stairs leading to and from floors, platforms, or pits." 29 C.F.R. 1910.24(a). It is purpose is to protect employees from injuries resulting from movement "from one structure level to another where operations necessitate regular travel between levels, and for access to operating platforms at any equipment which requires attention routinely during operations" by requiring fixed stairs. 29 C.F.R. 1910.24(b). There is nothing in 29 C.F.R 1910.24(b) to suggest that "operations" should be read as the period when actual work is being performed. The absurdity of such a limited definition of "operations" would be far more apparent if the distance from the plant floor to the platform were 40 inches instead of 26 inches. Nonetheless, it is fair to say that if Cherokee's dehackers, tasked to off-load bricks from the railcars to the monorail, did not climb up onto the monorail platform, they would not be in position to off-load bricks, and the operation, as the Hearing Examiner defined it, would grind to a halt. It is apparent therefore, that "operations" as used in the standard, must include getting employees into position to perform their assigned duties.

The Hearing Examiner additionally found that "workers do not regularly travel between the plant floor and the monorail level." Proposed Decision at 15. The American Heritage Dictionary[2] defines regular as "1. Customarily, usual, or normal…. 5. Occurring at fixed intervals; periodic." In this case, the record establishes that employees must step the 26 inches on and off the monorail platform each time they begin and end a shift or take a break and then return to work. FF 20; OAH T. 157-58. 281-82. Such activity clearly falls within the definition of "regular." For all of the reasons set forth above, the Commissioner finds that the cited

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[2] *The American Heritage Dictionary of the English Language* 1096 (1978).

standard applies.

Concerning the existence of a hazard and employee exposure, as noted above, the record establishes that no steps existed between the plant floor and the monorail platform and that employees were routinely exposed to this hazard. The record further establishes that the Employer either knew or could have known of the hazardous condition with the exercise of reasonable diligence. The absence steps was obvious and in plain view. Further, the Senior Industry Specialist from SIGNA Industrial Packing System ("SIGNA") testified on behalf of the Employer that Respondent Ex. 9 is a schematic diagram of a monorail system that is "practically identical" to that in the Employer's Beltsville facility. OAH T. 254. That diagram shows steps from the plant floor to the monorail platform. SIGNA's representative testified that although SIGNA did not manufacture the Employer's monorail, it was manufactured by a company that used SIGNA's design, and that Respondent Ex. 9 "would be a drawing we would show someone to describe how a monorail functions." OAH T. 250, 254. Based on this evidence, it is apparent that steps from the plant floor to the monorail platform were intended. Finally, injury or illness reports introduced into evidence by MOSH establish sprains or bruises sustained by employees while stepping up or down at the monorail platform. MOSH Ex. 9. These facts demonstrate that the Employer knew or should have known about the violative condition and taken reasonable measures to correct the hazard to prevent employee injury. The Employer's only defense to the citation is that the cited standard does not apply. As discussed above, the Commissioner finds no merit to this claim.

Based on the foregoing, the Commissioner finds that MOSH has established a violation of 29 C.F.R. 1910.24(b) by a preponderance of the evidence. Accordingly, the Commissioner

does not adopt the recommendation of the Hearing Examiner to dismiss Citation 2, Item 2, and affirms this citation.

ORDER

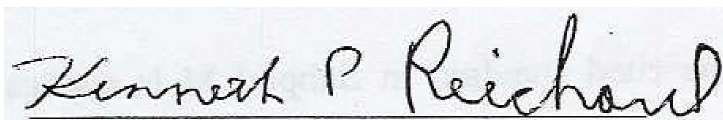
For the foregoing reasons, the Commissioner of Labor and Industry, on the 31st day of December, 2001, hereby Orders:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. 1910.176(b) with the proposed penalty of $3,325, be DISMISSED.

2. Citation 2, Item 1, alleging an other than serious violation of 29 C.F.R. 1910.23(a)(8) is DISMISSED.

3. Citation 2, Item 2, alleging an other than serious violation of 29 C.F.R. 1910.24(b) is AFFIRMED.

4. 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