

IN THE MATTER OF	*	BEFORE THE
	*	COMMISSIONER OF LABOR
RECREATIONAL INDUSTRIES, INC.	*	AND INDUSTRY
	*	MOSH CASE NO. U2506-006-10
		OAH CASE NO. DLR-MOSH-41-09-
		39257
	*	

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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 September 15, 2009, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH") issued citations to Recreational Industries, Inc. ("Recreational Industries"). Citation 1, Items 1 & 2 were for serious violations of Section 5-104(a) of the Labor and Employment Article, *Annotated Code of Maryland*. At the time of the hearing, the charges were consolidated to a single violation with an amended penalty of \$4,200.00. The citation stemmed from an accident investigation involving two employees of Recreational Industries.

Recreational Industries contested the citation and a hearing was held on December 8, 2009 and March 12, 2010 at the Office of Administrative Hearings' Cumberland Office, in Cumberland, Maryland. Charles Boutin, Administrative Law Judge presided as the Hearing Examiner ("HE"). The HE then issued a proposed decision recommending that the citation and proposed penalty be vacated.

The Commissioner ordered review and a review hearing was held on December 19, 2010. Based upon a thorough review of the factual record, the relevant law, and the arguments made by

both parties, the Commissioner¹ affirms the proposed decision of the Hearing Examiner and vacates the citation.

FINDINGS OF FACT

Allie Benton and Jessie Ferguson, two Recreational Industries employees, were injured while riding the Recreational Industries' Mountain Coaster ("Coaster") at the Wisp Resort in McHenry, Maryland. Neither employee was wearing a seatbelt at the time of the accident.² FF 3. Recreational Industries required that all employees participate in a training program. FF 4. There is a sign adjacent to the Coaster setting forth the rules for Coaster operation. Employer Ex. 4. The sign explicitly states that the Coaster may only be used with the "safety belt closed." *Id.* The Coaster rules are the same for the public and employees. FF 14.

DISCUSSION

The initial issue in this case is the legal standard that the Hearing Examiner applied in analyzing the general duty violation. The Commissioner finds that the Hearing Examiner erred in applying the analysis for a violation of a specific occupational safety and health standard to a general duty violation. Rather, the proper analysis is whether MOSH has established that Recreational Industries failed to provide a workplace free of recognized hazards, that the hazard was likely to cause death or serious physical harm and whether MOSH has demonstrated a

¹ The review hearing was heard before then Deputy Commissioner Craig Lowry. Mr. Lowry is no longer the Deputy Commissioner. Accordingly, this decision is issued by the current Commissioner Thomas J. Meighen.

² The Hearing Examiner's Finding of Fact 1 needs to be clarified. This Finding states that Allie Benton before leaving the top of the Coaster run was told to put on her seatbelt. Recreational Industries employee Debbie Pariseau testified that before she and Ms. Benton left the top on a run prior to the accident that she instructed Ms. Benton to put her seatbelt on. Tr.2 at 183. Finding of Fact 1 needs to be modified as follows: On a Coaster trip prior to the accident, Ms. Benton was told to put on her seatbelt.

feasible means to reduce the likelihood of harm. *See United Steel Workers v. Bethlehem Steel*, 298 Md. 665 (Md. 1984).

In support of the general duty violation, MOSH argues that two employees were not wearing seatbelts when riding the Coaster due to Recreational Industries' failure to properly train the employees in the recognition and avoidance of an unsafe work practice. MOSH also asserts that Recreational Industries failed to adequately instruct the two employees in proper seatbelt usage, weight limitations, and speed limitations on the track. As to the feasible abatement, MOSH contends that Recreational Industries could develop and implement a safety and health program that ensures that employees are trained in the necessary areas. Recreational Industries contends that the Hearing Examiner's proposed decision should be affirmed.

Turning first to MOSH's assertion that the employees were not wearing seatbelts because they had not been properly trained, the Commissioner finds that MOSH has failed to meet its burden of proof. Looking at the evidence related to wearing a seatbelt³, Eric Jacoby testified that all employees including Allie Benton were instructed to wear seatbelts. Tr.2 at 280.⁴ In addition, another Recreational Industries employee Debbie Pariseau testified that the rule was to wear a seatbelt when riding the Coaster. Tr.2 at 162. The sign posted adjacent to the Coaster reinforces that a seat belt must be closed in order to ride the Coaster. Employer Ex. 3&4. The video footage of the Coaster on the day of the accident shows Allie Benton wearing her seatbelt. Employer Ex. 10. As Recreational Industries manager Gerald Geisler noted it is just "common sense" to wear a seatbelt on the Coaster. Tr.3 at 187. There is also testimony from the MOSH

³ Based upon the Hearing Examiner's finding that Allie Benton's testimony at the hearing was not credible, the Commissioner is not considering this evidence as part of his general duty analysis.

⁴ Testimony was heard on multiple days. The transcript from the December 8, 2009 hearing is referred to as Tr.1, the transcript from the January 25, 2010 hearing is referred to as Tr.2, and the transcript from the March 12, 2010 hearing as Tr. 3.

Inspector and a supervisor at Recreational Industries that Recreational Industries was not aware of any other instance in which an employee did not wear a seatbelt while on the Coaster. Tr.2 at 25 & Tr.3 at 84. As to Jessie Ferguson, one of the injured employees, he did not testify but provided two written statements. In determining the weight given to his statements on seatbelt usage, the Commissioner finds that his statements are less than clear on this issue as well as potentially self-serving. As such, the Commissioner gives little weight to this evidence. Taking all the evidence into consideration, the Commissioner finds that MOSH has failed to demonstrate that there is substantial evidence to support the conclusion that Recreational Industries failed to properly train its employees in the recognition and avoidance of an unsafe work practice.

Turning next to the assertion that Recreational Industries failed to adequately instruct the two employees on proper weight limitations and speed on the track, the Commissioner again finds that MOSH has not met its burden of proof. As to the weight limitations, Recreational Industries manager Eric Jacoby testified that the rule was one adult only or one adult and one child so there was no need for employees to memorize specific weights. Tr.3 at 22. This was confirmed by both Jessie Ferguson and Debbie Pariseau who testified that they were familiar with the weight limitations of the Coaster. Employer Ex. 2 & Tr.2 at 156. Recreational Industries made a copy of the Coaster manual available at one of the Coaster stations for reference should there be any questions. Tr.3 at 100-101. As to the speed on the track, the sign adjacent to the ride states that "if the track is wet, you must increase the gap between the coasterbobs to at least 328 feet because of the longer braking distance." MOSH Ex. 12. Jacoby testified that he explains all the rules on the signs to the employees so that the employees can refer the guest to the sign if they have questions about the rules. Tr.2 at 286. Jessie Ferguson's statement confirmed he was aware of the speed limitations of the track. Employer Ex. 2. Based

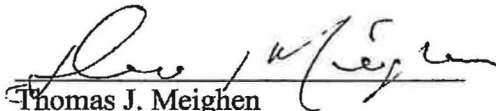
upon a review of all of the evidence, the Commissioner finds that MOSH has failed to prove by substantial evidence that Recreational Industries did not adequately instruct the two employees in proper seatbelt usage, weight limitations, and speed limitations on the track.

ORDER

Therefore, on this 1st day of September, 2016, the Commissioner hereby
ORDERS:

1. Citation 1, Item 1 for a serious violation Section 5-104(a) of the Labor and Employment Article, with a proposed penalty of \$4,200.00 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.


Thomas J. Meighen
Commissioner of Labor and Industry