IN THE MATTER OF	*	**BEFORE THE**
	*	**COMMISSIONER OF LABOR**
WILLIAMS STEEL ERECTION	*	**AND INDUSTRY**
COMPANY, INC.	*	
		MOSH CASE NO. J2569-071-98
	*	**OAH CASE NO. DLR-MOSH-41-990000108**

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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 Williams Steel Erection Company, Inc. ("Williams Steel" or Employer"), alleging certain violations. On November 17, 1999, a hearing was held at which the parties introduced evidence, presented witnesses, and then filed post-hearing briefs. Thereafter, William C. Herzing, Hearing Examiner, issued a Proposed Decision affirming in part, and dismissing in part.

By Order dated March 30, 2000, pursuant to Labor and Employment Article, § 5-214(e), *Annotated Code of Maryland*, the Commissioner of Labor and Industry ("Commissioner") ordered review. On April 4, 2000, the Employer filed a request for review on the issue of the burden of proof for employee misconduct and Citation 2, Items 1, 2, and 3. On June 7, 2000, the Commissioner held the review hearing and heard argument from the parties. Based upon a review of the entire record and consideration of

the relevant law and the positions of the parties, Citation 1 and Citation 2, Items 1 and 4 are DISMISSED and Citation 2, Items 2 and 3 are AFFIRMED.[1]

BACKGROUND

This case involves an inspection of a one-story block and steel building on which two individuals were welding and using a screw gun to anchor corrugated steel sheets to the joists of the building. FF 2 & 3; Tr. at 97.[2] The employees were not wearing fall protection. FF 4. The MOSH Inspector observed a fire extinguisher with a gauge indicating that the extinguisher was not fully charged. Tr. at 38. Ralph Pridgen, the supervisor on the job, connected an extension cord to a generator that ran from the ground level to a screw gun that was used on the roof. FF 11 & 12. During the inspection, a pick-up truck ran over the extension cord. *Id.*

DISCUSSION

I. 29 CFR 1926.501(b)(1) – Subpart M

Subpart M of Part 1926, subject to certain exceptions including steel erection work, sets forth the requirements and criteria for "fall protection in construction workplaces." 29 CFR 1926.500(a)(1). The Hearing Examiner found that MOSH failed to prove that the fall protection standard in Subpart M applied. On review, MOSH notes that the employees were moving along the edge of the roof anchoring steel sheets to the joists of the building and were exposed to a fall hazard. MOSH argues that the rationale for exempting steel erectors from Subpart M relates to the nature of steel erection work,

[1] Commissioner Kenneth Reichard ordered review and presided over the review hearing. Since Reichard is no longer Commissioner, James D. Fielder, Jr., Secretary of Labor, Licensing and Regulation has carefully reviewed the record in this case and issues this decision.

[2] The Hearing Examiner's Findings of Fact are affirmed.

and that the type of work that the employees were performing was not typical of steel erection work that requires the unencumbered mobility which can render fall protection impractical and/or unfeasible. The Employer counters that the work constitutes steel erection work, and that the fall protection requirements of Subpart R, and not Subpart M, apply.

MOSH is seeking to create an exception due to the nature of the work being performed. Such an interpretation is not supported by the facts of this case. Section 501(b)(1) is not applicable, and the Hearing Examiner's conclusion that MOSH has failed to meet its *prima facie* burden is affirmed.[3] Citation 1 is dismissed.

II. 29 C.F.R. 1926.150(a)(4) – Fire Protection

The Hearing Examiner affirmed the citation for failing to maintain fire-fighting equipment in operating condition under 1926.150(a)(4). On review, the Employer argues that the standard does not require that a fire extinguisher be fully charged. MOSH maintains that unless a fire extinguisher is fully charged, it does not have maximum fire fighting capability, and therefore, is not fully operational.

Section 1926.150(a)(4) provides that all fire fighting equipment "shall be periodically inspected and maintained in operating condition and defective equipment shall be immediately replaced." The MOSH Inspector testified that the fire extinguisher gauge had a green zone, a yellow zone, and a red zone. Tr. at 38-40. It was his testimony that at the time of the inspection, the gauge was in the yellow zone. Tr. at 113. The MOSH Inspector stated that he did not test the extinguisher to determine the amount

[3] The Employer also was cited under 1926.503(b)(1) for failing to have a written certification record for training in fall hazards under Subpart M. Given the conclusion that Subpart M does not apply, Citation 2, Item 4, Section 503(b)(1) also is dismissed.

of fire material in the extinguisher. Tr. at 116. MOSH contends that the fire extinguisher was defective because the gauge was in the yellow zone.

The cited standard states that the fire extinguisher must be "operational." There is nothing in the standard requiring a fire extinguisher to be fully charged to be operational. There is nothing in the record to demonstrate that the fire extinguisher was not operational. The fact that the gauge was in the yellow zone meant that the fire extinguisher was charged, and therefore, was operational albeit not at its maximum power. While the safer work practice would be to have a fully charged extinguisher to allow for maximum fire-fighting capability, the standard is not violated by an extinguisher that is operational although less than fully charged. The Hearing Examiner is reversed. Citation 2, Item 1 is dismissed.

III. 29 C.F.R. 1926.405(a)(2)(ii)(I) – Electric Cords[4]

The Hearing Examiner affirmed the citation under Section 405(a)(2)(ii)(I) for failing to protect flexible cords used for temporary wiring from damage. On review, the Employer asserts that the cords in use are not temporary wiring, and therefore, the cited standard does not apply.

The scope provision of Section 405(a)(2) provides that the section applies to "temporary electrical power and lighting wiring methods which may be of a class less than would be required for a permanent installation." The flexible extension cord used by the Employer ran from a generator to provide power to a screw gun. FF 11. The flexible extension cord is clearly a "temporary" wiring method that provided "electrical

[4] While the Employer filed an exception to the violation of Section 1926.416(e)(1), at the review hearing, the Employer did not provide any grounds to support the dismissal of this

power" to the screw gun. Therefore, the flexible extension cord falls within the plain language of the scope of the cited provision since it is a temporary electrical power method "of a class less than would be required for permanent installation." The fact that the flexible extension cord falls within the scope of Section 405(a)(2) is further demonstrated by the fact that extension cords are specifically addressed in a subsequent subsection of 405(a)(2). *See* 1926.405(a)(2)(ii)(j)(Extension cord sets used with the portable electric tools and appliances shall be of a three-wire type and shall be designed for hard and extra hard usage.).

Having concluded that the cited standard applies, it is undisputed that an employee was using a screw gun that was attached to a flexible electric cord that was plugged into a generator. FF 11 & Tr. at 37, 40-41. Section 405(a)(2)(ii)(I) requires that cords be protected from damage. The electric cord ran from the roof to a generator on the ground through an area that was exposed to vehicular traffic, and during the course of the inspection, a pick-up truck ran over the cord. Tr. at 80. The Employer had constructive knowledge because the supervisor, Mr. Pridgen, placed the extension cord in use that morning in addition to the fact that the cord was in plain view. Tr. at 82. The Hearing Examiner's conclusion that MOSH has proven the *prima facie* elements to establish a violation of 1926.405(a)(2)(ii)(I) is affirmed.[5]

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citation. Having reviewed the record relating to this violation, the Hearing Examiner's finding that MOSH met its burden of proving a violation of 1926.416(e)(1) is affirmed.

[5] Both before the Hearing Examiner, and on review, the Employer raised the issue of the burden of proof in establishing the affirmative defense of employee or supervisor misconduct. Since that time, the Maryland Court of Appeals has affirmed the Commissioner's longstanding position that employee or supervisor misconduct is an affirmative defense which the employer must plead and prove. *See Commissioner of Labor and Industry v. Cole Roofing*, 368 Md. 459 (2002). Properly assigning the burden of proof to the Employer in this case, the record reveals that the Employer has failed to

ORDER

For the foregoing reasons, the Secretary of Labor, Licensing and Regulation on the 23rd day of May, 2003, hereby ORDERS:

1. Citation 1, Item 1, alleging a serious violation of 29 CFR 1926.501(b)(1) with a proposed penalty of $875.00 is DISMISSED.
2. Citation 2, Item 1 alleging an other than serious violation of 29 CFR 1926.150(a)(4) with no penalty is DISMISSED.
3. Citation 2, Item 2, alleging an other than serious violation of 29 CFR 405(a)(2)(ii)(I) with no penalty is AFFIRMED.
4. Citation 2, Item 3, alleging an other than serious violation of 29 CFR 1926.416(e)(1) with no penalty is AFFIRMED.
5. Citation 2, Item 4, alleging an other than serious violation of 29 CFR 1926.503(b)(1) with no penalty is DISMISSED
6. 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.

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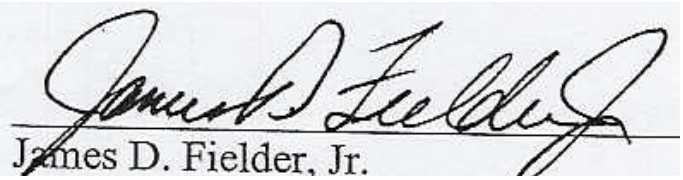
provide any evidence that it had an established work rule relating to temporary wiring that was communicated to employees/supervisors and enforced by the Employer. The Employer has failed to prove this affirmative defense.

Consult Labor and Employment Article, § 5-215, Annotated Code of Maryland, and the Maryland Rules, Title 7, Chapter 200.



Secretary, Department of
Labor, Licensing and Regulation