

IN THE MATTER OF  
THE DRIGGS  
CORPORATION

\* BEFORE THE COMMISSIONER  
\* OF LABOR AND INDUSTRY  
\*  
\* MOSH CASE No.M3373-016-97  
\* OAH CASE No.97-DLR-MOSH-41  
\* 011589  
\* HEARING DETERMINATION  
\* NO. 00-6  
\*

\* \* \* \* \*

**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 one citation to the Driggs Corporation (“Employer”), alleging a violation of Section 5-104, *Labor and Employment Article, Annotated Code of Maryland*. Following an evidentiary hearing, Hearing Examiner William C. Herzing issued a proposed decision affirming the citation.

The Employer filed a request for review. Thereafter, a hearing was held before the Commissioner of Labor and Industry (“Commissioner”). Based upon a review of the entire record, consideration of relevant law, and the parties’ arguments, the Commissioner reverses the Hearing Examiner’s disposition of this matter.

**FINDINGS OF FACT**

The Hearing Examiner’s findings of fact are supported by the record and are affirmed. As found by the Hearing Examiner, the Employer was performing highway

renovation work. On a secondary two lane road, dump trucks were traveling to stockpile materials. Findings of Fact 2 & 3. The Employer instituted temporary traffic control measures to accommodate the dump truck delivery to the stockpile which included traffic cones in the center of the road and flaggers stationed to alternate northbound and southbound traffic. Finding of Fact 4. A load operator at the site was responsible for instructing dump truck drivers where to dump their loads. Finding of Fact 8. Traffic had been stopped for an earlier dump truck. Finding of Fact 9. While the load operator stood on the step of one of the dump truck's stopped on the shoulder of the road, one of the flaggers permitted the stopped traffic to proceed. *Id.* The load operator backed down from the dump truck into oncoming traffic, and was struck by the mirror of a pick-up truck that had recently been released by the flagger. Finding of Fact 10 & T. at 107-08.

The Employer's flaggers at the site had not taken the Maryland State Highway Administration's Approved Flagger Program ("Flagger Program") test. Finding of Fact 13. However, the flagger involved in the accident had participated in the Employer's flagger training that included viewing a video tape of flagging practices. Finding of Fact 14.

The Commissioner additionally finds that the Flagger Program contains no specific requirement that a flagger provide a warning to workers in the area prior to releasing traffic nor are there any questions on the Flagging Program test related to a duty

to warn when releasing traffic. T. at 252, 263 & 265, MOSH Ex. 22.<sup>1</sup>

### CONCLUSIONS OF LAW

As noted, the Employer was cited under Section 5-104, *Labor and Employment Article, Annotated Code of Maryland*. This provision, known as the general duty clause, requires, in relevant part, that an employer provide each of its employees with employment and a place of employment that is free from each recognized hazard that it causing or likely to cause death or serious physical harm. To establish a violation of the general duty clause, MOSH must show that in the employer's workplace, there is a condition either the employer or its industry recognizes as a hazard, that the condition is causing or likely to cause death or serious physical harm, and that there is a feasible means of abatement that would eliminate or materially reduce the hazard. *St. Joe Lead Co. Smelting Division*, 9 O.S.H. Cas. (BNA) 1646, 1648 (8<sup>th</sup> Cir. 1981). MOSH must also show that the Employer knew, or in the exercise of reasonable diligence should have known, of the hazard. *Tampa Shipyards, Inc.* 15 O.S.H. Cas. (BNA) 1533, 1535 (R.C. 1992).

On review, the Employer challenges the Hearing Examiner's proposed decision on several grounds. The Employer's most persuasive argument, one that is dispositive of this case, is that MOSH did not prove, and the Hearing Examiner failed to find, the

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<sup>1</sup> On review, the Employer makes numerous challenges to the Hearing Examiner's findings of fact on the grounds that "they fail to include certain material facts" necessary to dismiss the penalty. Given the Commissioner's additional findings of fact, and his dismissal of the citation, it is not necessary to address each of the Employer's factual challenges.

feasibility and likely utility of the Flagging Program as a means to avoid the citation.

In addressing the issue of feasibility and likelihood of utility, the MOSH inspection worksheet states that the “feasible and acceptable means of abatement would be to provide flagger personnel who meet and passed the ‘Maryland Approved Flagger Program.’” MOSH Ex.9 at 1. The MOSH inspection worksheet also explains that “[t]he personnel had not been tested for the Maryland State Highway Administration Flagger Program and the controlling flagger was not fully aware of safe traffic control practices.” *Id.* The MOSH Inspector testified that “[w]ith proper certified flagging, that would have been one means of providing a safer work - - safe employment for the employee.” T. at 85.

Gordon Lockard, the author of Maryland’s Flagger Program, testified on behalf of MOSH. According to Lockard, the program instills in the flagger “common sense” and “a sense of responsibility for the safety of the public and the workers.” T. at 252. He explained that Maryland’s Flagger Program would teach a flagger “to use common sense when you are out there on the highway because you are one of the most important work-safety people in the work area.” T. at 253. Lockard also testified that the Flagging Program test does not contain any questions regarding a flagger’s responsibility to notify other workers of the flagger’s intent to release traffic. T. at 263. In response to the question of whether the Flagging Program contains anything other than the generalities of a sense of responsibility and common sense that would obligate a flagger to notify another worker of the intent to release traffic, Mr. Lockard testified there were no other

such requirements. T. at 265.

The Commissioner finds that MOSH has failed to prove that the feasible means of abatement identified by MOSH would materially reduce the hazard. There is no evidence in the record that passing the approved Maryland Flagging Program course would have reduced the likelihood of this accident. The record demonstrates that the Maryland Flagger Program does not include a duty for a flagger to provide a warning to other workers prior to releasing traffic. Therefore, even if the flagger at issue in this case had participated in the Flagger Program course, and passed the test, she would not have been taught or tested on any Flagger Program requirement that a flagger warn others of the release of traffic. Moreover, as to the generalities of common sense and responsibility, the Employer's traffic manager testified that he had personally observed the flagger involved in the incident for over a month, and stated that she demonstrated a sense of "responsibility for safety." T. at 326. These are the exact qualities that Lockard testified that the Flagger Program sought to instill in a flagger. Based on the record in this case, there is no evidence that the Flagging Program is a feasible means of abatement that would materially reduce the hazard at issue.

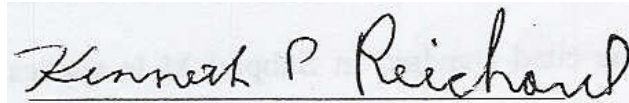
Accordingly, the Commissioner concludes that MOSH has failed to prove its

prima facie case<sup>2</sup>, and therefore, the citation is dismissed.<sup>3</sup>

ORDER

The Commissioner of Labor and Industry hereby ORDERS, this 17<sup>th</sup> day of October, 2000, that:

Citation 1, alleging a SERIOUS violation of Section 5-104(a) of the *Labor and Employment Article*, and the proposed penalty of \$4,325.00 is DISMISSED; and that this Order becomes final 15 days after its issuance. Judicial review may be requested by filing a petition for judicial review in the appropriate circuit court. *See Labor and Employment Article, § 5-215, Annotated Code of Maryland*, and Maryland Rules, Title 7, Chapter 200.



Kenneth P. Reichard  
Commissioner of Labor and Industry

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<sup>2</sup> While the Commissioner has determined that there is no general duty violation, the facts surrounding this accident may warrant the Employer conducting an assessment of its flagging procedures to determine if adjustments could improve its safety practice.

<sup>3</sup> On review, MOSH acknowledges that the Hearing Examiner's Proposed Decision failed to address MOSH's prima facie element of feasibility and utility. To remedy this, MOSH requests that the Commissioner remand this case to the Hearing Examiner for specific findings regarding abatement. The Commissioner concludes that a remand is unwarranted. The Commissioner has reviewed the record and found no evidence to demonstrate the utility of the Flagging Program in relation to the accident.