IN THE MATTER OF	*	**BEFORE THE**
R.E. MICHEL COMPANY, INC.	*	**COMMISSIONER OF LABOR**
	*	**AND INDUSTRY**
	*	**MOSH CASE NO. H1442-001-01**
	*	**OAH CASE NO. DLR-MOSH-41-200000105**
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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 inspection, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH"), issued a citation to R.E. Michel Company, Inc. ("R.E. Michel" or Employer"), alleging a violation. On February 2, 2001, a hearing was held at which the parties introduced evidence, presented witnesses, and then filed post-hearing briefs. Thereafter, Paul B. Handy, Hearing Examiner, issued a Proposed Decision recommending that the citation be affirmed.

The Employer filed a timely request for review. On June 27, 2001, the Commissioner of Labor and Industry held the review hearing and heard argument form the parties. Based upon a review of the entire record and consideration of the relevant law and the positions of the parties, as recommended by the Hearing Examiner, Citation 1, Item 1 for violation of 29 CFR 1910.176(b) is AFFIRMED.[1]

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[1] Commissioner Kenneth Reichard ordered review and presided over the review hearing. Keith Goddard is now the Commissioner of Labor and Industry and has delegated this case to Acting Deputy Commissioner Craig Lowry. Acting Deputy Commissioner Lowry has carefully reviewed the record in this case and issues this decision.

DISCUSSION

The facts in this case are not in dispute. This case arises from an accident at the Employer's warehouse distribution center. An employee, while engaged in his assigned duty to clean a warehouse aisle at the end of his shift, noticed an empty box resting on a full box. FF 10.[2] When the employee pulled the empty box, a stack of three full boxes weighing 108 pounds each fell and knocked the employee to the ground. *Id.* The employee sustained severe injuries including a broken neck and back. *Id.* The Hearing Examiner concluded that the accident was caused by the fact that "at least one of the boxes was not stacked in a secure or stable manner and was resting partly on the employee box" that was pulled by the employee. FF 11. MOSH cited the Employer for failing to store material in tiers so that it is stacked, blocked, interlocked or limited in height so that it was stable and secure against sliding and collapse.

On review, the Employer challenges the Hearing Examiner's recommendation to find a violation of 29 C.F.R. 1910.176(b) on several grounds. First, the Employer contends that the Hearing Examiner erred in concluding that MOSH satisfied its burden of proving the *prima facie* element of knowledge. Second, the Employer argues that the Hearing Examiner erred in rejecting the Employer's defense of employee misconduct.[3]

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[2] Herein, the Hearing Examiner's Findings of Fact is referred to as "FF"; the transcript of the February 2, 2001 hearing as "Tr."; and the Employer's Exhibits from the hearing as "Er. Ex.".

[3] The Employer challenges Finding of Fact No. 15 which states the "Employer modified its training program after the accident" by adding information on correcting leaning boxes." FF 15. John Michel, the director of distribution, testified that after the accident, he "drafted a formal document" restating managerial and employee responsibilities regarding stacking and cleanliness. Tr. At 143. He added that the drafted policy did not differ but that it was formalized. Tr. At 144. Finding of Fact No. 15 is therefore modified to state:

> Following the incident of July 20, 2000, Michel modified its safety training Program for forklift operators regarding stacking and cleaning by putting it in writing.

The Employer challenges the Hearing Examiner's conclusion that the Employer had constructive knowledge, arguing that it exercised reasonable diligence by implementing procedures to ensure that stacking hazards were identified and corrected as quickly as possible. Employer's Notice of Appeal Brief at 9. In determining whether the Employer had constructive knowledge, the issue is whether the employer "exercised reasonable diligence" to discern the presence of stacking hazards arising from the cleaning process. *Secretary of Labor v. Gary Concrete Products, Inc.* 15 O.S.H. (BNA) Cas. 1051, 1054 (1991). The exercise of reasonable diligence includes adequately training and communicating written safety practices and procedures, and enforcing those measures, to ensure that employees can safely perform their job. *Id.* at 1055.

The hazard of falling boxes was an accepted occurrence in the warehouse and was common knowledge to management. Tr. at 67 & 70. Throughout the course of the day, employees were required to clean their assigned aisles of debris, shrink wrap and leaning empty boxes. Tr. at 136, 181. The employee involved in the accident was cleaning his assigned aisle when he noticed the empty box, disembarked from his forklift, and pulled the empty box down to remove it. FF 10.

As demonstrated by the facts of this case, the cleaning of the aisles has the potential to alter or shift stacked boxes, impacting on their security and stability. Yet, the Employer had no work rule specifying cleaning techniques to reduce the hazard of destabilizing stacked boxes. The employee's supervisor testified that upon observing the empty box, the employee "should have assessed the situation first before he yanked… when he felt the weight on it. he should have stopped and gotten on his forklift." Tr. at 203. There was no work rule requiring that during cleaning an employee was required to first assess the potential that moving an empty box

would have on a stack of boxes. By the Employer's admission, its rules relating to stacking and storing products were "informal" and "verbal" (Tr. at 118) and stacking issues were left up to "common sense." Tr. at 43. Given the potential hazard of falling boxes posed by cleaning, reasonable diligence would include a work rule specifically addressing what to do while cleaning to ensure that the boxes would remain stable and secure against sliding or collapse.

The record is replete with evidence of the Employer's comprehensive safety program, and specifically evidence on rules relating to forklift operation, including how to pick-up, stack and drop loads, as well as safe lifting practices and housekeeping training.[4] FF 4. The Employer has a system for inspecting the aisles for stability and cleanliness that includes supervisors, a bulk consolidator and employees. Tr. at 143, 165, 185. The importance of cleaning is addressed at orientation training, staff meetings, and again through informal meetings on the warehouse floor. Tr. at 119; Er. Ex. 4; Er. Ex. 9. Despite these procedures, the Employer had no written work rule in its safety program specifically addressing the hazard in this case – namely how to clean in a manner that takes into consideration the fact that cleaning has the potential to dramatically impact on the stability of stacked boxes. Informal instructions that rely upon common sense do not amount to a safety work rule, especially in an environment such as the Employer's where safety procedures are otherwise clearly spelled out and enforced. The absence of written work rules in this environment makes the standard of conduct vague and the imposition of and the kind of discipline difficult at best. The Acting Deputy Commissioner concludes that the Employer failed to exercise reasonable diligence by not providing specific training or instructions on how to safely clean the aisles to prevent the hazard of falling boxes.

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[4] The housekeeping training advised employees to keep their work area clean, dispose of waste, report broken equipment, and return items to their assigned location when finished. Er. Ex. 2.

Based upon this conclusion, the Acting Deputy Commissioner finds that the Employer had constructive knowledge of the hazard, and that MOSH has satisfied its burden of proving the *prima facie* elements of a violation of Section 1910.76(b).

The Employer's second challenge to the Hearing Examiner's decision is that the Hearing Examiner erred in rejecting the Employer's defense of employee misconduct. While this case was pending , the Maryland Court of Appeals affirmed the Commissioner's position that employee or supervisor misconduct is an affirmative defense which the employer is obligated to plead and to prove. *See Commissioner of Labor and Industry v. Cole Roofing,* 368 Md. 459 (2002). To establish employee misconduct, the Employer must show that: (1) it had established work rules to prevent the violation; (2) the work rules had been adequately communicated to its employees; and (3) it had taken steps to discover violations, and had effectively enforced the rules when violations had been discovered. *Sec. of Labor v. D.A. Collins Construct, Inc.* 117 F.3d 691, 695 (2d Cir. 1997). As previously discussed above, the Employer did not have work rules in effect to prevent the violation in this case. The Hearing Examiner's recommended conclusion that MOSH has proven the *prima facie* elements to establish a violation of 1910.176(b) is therefore affirmed.

ORDER

For the foregoing reasons, the Acting Deputy Commissioner of Labor and Industry on the _2nd_ day of January, 2004, hereby **ORDERS**:

1. Citation 1, Item 1, alleging a serious violation of 29 CFR 1910.176(b) with a penalty of $4,150.00 is **AFFIRMED**.

2. 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.

Craig D. Lowry, Acting Deputy Commissioner of Labor and Industry

Note: Commissioner's decision overturned by Circuit Court of Baltimore City.