STATE OF MARYLAND
DLLR
DEPARTMENT OF LABOR, LICENSING AND REGULATION

DIVISION OF LABOR AND INDUSTRY
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January 14, 2014

Ronald W. Taylor, Esquire
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Subject: Balfour Beatty Infrastructure, Inc.
MOSH Case No. M138000709
OAH No.: DLR-MOSH-41-09-07465

Dear Sir:

Enclosed is the Final Decision and Order issued today in the case noted above.

Sincerely,

Minnie L. Godsey

Minnie L. Godsey
Administrator Officer
Division of Labor and Industry

cc: Jenny Baker/Sarah Harlan, Assistant Attorneys General
Catherine Bellinger, Assistant Attorney General
Judge Jana Burch, Office of Administrative Hearings
Librarian, Office of Administrative Hearings
MOSH Office of Review

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

IN THE MATTER OF	*	**BEFORE THE**
	*	**COMMISSIONER OF LABOR**
BALFOUR BEATTY	*	**AND INDUSTRY**
INFRASTRUCTURE, INC.	*	**MOSH CASE NO. M138000709** **OAH CASE NO. 41-09-07465**
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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*. On November 8, 2008, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH") issued two citations to Balfour Beatty Infrastructure, Inc. ("Balfour Beatty") for violating Maryland's Occupational Safety and Health law. The citations stemmed from an inspection that MOSH performed as a result of an employee sustaining serious injuries after being struck with a headache ball.

The Employer contested the citations and a hearing was held on May 18, 2009 at the Office of Administrative Hearings in Hunt Valley, Maryland. Thomas G. Welshko, Administrative Law Judge, presided as the Hearing Examiner ("HE"). The HE issued a proposed decision recommending that the Citations and proposed penalty of $4,475.00 be affirmed.

Balfour Beatty appealed the proposed decision and the Commissioner of Labor and Industry held a review hearing on January 12, 2010. On review, Balfour Beatty argues that both citations should be dismissed. Based upon a thorough review of the factual record, the relevant law, the arguments made by both parties, and the brief

submitted by the Employer, the Commissioner adopts the proposed decision of the Hearing Examiner and affirms Citations 1 and 2.

FINDINGS OF FACT

On September 30, 2008, Balfour Beatty was removing piling in conjunction with the construction of a CSX railroad bridge in Hyattsville, Maryland. (Tr. 29.) Balfour Beatty employees used a link belt crane with a lattice boom to remove pilings adjacent to the bridge. (Tr. 30.) The crane had been erected the previous day. (Tr. 40.) The crane had two hooks attached to it. Attached to one hook was a headache ball and attached to the other hook was a vibratory hammer used for pile driving and pile moving. (Tr. 55, 65.) The headache ball weighed approximately 650 pounds. (Tr. 132, 167-68.) A metal rope sling was used to tie back the headache ball and secure it to the body of the crane so that it did not interfere with the pile removal operations. (Tr. 55-57.) Wire rope slings of the type used to secure the headache ball are common on a construction site. (Tr. 42-43.) They are considered rigging equipment and can be used for a variety of functions including supporting material, lifting and holding material. (Tr. 42.) While the employees were lowering sheet pile, the sling securing the headache ball broke causing the headache ball to swing out. (MOSH Ex. 6, Tr. 65-66.) The headache ball grazed the arm of one employee and struck another employee directly in the head causing serious injury. (MOSH Ex. 6; Tr. 34.)

Following the accident with the headache ball, MOSH was contacted and sent two compliance officers to the job site to perform an inspection. In order to get to the area of the job site where the crane was located (and where the injury occurred), inspectors and employees were required to cross a temporary foot bridge that Balfour Beatty had

constructed over a creek. (MOSH Ex. 5 Photo No. 25, 26, 30; Employer Ex. 1; Tr. 81-82, 150, 153). It was built approximately seven feet above the creek bed. (Tr. 150). The bridge did not have a guard rail for fall prevention. (MOSH Ex. 5 photos 25 & 26; Employer Ex. 1.)

During the course of the investigation, the compliance inspectors had the opportunity to inspect the broken wire rope sling. When asked about the condition of the wire rope, one inspector testified "[I]t was very rusty…every piece that we could see, all the strands of the wire rope had rust on them all the way around the strands." (Tr. 46.) MOSH took several photographs of the broken wire rope which reflect the rusted condition. (MOSH Ex. 5 photos 8-13.) The compliance inspector testified that in order for the strands of the rope to be rusted all around, they could not have been wound together tightly. (Tr. 73.) Loosening and separating of wire rope strands in a manner that allows the elements to penetrate the interior sides of the strands is referred to as "bird-caging." (Tr. 75-77.) In his statement to MOSH, Balfour Beatty crane operator Brian McKinnon stated that he and supervisor Derwood Huffman had both "commented on the sling being frayed." (MOSH Ex. 7.)

The compliance inspectors remained on the job site for three days, interviewed employees and took photographs. Following the inspection, MOSH issued two citations. Citation 1, Item 1 charged Balfour Beatty with a serious violation of 29 C.F.R 1926.251(a)(1) for failing to remove a defective sling from service and proposed a penalty of $4,475.00. Citation 2, Item 1 charged Balfour Beatty with an other than serious violation of 29 C.F.R. 1926.501(b)(1) for failing to provide fall protection on the temporary bridge constructed at the job site over the creek.

DISCUSSION

In order to uphold the citations, the Commissioner must find that MOSH has demonstrated by a preponderance of the evidence that (1) the standard at issue applies; (2) the Employer failed to comply with the standard; (3) employees were exposed to the violative conditions; and (4) the Employer knew or with the exercise of reasonable diligence should have known of the condition. *See, e.g., Astra Pharmaceutical Products, Inc.*, 9 O.S.H. Cas. (BNA) 2126 (R.C. 1981), *aff'd in part* 681 F.2d 69 (1st Cir. 1982).

With respect to Citation 1, Item 1, Balfour Beatty argues that (1) the cited standard is not applicable; (2) even if the cited standard were applicable, MOSH failed to prove that the wire rope sling was defective; (3) MOSH failed to prove that Balfour Beatty had knowledge of any defect in the wire rope sling and (4) the violation should have been characterized as other than serious. With regard to Citation 2, Item 1, Balfour Beatty argues that MOSH failed to prove that Balfour Beatty's employees were exposed to the hazard. Finally, Balfour Beatty argues that the HE committed error by denying Balfour Beatty the opportunity to submit a post-hearing brief. For the reasons set forth herein, the Commissioner adopts the HE's proposed decision.

Citation 1, Item 1.

Balfour Beatty's first argument is that the cited standard does not apply. The standard in question, 29 C.F.R. 1926.251(a)(1) provides as follows:

> Rigging equipment for material handling shall be inspected prior to use on each shift and as necessary during its use to ensure that it is safe. Defective rigging equipment shall be removed from service.

Balfour Beatty argues that because the wire rope sling was being used to secure the headache ball and was not actually being used to hoist or move material, the standard

does not apply. As stated in its brief, "[b]ecause the sling was not attached to the load, the standard is inapplicable." (Employer Brief p. 20.) In support of its argument, Balfour Beatty cites Kelley Steel Erectors, Inc., 8 OSHC 1191 (BNA) (1979). In Kelley, an employer was charged with a violation of 1926.251(a)(1) for failing to remove a wire rope chocker from service. Kelley argued that the equipment alleged to be defective was used as a towing device and the standard was not applicable to tow ropes. The Review Commission agreed and vacated the citation.

However, the facts of this case are more analogous to Bradenburg Indus. Services Co., 18 OSHC 1386 (BNA) (1998). In Bradenburg, the employer was cited for a violation of 1926.251(a)(1) because an excavator that was being used to lift and move steel pilings had a shackle that was excessively worn. The employer did not dispute that the shackle was defective but argued that the violation could not stand because the defective equipment was not being used for hoisting. The Review Commission disagreed and found that the shackle was part of the apparatus used to lift the material and, therefore, was "consistent with the activity of 'hoisting' as used in [the standard.]" Id at 1389.

In Bradenburg, there was no argument that the shackle itself was not being used to move or hoist equipment. Rather, it was a part of the apparatus used to move the material and it was defective. The same argument applies in this case. The wire sling itself was not being used to hoist or move material but it was part of the crane apparatus that was being used to hoist and move steel pile. Without the wire sling tying back the headache ball, the crane would not have been able to move the steel pile effectively. The purpose of the standard at issue is to ensure that all rigging equipment is in good working

order and is not defective or damaged before use. It would lead to an absurd result to suggest that the standard does not apply to a defective item integral to a rigging apparatus performing its function because the item itself was not actually used to lift the material.

Balfour Beatty argues that even if the cited standard were applicable, MOSH failed to prove that the wire rope sling was defective. The Commissioner disagrees. MOSH's witness testified that he carefully examined the broken wire rope and the strands were rusted all around. (Tr. 46, 79.) The witness further testified that in order for the strands to be rusted in such a manner, they would have to have been loose and separating, thereby, allowing the elements to penetrate. (Tr. 73-75.) Balfour Beatty's crane operator stated that both he and supervisor Derwood Huffman had remarked on the frayed condition of the wire rope sling. (MOSH Ex. 7.) Balfour Beatty did not present any evidence at the hearing refuting the testimony of the MOSH inspector or the statement of its crane operator nor was there evidence in the record to refute it.[1]

Balfour Beatty argues that the HE improperly shifted the burden of proof to the employer. It specifically takes issue with the HE's statement in his proposed decision that "[s]ince MOSH presented a prima facie case, the Employer had the obligation to present some evidence to defeat that case, but it did not do so. Therefore, the Employer's assertion that the wire rope sling failed for some reason other than it frayed is mere speculation." (Proposed Decision pp. 12-13.) There is no question that the burden of proof rests with MOSH. MOSH offered several pieces of evidence that when taken

[1] The HE discounted a sentence in the statement of carpenter Roy Cruz that "the cable was good." (MOSH Ex. 8.) The HE found that because (1) Mr. Cruz was a carpenter as opposed to a crane operator or a supervisor and (2) there was a significant language barrier, this statement was not entitled to the same weight as other evidence.

together lead the finder of fact to infer that the sling was in fact defective. Balfour Beatty elected not to offer any evidence at all regarding the condition of the wire rope sling. While the HE's statement may have been somewhat inartfully worded, when read in context, the HE's conclusion and the reasons for it are apparent. The HE found that MOSH presented sufficient factual evidence from which to conclude that the sling was damaged or defective. The employer did not offer any evidence to refute this. Therefore, MOSH met its burden with respect to this issue.

Next Balfour Beatty argues that MOSH failed to establish that Balfour Beatty knew, or with the exercise of reasonable diligence, should have known that the wire rope sling was defective. In finding that Balfour Beatty knew or should have known about the defective condition of the wire rope, the HE relied upon the statement of crane operator Brian McKinnon who stated that both he and Supervisor Derwood Huffman had remarked on the frayed condition of the wire rope in addition to the photograph of the broken sling. (MOSH Ex. 7.) Mr. McKinnon's statement as well as the pictures clearly depicting the extensive rust on all sides of the rope strands were sufficient evidence from which to to conclude that Supervisor Derwood Huffman knew or should have known about the defective condition of the sling.

Balfour Beatty also argues that MOSH failed to establish that Mr. Huffman was in fact a supervisor. MOSH offered four employee statements into evidence at the hearing. Two of those employees, construction foreman John Stevenson and carpenter foreman Amilcar Rodriguez both named Derwood Huffman as their supervisor.[2] (MOSH Exs. 6 and 9.) The compliance officer also testified that during his interviews with these

[2] A third employee, Roy Cruz, stated that Amilcar Rodriguez was his supervisor. (MOSH Ex. 8.)

employees, they named Mr. Huffman as their supervisor. (Tr. 103.) There is no evidence in the record to suggest that he was not in fact a supervisor.

Lastly with respect to Citation 1, Item 1, Balfour Beatty argues that the violation should not have been characterized as serious. In order for a violation to be characterized as serious, there must be "a substantial probability that death or serious physical harm could result from [the] condition." Md. Lab. & Emp. Code Ann. § 5-809 (a)(1). The HE correctly found that if a sling securing a 650 lb metal headache ball broke and swung loose, it could have and in fact did cause serious bodily injury and, therefore, the citation was properly characterized as serious.

Citation 2, Item 1

MOSH also cited Balfour Beatty for constructing a foot bridge over a creek bed without fall protection. The cited standard, 29 C.F.R. § 1926.501(b)(1), provides:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

The creek bed was less than 6 feet below the bridge on one side, but it was slightly over seven feet below the bridge on the other side. The violation was deemed other than serious and no monetary penalty was proposed. MOSH found that the hazard was in plain sight and employees were exposed.

Balfour Beatty does not dispute that a bridge more than 7 feet over a creek bed without fall protection is a violation of §1926.501(b)(1). Rather, Balfour Beatty argues that MOSH failed to prove that its employees were in the zone of danger because they could have walked on the left side of the bridge rather than the right. Balfour Beatty built the bridge for the sole purpose of providing its employees with a means to get from one

part of the job site to another. Because Balfour Beatty employees were required to use the footbridge in order to access part of the work site and because there was no sign or notice instructing employees to walk only on the left side of the bridge, the Commissioner finds that MOSH has met its burden of proof.

Post Hearing Brief

Finally, Balfour Beatty argues that the HE erred in not affording it the opportunity to submit a post hearing brief. Balfour Beatty argues that under the DLLR regulation then in effect, COMAR 09.12.20.15(E)(1), it should have been permitted the opportunity to do so. This regulation was subsequently amended to clarify that the issue of post hearing brief submission is at the discretion of the HE.

With regard to the issue of submission of a brief with proposed findings of fact and conclusions of law, counsel for Balfour Beatty stated at the hearing that he was "not asking for that" but rather the opportunity "to submit case law or appropriate citations." (Tr. 226.) The HE determined that based on the evidence submitted and the nature of the issues to be decided, closing briefs were not necessary and would not assist him in his decision-making. (Tr. 227.) The HE gave both parties an opportunity to prepare and deliver oral closing arguments, and both parties availed themselves of the opportunity. (Tr. 228-68.)

The Commissioner finds that Balfour Beatty was not prejudiced by delivering an oral rather than a written closing. Moreover, on review, the Commissioner reviews the entire record. Balfour Beatty submitted a thirty four (34) page brief for the Commissioner's consideration together with the entire record before the HE for the Commissioner to consider in administering the final administrative decision.

Therefore, on this 14TH day of January, 2014, the Commissioner hereby ORDERS:

1. Citation 1, Item 1 for a serious violation of 29 C.F.R. §1926.251(a)(1) with a proposed penalty of $4,475.00 is AFFIRMED.

2. Citation 2, Item 1 for an other than serious violation of 29 C.F.R. §1926.501(b)(1) with no proposed penalty is AFFIRMED.

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.

J. Ronald DeJuliis
Commissioner of Labor and Industry