IN THE MATTER OF	*	**BEFORE THE**
OTIS ELEVATOR COMPANY	*	**COMMISSIONER OF LABOR**
	*	**AND INDUSTRY**
	*	**MOSH CASE NO. J8945-021-02**
	*	**OAH CASE NO. DLR-MOSH-41-200200071**
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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*. Following an accident inspection, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH"), issued two citations to Otis Elevator Company ("Otis" or "Employer"), alleging violations. On January 20, 2003, a hearing was held at which the parties introduced evidence, presented witnesses, and then filed post-hearing briefs. Thereafter, Administrative Law Judge Eleanor A. Wilkinson, sitting as Hearing Examiner, issued a Proposed Decision recommending that one of the citations be Affirmed, and the other dismissed.

The Employer filed a timely request for review. On October 14, 2003, the Commissioner of Labor and Industry held the review hearing and heard argument from the parties. Based upon review of the entire record and consideration of the relevant law, positions of the parties, and the Hearing Examiner's Proposed Decision, Citation 1, Item

1 for violation of 29 CFR 1910.23(c)(1) is **DISMISSED**[1] and Citation 2, Item 1 for a violation of 29 CFR 1910.26(c)(3)(iii) is **AFFIRMED**.

DISCUSSION

This case arises out of an accident involving an employee who fell eighteen feet down an elevator shaft of the Tremont Hotel. On the day of the accident, a four-man crew was installing new cable, or re-roping elevator car number four. FF 3.[2] Re-roping required access to the cables in the elevator hoistway. The depth of the elevator pit made it impossible to set up a ladder on the basement floor so the foreman, Mark Good, decided to place the ladder on the mezzanine level. FF 5.

The feet of the ladder rested on the elevator door sill. FF 10. Good attached a two by four, just above the ladder's bottom feet and tied the board horizontally across the ladder. FF 11. The employees testified that the intended purpose of the two by four was to prevent the bottom of the ladder from kicking out into the hallway. *Id.*; Tr. At 216, 330. The end of the two by four touching the south wall rested on a ledge and leaned on a metal rail. FF 12. On the north wall, there was no ledge or metal rail, so the two by four was flush with the wall. *Id.* There was nothing to prevent this side of the ladder from pushing into the hoistway. *Id.* At the top of the ladder, Good tied both rails to the counterweight rails located at the rear of the elevator hoistway. FF 7. The Hearing Examiner found that MOSH established its prima facie case that a violation of 1910.23(c)(3)(iii) occurred. The Hearing Examiner also concluded that the Employer

[1] The Commissioner affirms the Hearing Examiner's finding that the evidence in the record does not support a violation of 29 CFR 1910.23(c)(1).

[2] Herein, the Hearing Examiner's Findings of Fact are referred to as "FF" and the transcript of the January 20, 2003 hearing as "Tr.".

failed to prove its affirmative defense of employee misconduct, and therefore, recommended affirming the citation.

I. Applicability of the General Industry Standards

Relying upon the fact that the Tremont Hotel remained operational during the Employer's work, the Hearing Examiner concluded, as alleged by MOSH, that the general industry standard applies. The Employer excepts. OSHA's position is that work that is considered "improvement" falls within the construction standards, while work that constitutes "maintenance" falls within the general industry standards. *See* 8/11/94 Construction vs. Maintenance Memorandum by James W. Stanley (Stanley Memorandum).

"Determinations of whether a contractor is engaged in maintenance operations as opposed to construction activities is made on a case-by-case basis, taking into account all information available at a particular site." Stanley Memorandum at 2. On the day of the alleged violation, the entire four man crew, a crew that was not part of the Employer's construction unit but rather its modernization unit, was re-roping elevator car number 4. Tr. At 309. Over a number of years, the sheave had been undercut to a point where larger rope than usual was being used to give the sheave the necessary traction. Tr. At 406. These ropes began slipping over the sheave and replacement was necessary to ensure that the elevator continued to operate properly. Tr. At 405. The re-roping work being performed falls within the ordinary meaning of "maintenance" as "the work of keeping something in proper condition." American Heritage Dictionary (1978). This work maintained the ropes and sheaves in operating condition while not altering the elevator unit's normal and customary operation while the hotel remained open.

The Stanley Memorandum also provides that in instances where an activity cannot be easily classified as construction or maintenance, the more protective standard should be cited. Stanley Memorandum at 3. MOSH cited the Employer for failure to adequately secure the ladder under Section 1910.23(c)(3)(iii), a general industry standard. This standard states that a ladder base section "must be placed with a secure footing." The construction industry standard, urged by the Employer, provides that a ladder that can be displaced "shall be secured to prevent displacement" or a "barricade shall be used to keep the activities or traffic away from the ladder." 29 C.F.R. 1926.1053(b)(8). The construction industry's alternative option of barricading to keep activities away from the ladder provides protection to employees and the public in the area around the ladder if the ladder kicks out. The general industry standard holds an employer to a higher standard by providing greater protection to employees in requiring a secure ladder. Taking into account the nature of the re-roping work and the greater protection afforded by the general industry standard, the Commissioner concludes that the general industry standard applies.

II. Compliance with the Standard

The Employer contends as a matter of law, that the Hearing Examiner gave insufficient weight to foreman Good's efforts to secure the ladder.[3]

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[3] The Employer also alleges that the Hearing Examiner improperly focused on Otis' post-accident remedial measures. The Employer mischaracterizes the Hearing Examiner's discussion. In the Proposed Decision, the Hearing Examiner merely identifies that the foreman used a different method of securing the ladder after the accident. Proposed Decision at 13. There was no finding of fact on this issue, and there is nothing to indicate that this fact provided the basis for the Hearing Examiner's conclusion.

The cited standard, 1910.23(c)(3)(iii), requires that a "ladder base section must be placed with a secure footing." As found by the Hearing Examiner, the evidence depicting the set-up of the ladder reveals that the ladder was not secured from slipping in both directions. Proposed Decision at 13.[4] While the facts establish that the foreman and one of the crew jumped up and down to test whether the ladder was secure, and that the crew expressed satisfaction that it was secure, the motion of jumping up and down on the ladder tested the ladder's stability in terms of it kicking out into the hallway. There is no evidence that there was any determination of whether the ladder was secure from kicking into the hoistway. In fact, during MOSH's investigation after the accident, the foreman reinstalled the ladder in the exact manner as on the day of the accident. Tr. At 421. The foreman then pushed his foot or hand against the ladder, pushing it toward the hoistway, causing the ladder to easily fall into the hoistway. Tr. At 422. The credible evidence supports the finding that there was no mechanism to prevent the ladder from kicking in, and therefore, that the ladder was not secure.

The Commissioner finds no merit to the Employer's assertion that the ladder was secure on the day of the accident because the method used by the foreman was consistent with "industry practice." Merely because a precaution is industry practice does not mean that the practice is safe. An entire industry could avoid liability by maintaining an inadequate safety practice. *Cape & Vineyard Div.*, 2 O.S.H. Case (BNA) 1628, 1631 (1975). Industry practice is but one aspect of the test used by OSHA to examine whether, in a general duty clause case, the alleged hazard would be recognized by a reasonable

[4] There are no strong reasons to overrule the Hearing Examiner's credibility determination. *Anderson v. Dep't of Public Safety and Correctional Services*, 330 Md. 187, 216-17 (1993).

Person as a hazard warranting the use of protective equipment. See *Owens Corning Fiberglass Corp*. 7 O.S.H. Case (BNA) 1291, 1294-95 (1979). The Commission has made it clear that industry practice is not dispositive in these types of cases. *Id*. The keystone of MOSH Act, like its federal counterpart, is preventability. Employers, while not strictly liable for an accident, have a duty to prevent the first accident. *Brennan v. OSHRC,* 2 O.S.H. Case (BNA) 1641, 1646 (2d Cir. 1975); *Arkansas-Best Freight Sys. Inc.*, 3 O.S.H. Case (BNA) 1910, 1912 (1976). Because the foreman reports being unaware of a ladder previously kicking into the hoistway does not establish the absence of a hazardous condition. The Commissioner finds that the standard was violated because the evidence plainly shows that the ladder was not secure from kicking into the hoistway thereby exposing employees to the hazard of an unsecured ladder, eighteen above the ground floor.[5]

III. Affirmative Defense of Employee Misconduct

The Employer also challenges the Hearing Examiner's conclusion that it failed to establish the defense of employee misconduct. On Review, the Employer contends that the hazard at issue was the employee standing in the hoistway before climbing on the

[5] To the remaining prima facie elements of exposure and knowledge, employee exposure is established by the fact that the employees were working around the unsecure ladder, two employees jumped on the ladder, and a third put at least his left foot on the ladder. See *Kokosing Construc. Co. Inc.* 17 O.S.H. Case (BNA) 1869 (1996). As to actual knowledge, an employer is charged with the knowledge of its supervisor. *Western Waterproofing Co. v. Marshall*, 576 F.2d 139 (1978). Here, the supervisor set up the ladder. Under the theory of constructive knowledge, an employer has knowledge of hazards that are in plain view. *Kokosing Construc. Co. Inc.*, 17 O.S.H.Case (BNA) 1869 (1996). The ladder was in plain view from the time that it was set up prior to lunch until after lunch when the accident occurred. Accordingly, MOSH has established a prima facie case that the cited standard has been violated.

ladder, and that the Hearing Examiner therefore erred in basing her decision on ladder safety as opposed to fall protection.

The Employer was cited under the ladder standard for an unsecure ladder not under the fall protection standard. The analysis under the employee misconduct defense, therefore, examines the cited hazard – namely – the hazard posed by the displacement of the unsecured ladder.[6] Had the ladder been secure, as required by the standards, it could have prevented the unsafe condition from occurring.

To establish the defense of employee misconduct, an employer must show each of the following: (1) established work rule to prevent the reckless behavior and/or unsafe condition from occurring; (2) adequate communication of the rule to its employees; (3) steps taken to discover incidents of noncompliance; and (4) effective enforcement of the rule whenever employees transgress it. *P.Gioiso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 109 (1st Cir. 1997). There is no evidence that Otis had a ladder safety rule to address safely securing a ladder. Such a rule could require employees to check to see that a ladder is secure, both from kicking in and from kicking out, prior to use. This type of safety rule is particularly important in the elevator industry that utilizes ladders in hoistways at considerable heights. In terms of communication of ladder rules to employees, there is no evidence in the record that the Employer provided ladder safety

[6] Regarding the Employer's claim that the evidence fails to show that the injured employee used the ladder, the Hearing Examiner properly found that Tice, the employee who fell into the hoistway, was on the ladder as he was last seen stepping on the ladder with his left foot and reaching with his hand toward the ladder. FF 21.

training until after the accident. With no rule or training, there can be no finding of compliance with the inspection and enforcement requirements of *Gioiso*. Accordingly, the Commissioner affirms the Hearing Examiner's conclusion that the Employer has failed to satisfy its burden of establishing the affirmative defense of employee misconduct. The Hearing Examiner's recommended conclusion that MOSH has proven the prima facie elements to establish a violation of 1910.23(c)(3)(iii) is therefore affirmed.

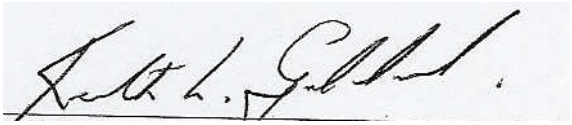
ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on the 26th day of April, 2004, hereby **ORDERS**:

1. Citation 1, Item 1, alleging a serious violation of 29 CFR 1910.23 (c)(1), with a penalty of $3,625.00 is **DISMISSED**;

2. Citation 2, Item 1, alleging a serious violation of 29 CFR 1910.26(c)(3)(iii), with a penalty of $3,625.00 is **AFFIRMED**.

3. 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.



Dr. Keith L. Goddard
Commissioner of Labor and Industry