STATE OF MARYLAND
DLLR
DEPARTMENT OF LABOR, LICENSING AND REGULATION

DIVISION OF LABOR AND INDUSTRY
Matthew Helminiak, Commissioner
1100 N. Eutaw Street, Room 600
Baltimore, MD 21201

April 18, 2019

Zachary Erwin, Esquire
Anderson, Coe & King, LLP
7 St. Paul Street, Suite 1600
Baltimore, Maryland 21202-1653

RE: Specialty Industries, Inc.
MOSH No.: Q4692-003-18
OAH No.: DLR-MOSH-41-18-17246

Dear Sir:

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

Sincerely yours,

Minnie L. Godsey

Minnie L. Godsey
Office of the Commissioner

Enclosure

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

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

IN THE MATTER OF	*	BEFORE THE
SPECIALTY INDUSTRIES, INC	*	COMMISSIONER OF LABOR
	*	AND INDUSTRY
	*	MOSH CASE NO. Q4692-003-18 OAH CASE NO. 41-18-17246
	*	

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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. The Maryland Occupational Safety and Health Unit ("MOSH") issued three citations to Specialty Industries, Inc. ("Specialty Industries" or "Employer") following an accident investigation at a Tyson Foods facility in Snow Hill Maryland. Citation 1, Item 1 was for a serious violation of 29 CFR 1926.251(a)(1) for failing to inspect rigging equipment for material handling prior to use on each shift. Citation 1, Item 2 was for a serious violation of 29 CFR 1926.501(a)(2) for failing to determine if the walking/working surfaces on which employees are working have sufficient strength and integrity to support the employees safely. Citation 2, Item 1 was for an other than serious violation of 29 CFR 1926.251(c)(16) which requires that wire rope swings have permanent affixed legible identification markings stating, among other things, the size and rated capacity for the type of hitch used.

Specialty Industries contested the citations and a hearing was held on September 5, 2018 at the Office of Administrative Hearings in Hunt Valley, Maryland before Administrative Law Judge Willis Gunther Baker ("ALJ"). On November 30, 2018, the ALJ issued a proposed

decision recommending that the citations and proposed penalties be upheld. Specialty Industries filed a timely request for review. A review hearing was held before the Commissioner of Labor and Industry on March 6, 2019. Based upon a thorough review of the record, the relevant law and the arguments made by both parties, the Commissioner vacates all three citations.

FINDINGS OF FACT

Specialty Industries was hired by Tyson Foods to remove a bucket elevator at a Tyson Foods feed manufacturing facility in Snow Hill, Maryland. The plan was to replace the existing bucket elevator with a new one in a different location that included an explosion proof panel. The existing elevator was attached to a concrete curb by a metal transition with a flange and was secured with five bolts. The elevator was accessible by a service platform. Prior to beginning the work, Specialty Industries Field Supervisor John Towns went on the service platform with a Tyson representative to inspect the equipment and make sure the service platform was structurally sound. (Tr. 266-268.) Prior to dismantling the elevator, Mr. Towns inspected the elevator base for stability and cleaned the area around the base and transition. (Tr. 277-278.) He noted that there were anchors in the base. (Tr. 278.) The nuts appeared to be in place and he could still see the bolt threads. He did not see any evidence that a bolt had been cut off. (Tr. 279.) He did not notice anything that suggested the base had moved or displaced over time nor did he notice anything that appeared rusted or corroded to a point that suggested stability was compromised. (Tr. 280.)

When it began dismantling the elevator, Specialty Industries first used a hand-operated wrench to remove the elevator belt and then cut away the discharge spout, ladders and a metal

catwalk.[1] (Tr. 264-265.) Once those portions were cut away, the plan was to lift the elevator off the roof with a crane. (Tr. 265.) On October 14, 2017, a crew of Specialty Industries' employees were on the roof and one was preparing to get the elevator rigged up to the crane. (Tr. 283.) The elevator tipped over resulting in severe lacerations to the employee. Mr. Towns went up to the roof immediately after the elevator tipped over and when he realized the employee was seriously injured, he used the crane and a basket to lower the injured employee to the ground as an ambulance was arriving. (Tr. 284-285.)

After the injured employee was provided medical attention, Mr. Towns and a Tyson project engineer examined the toppled elevator and determined that it was unsafe and needed to be brought to the ground. Mr. Towns used a polyester choker sling to lower the elevator. The sling belonged to Specialty Industries and Mr. Towns testified that he ran the entire length of the sling through his hands beginning at the spot where the casing is bonded or stitched together. (Tr. 289.) He testified that this has been his practice for 14 years when rigging slings. (Tr. 289.) Mr. Towns testified that he did not observe any damage or tears to the sling when he ran it through his hands. (Tr. 289.)

On October 16, 2017, two days after the accident, MOSH arrived and conducted an investigation. Following the investigation, three citations were issued.

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

[1] The ALJ found that the discharge spouts and ladders had provided some support to the elevator. There was no evidence in the record to support this and structural engineer testified that they did not provide any support. (Tr. 224-225; 240.)

employer failed to comply with the standard; (3) employees were exposed to the violative condition; and (4) the employer knew or with the exercise of reasonable diligence should have known of the condition. *See Secretary of Labor v. Dun-Par Engineered Form Co.*, 12 O.S.H. Cas. (BNA) 1962 (1986); *Secretary of Labor v. 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).

Citation 1, Item 1

Citation 1, Item 1 was for a violation of 29 CFR 1926.251(a)(1) for failing to inspect rigging equipment prior to use. At issue was the nylon sling used to lower the bucket elevator to the ground. When MOSH did its inspection, the sling had a tear. (MOSH Ex. 4) The compliance officer testified that based on the condition of the tear and the extent of fraying, the tear had to have pre-dated its use the previous day. (Tr. 99.) The Employer's witness testified that he did in fact inspect the sling prior to its use and there was no tear. He further testified that this was consistent with his past practice for the past 14 years. Counsel for the employer suggested that the sling could have torn during the process of lowering the bucket elevator.[2]

The Commissioner has examined the photographic evidence and considered the testimony. The Commissioner finds that MOSH has not met its burden of proof with regard to this citation. There was no evidence that the compliance officer had any expertise with regard to nylon slings and the rate at which a tear might fray. He also did not see the position of the sling when it was in use nor discuss the sling with anyone from Specialty Industries. (Tr. 97-99.) The Commissioner finds that the compliance officer's unsupported personal opinion about the

[2] In footnote 3 of its December 21, 2018 Request for Review, Specialty Industries states that it "has run tests showing that fresh cuts in an identical nylon sling...present the exact same pattern and amount of fraying." Because no evidence of these tests was presented at the hearing, the Commissioner cannot consider this information.

appearance of the tear is not sufficient to overcome the direct testimony of the employer's field supervisor that he personally examined the sling prior to using it. Accordingly, the Commissioner vacates this citation.

Citation 1, Item 2

Citation 1, Item 2 was for a violation of 29 CFR 1926.501(a)(2) for failure to evaluate the structural integrity of the elevator platform. MOSH's sole basis for finding that the elevator was not inspected to ensure structural integrity was that the elevator collapsed. (Tr. 76). In the violation worksheet (MOSH Ex. 9), MOSH identifies the hazard as follows: "Employees working on the removal of the bucket elevator...were standing on the elevator platform...when the rotted flange of the elevator base which connected the elevator to the grain elevator roof collapsed." MOSH's theory was that the metal flange at the base of the elevator was corroded to such an extent that it could not support the elevator and that this should have been apparent to the employer if an appropriate inspection had been done.

The employer's field supervisor testified that, together with a Tyson representative, he did inspect the elevator base for stability and walked on the platform before the employees began working on it. In addition to the testimony of the field supervisor, the employer offered the testimony of Richard Kobetz a structural engineer with 45 years of experience who was accepted at the hearing as an expert in the field of engineering. Mr. Kobetz also prepared a report dated September 18, 2018. The engineer's report concluded that the cause of the accident was that five anchor bolts that were not visible before the elevator fell were completely corroded.

The Commissioner finds that MOSH has not met its burden of proof with regard to this citation. It is MOSH's theory that a rotting flange connecting the elevator to the concrete curb

caused the elevator fall. (Tr. 102.) MOSH's sole basis for concluding the base was not inspected for stability was because it fell. The compliance's officer's conclusion that the cause of the accident was the rotting flange was directly refuted by the employer's expert engineer. The engineer testified that the flange functioned properly. (Tr. 229-230.) The engineer testified that "the root cause of the incident was that the anchor bolts were absolutely completely corroded, and ... had they had even a small percentage of their strength, they would have been able to resist the overturning load and kept the elevator stable. The fact that they were completely corroded is highly unusual, and was concealed because the top of the bolts on the flange, the bolt, the nuts, and washers were all in place and appeared normal." (Tr. 234-235.)

In light of the testimony of the structural engineer about the cause of the elevator tipping and the fact that it would not have been apparent to the Employer, the Commissioner finds that MOSH has not met its burden with regard to this citation and, accordingly, vacates the citation.

Citation 2, Item 1

Citation 2, Item 1 was for an other than serious violation of 29 CFR 1926.251(c)(16) and involved an illegible identification tag on a crane bridle. The bridle and crane were owned by the crane company from whom Specialty Industries had leased the crane. Specialty Industries argues that it did not exercise any control over the equipment in question because it belonged to the crane rental company and, therefore, it should not be cited. It also argues that the equipment was used during a rescue operation and, therefore, pursuant to an OSHA interpretive ruling that it will not issue citations to employers where a potential violation occurs during the course a rescue operation, the citation should be vacated. MOSH argues that because the Employer did not expressly raise this argument before the ALJ, the Commissioner should not consider it.

The evidence adduced at the hearing indicates that while the crane and certain rigging equipment were leased from the crane company, the equipment was going to be used and operated by Specialty Industries employees. The fact that the equipment was provided by a third party does not absolve Specialty Industries of its obligation to inspect the equipment prior to use by its own employees. With regard to Specialty Industries second argument, the evidence suggests that the bridle in question was used during the course of a rescue operation. Specifically, it was used to lower the injured employee to the ground as quickly as possible. While Specialty Industries did not expressly raise this argument before the ALJ, there is sufficient factual evidence in the record for the Commissioner to consider it on review. Based on OSHA's *Policy on Employee Rescue Efforts*[3], the Commissioner vacates this citation.

[3] The OSHA policy can be found at Federal Register No. 59:66612-66613 (December 27, 1994).

ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on this 18th day of April, 2019, hereby ORDERS:

Citation 1, Item 1 for a serious violation of 29 CFR 1926.251(a)(1) with a proposed penalty of $1575.00 is VACATED.

Citation 1, Item 2 was for a serious violation of 29 CFR 1926.501(a)(2) with a proposed penalty of $2,575.00 is VACATED.

Citation 2, Item 1 for an other than serious violation of 29 CFR 1926.251(c)(16) with no proposed penalty is VACATED.

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.

Matthew Helminiak
Commissioner of Labor and Industry