Maryland
DEPARTMENT OF LABOR

DIVISION OF LABOR & INDUSTRY
Office of the Commissioner
10946 Golden West Drive, Suite 160
Hunt Valley, MD 21031

April 21, 2023

Frank L. Kollman
Kollman & Saucier, P.A.
1823 York Road
Timonium, MD 21093

RE: Eastern Lift Truck Co.
MOSH No.: F7721-021-22

Dear Mr. Kollman:

Enclosed is the Final Decision and Order of the Commissioner of Labor and Industry issued today in the above-captioned manner.

Sincerely yours,

Christina Schaefer
Executive Assistant to the Commissioner
Division of Labor and Industry

Enclosure:

cc: Jenny Baker/Sarah Harlan, Assistant Attorneys General
Catherine Bellinger, MOSH Assistant Attorney General
Judge Tracey Johns Delp, Office of Administrative Hearings
MOSH Office of Review

IN THE MATTER OF	*	BEFORE THE
EASTERN LIFT TRUCK CO.	*	COMMISSIONER OF LABOR
	*	AND INDUSTRY
	*	MOSH CASE NO. F7721-021-22 OAH CASE NO. 41-22-20067
	*	

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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 citations to Eastern Lift Truck Company, Inc. ("Eastern Lift" or "Employer") and assessed penalties totalling $4,874.00 following an inspection at the Employer's facility in Upper Marlboro, Maryland. Eastern Lift contested the citations and a hearing was held on November 1, 2022 at the Office of Administrative Hearings in Hunt Valley, Maryland before Administrative Law Judge Tracy Johns Delp ("ALJ"). On December 13, 2022, the ALJ issued a proposed decision recommending that Citation 1, Items (a) and (b) and Citation 2, Items 1, 2, and 3 be upheld and that Citation 1, Items 2 and 3 be dismissed. Both MOSH and Eastern Lift requested review of the ALJ's proposed decision. A review hearing was held before the Commissioner of Labor and Industry on January 30, 2023 at the Division of Labor and Industry's Offices in Hunt Valley, Maryland. Based upon a thorough review of the record, the relevant law and the arguments made by both parties, the Commissioner affirms the citations that the ALJ recommended be upheld and vacates the the citations the ALJ recommended be dismissed.

FINDINGS OF FACT

The employer is a forklift rental company with locations in multiple states including Maryland. The company's North American Industry Classification System ("NAICS") code places it on MOSH's High Hazard Industry List. Compliance Officer Michael Sabarese was instructed by his supervisor to conduct a comprehensive safety inspection at a work site on the High Hazard List. On April 5, 2022, Mr. Sabarese conducted a comprehensive safety inspection at Eastern Lift's facility in Upper Marlboro. Following the inspection, MOSH issued seven citations. Citation 1, Item 1(a) was for a serious violation of 29 CFR 1910.253(b)(2)(ii) for storing an oxygen container in an area where it could be knocked over or damaged. A penalty of $2,250.00 was assessed. Citation 1, Item 1(b) was for a serious violation of 29 CFR 1910.253(b)(4)(iii) for failing to store oxygen cylinders within a certain distance of fuel-gas cylinders or other combustible material. For penalty purposes, Items (a) and (b) were combined. Citation 1, Item 2 was for an other than serious violation of 29 1910.334(a)(2)(ii) for charging cables that had multiple cuts in the cord's outer sheathing exposing bare copper conductors. No penalty was assessed.[1] Citation 1, Item 3 (a) and (b) were for serious violations of the General Duty Clause for failing to anchor steel storage racks to the floor. A penalty of $1,312.00 was assessed. Citation 2, Item 1 was for an other than serious violation of 29 CFR 1910.305(g)(1)(iv)(A) for using an extension cord in lieu of permanent wiring to supply 120 volts and 20 amperes of power to a Samsung television. Citation 2, Item 2 was for an other than serious violation of 1910.305(g)(1)(iv) for running an extension cord through a hole in the wall

[1] This citation was originally classified as a serious violation with a penalty of $1,312.00. MOSH reclassified it at the hearing to an other than serious with no penalty.

to power a television. Citation 2, Item 3 was for an other than serious violation of 29 CFR 1910.305(g)(2)(iii) for failing to provide strain relief on the housing end of a disconnect switch.

STANDARD OF PROOF

In order to establish a violation of the Act, MOSH must demonstrate 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 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 in relevant part*, 681 F.2d 69 (1st Cir. 1982).

In order to establish a violation of General Duty Clause, MOSH must prove (1) some condition or activity in the workplace presented a hazard; (2) the hazard was recognized; (3) the hazard was likely to cause death or serious physical harm; and (4) feasible means to eliminate or materially reduce the hazard existed. *Commissioner of Labor and Industry v. Whiting-Turner Contracting Company*, 462 Md. 479, 491 (2019).

THE CITATIONS

Citation 1, Item 1(a)

Citation 1, Item 1(a) was for a serious violation of 29 C.F.R. §1910.253(b)(2)(ii) for storing an oxygen cylinder in an area where it could be knocked over or damaged. Having reviewed the evidence and the arguments presented by the parties, I adopt the ALJ's proposed findings of fact and conclusions of law. I find that the standard applies, the employer did not comply with the standard, at least one employee was exposed to the hazard, and the employer

knew or should have known of the hazard on the site. I agree with the ALJ's determination that the amount of oxygen stored in the cylinder is not relevant in determining whether there was a violation of the standard.

Citation 1, Item 1(b)

Citation 1, Item 1(b) was for a violation of 29 CFR §1910.253(b)(4)(iii) for storing an oxygen container within 20 feet of an acetylene cylinder and a 150 gallon used oil tank without a noncombustible barrier in place. Having reviewed the evidence and the arguments presented by the parties, I adopt the ALJ's proposed findings of fact and conclusions of law. I find that the standard applies, the employer did not comply with the standard, at least one employee was exposed and the employer knew or should have known of the hazard on the site.

Citation 1, Item 2

Citation 1, Item 2 was for an other than serious violation of 29 CFR §1910.334(a)(2)(ii) which provides that if there is a defect in a cord that might expose an employee to injury, the damaged item must be removed from service. In this case, the charging cables for a forklift battery charger had multiple cuts in the cord's outer sheathing. The compliance officer took pictures of the cord with the cuts. However, the compliance officer acknowledged on cross examination that the cords had been covered by electrical tape and he instructed an employee to remove the tape prior to taking the photographs. The compliance officer conceded on cross examination that electrical tape has insulating capabilities and he did not know whether covering the cord with the tape eliminated the hazard. The ALJ found that MOSH failed to prove a violation of the standard. Having reviewed the evidence and the arguments presented by the parties, I adopt the ALJ's proposed findings of fact and conclusions of law.

Citation 1, Item 3

Citation 1, Item 3 was for a violation of the General Duty Clause. MOSH cited the employer under the General Duty clause because the employer had 5 steel storage racks at its facility that were not bolted to the floor. The footing or plates at the bottom of the racks contained holes which could be used to bolt the racks to the floor. MOSH argued that "common sense" required that the racks be bolted to the floor. In support of its position, MOSH relied on a standard from the American National Standards Institute ("ANSI"). The Standard, MH 16.1-2012, Specification for the Design, Testing and Utilization of Industrial Steel Storage Racks provides in part "[t]he bottom of all columns shall be furnished with column base plates, as specified in Section 7.2. All rack columns shall be anchored to the floor with anchor bolts capable of resisting the forces caused by the horizontal and vertical loads on the rack." (MOSH Ex. 11).

The employer's Safety Director, Jeremy Ark, testified that the racks had been in place for twenty years, they were stable and the loads were properly positioned and, therefore, employees were not at risk. (Tr. 172, 176.) The ALJ found Mr. Ark's testimony to be "credible and persuasive." Mr. Ark further testified that the employer had a concern regarding how many bolts could be used on each base plate because too many bolts in close proximity could crack the floor and undermine its structural integrity. The ALJ found that MOSH did not address the issue of the floor's structural integrity and found Mr. Ark's testimony to be "compelling." Weighing MOSH's "common sense" argument against the employer's testimony about the structural integrity of the floor, the ALJ concluded that MOSH failed to meet its burden.

Having reviewed all the evidence and the arguments raised by the parties, I adopt the ALJ's findings of fact. I further conclude that MOSH failed to meet its burden of establishing a hazard and that a hazard was, or should have been, recognized. Accordingly, I find that MOSH failed to meet its burden with regard to this element.

Citation 2, Item 1

Citation 2, Item 1 was for an other than serious violation of 29 CFR §1910.305(g)(1)(iv)(A) for using a flexible cord or cable as a substitute for fixed wiring. Specifically, a television in the employer's maintenance shop was powered by a 50 foot orange extension cord used to supply 120 volts and 1 ampere of electricity. Having reviewed the evidence and the arguments presented by the parties, I adopt the ALJ's proposed findings of fact and conclusions of law. I find that the standard applies, the employer did not comply with the standard, at least one employee was exposed to the hazard, and the employer knew or should have known of the hazard on the site.

Citation 2, Item 2

Citation 2, Item 2 was for a an other than serious violation of 29 CFR §1910.305(g)(1)(iv)(B) which provides that, unless permitted otherwise in the standard, flexible cords and cables may not run through holes in walls, ceilings or floors. In this case, an extension cord powering the television referenced above was run through a block wall separating two areas of the maintenance shop. Having reviewed the evidence and the arguments presented by the parties, I adopt the ALJ's findings of fact and conclusions of law. I find that the standard applies, the employer did not comply with the standard, at least one employee was exposed to the hazard, and the employer knew or should have known of the hazard.

Citation 2, Item 3

Citation 2, Item 3 was for an other than serious violation of 29 CFR §1910.305(g)(2)(iii) which provides that flexible cords and cables must be connected to devices and fittings so that strain relief is provided. In this case, the compliance officer observed a Champion R-Series air compressor containing a disconnect switch with a power cord that was lacking strain relief at the switch end. Having reviewed tbe evidence and the arguments presented by the parties, I adopt the ALJ's findings of fact and conclusions of law. I find that the standard applies, the employer did not comply with the standard, at least one employee was exposed to the hazard, and the employer knew or should have known of the hazard.

ORDER

For the foregoing reasons, on this _____ day of April, 2023, the Commissioner of Labor and Industry hereby ORDERS:

Citation 1, Item 1(a) alleging a serious violation of 29 CFR §1910.253(b)(4)(iii) with a proposed penalty of $2,250.00 is AFFIRMED;

Citation 1, Item 1(b) alleging a serious violation of 29 CFR §1910.253(b)(4)(iii) with no proposed penalty is AFFIRMED;

Citation 1, Item 2 alleging an other than serious violation of 29 CFR §1910.334(a)(2)(ii) with no proposed penalty is VACATED;

Citation 1, Item 3 alleging a serious violation of §5-104(a) of the Labor and Employment Article with a proposed penalty of $1,312.00 is VACATED;

Citation 2, Item 1 alleging an other than serious violation of 29 CFR §1910.305(g)(1)(iv)(A) with no proposed penalty is AFFIRMED;

Citation 2, Item 2 alleging an other than serious violation of 29 CFR §1910.305(g)(1)(iv)(B) with no proposed penalty is AFFIRMED;

Citation 2, Item 3 alleging an other than serious violation of 29 CFR §1910.305(g)(2)(iii) 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.

April 21, 2023

Matthew Helminiak
Commissioner of Labor and Industry