

IN THE MATTER OF

PICO INDUSTRIES, INC.

* BEFORE THE
* COMMISSIONER OF
* LABOR AND INDUSTRY
* MOSH CASE NO. I4870-026-03
* OAH CASE NO.
* DLR-MOSH-41-03-31262
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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*. Following a planned inspection, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH"), issued seven citations (some containing more than one item and/or sub-item) to Pico Industries, Inc. ("Pico" or "Employer"), alleging various violations. A hearing was held on November 5 and 26, 2003, at which the parties introduced evidence, presented witnesses, and made arguments. Thereafter, Administrative Law Judge Robert F. Barry, sitting as Hearing Examiner, issued a Proposed Decision recommending that the citations be affirmed, with the exception of four of the items.

The Employer filed a timely request for review and the Commissioner exercised his authority pursuant to Labor and Employment Article, § 5-214(e), and ordered review. On June 15, 2004, the Commissioner of Labor and Industry held a review hearing and heard argument from the parties. Based upon a review of the entire record and consideration of the relevant law and the positions of the parties, for the reasons set forth

below, the Hearing Examiner's recommendations are affirmed in part, and reversed in part.¹

DISCUSSION²

In this case, the Employer was a subcontractor hired to erect the steel frame and roof for a new school. In April of 2003, MOSH Inspectors conducted a planned inspection of the jobsite and issued citations totaling twenty-one violations. The Hearing Examiner ("HE") upheld seventeen of the twenty-one violations. On review, MOSH asserts that the HE erred in dismissing the citations related to the crane and to the ladder. Before the Commissioner, the Employer contends that MOSH was unreasonable in its penalty assessment.

Turning first to the crane violations, the Employer was cited for violating 29 C.F.R. 1926.500(a)(1) for failing to comply with the crane manufacturer's specifications. The citation identifies two bases for the violation: (1) the diagonals of the jib are bent out of plumb approximately 3/8"; and (2) the swing-away latch assembly has not been repaired per the manufacturer's specifications with "welds not flush and overheated welded joints." MOSH Ex. 7J. The HE dismissed this citation concluding that he was not "satisfied" with MOSH's evidence, especially MOSH's failure to present its witness

¹ At the time of the hearing, the position of Commissioner of Labor and Industry was vacant. The Secretary of Labor, Licensing and Regulation designated Ileana O'Brien to hear the review. Robert Lawson is now the Commissioner of Labor and Industry and has carefully reviewed the record in this case and issues in this decision.

² Herein, the transcript of the November 5th hearing is referred to as "Tr1" and the November 26th hearing is referred to as "Tr2", the MOSH Exhibits from the administrative hearing as "MOSH Ex.", and the Hearing Examiner's Proposed Decision as "HE Proposed Decision."

Jim Dawson for cross-examination.³ HE Proposed Decision at 17. On review, MOSH argues that even putting aside the evidence from Mr. Dawson, there is sufficient evidence to establish this violation.

Looking only at the evidence related to the jib and without considering the weld on the swing-away latch assembly and Mr. Dawson's opinion, the manufacturer's specifications provide that diagonals cannot be out of straightness more than 1/16th of an inch. MOSH Ex. 11 at 1-3. A MOSH Inspector testified that he measured the distance between two diagonals and found the distance to be 3/8th of an inch, approximately five times the allowable limit. Tr2 at 15. The photographic evidence supports this testimony reflecting that the diagonals were bent. *See* MOSH Ex. 5 at 55, 56, 57 & 58. The Commissioner concludes that MOSH has established that the Employer violated the manufacturer's specifications in operating a crane with bent diagonals, and that this citation should be affirmed.⁴

MOSH also challenges the HE's dismissal of the citation relating to 29 C.F.R. 1926.550(a)(7)(ii) for failure to take wire ropes out of service when as much as one-third

³ As part of its investigation, MOSH attempted to contact the P&H Crane Company but the company had been purchased by Terex Waverly Cranes. MOSH contacted Terex Waverly Cranes and was put in touch with Jim Dawson. MOSH sent photographs of the crane and asked Mr. Dawson for his assessment of the welds on the swing-away latch assembly. Mr. Dawson reviewed the photographs and responded with an e-mail stating that some of the "areas are questionable." He continued that it "is hard to tell from the photos . . . but it appears to be bent . . . [and] has been repaired and exposed to quite a lot of heat." MOSH Ex. 10. MOSH introduced the e-mail into evidence but Mr. Dawson did not testify. It is unnecessary to determine the weight to afford this evidence as the Commissioner finds that the evidence relating to the bent jib is sufficient to support this citation.

⁴ As to the remaining prima facie elements, the employees told the MOSH Inspector that the foreman had operated the crane approximately two weeks ago. This condition was in plain view. This evidence demonstrates that there was employee exposure and employer knowledge through the foreman's use of the crane. Tr1 at 45-46.

of the original diameter or outside individual wires is kinking, crushing, bird caging or when there is any other damage resulting in distortion of the rope structure. The Employer asserts that there was no "kink" in the cable but rather a curvature of the rope, and that none of the strands were broken. Tr2 at 113. In addition, he testified that there were no distortions in the rope. Tr2 at 127. The photographic evidence supports the Employer's description that there was no kinking or distortion of the wire rope. *See* MOSH Ex. 5, Photographs 51 & 52. The MOSH Inspectors testified to the contrary that the rope had a kink. Tr1 at 162 & 264; Tr2 at 21-22. Weighing the photographic evidence and the testimony, the Commissioner concludes that MOSH has failed to prove its prima facie case, and dismisses this violation.

As to the ladder violations, MOSH asserts that the HE erred in dismissing the citation under 29 C.F.R. 1926.1060(a) by concluding that there was insufficient evidence that the ladder was not inspected or safe. The Commissioner agrees. The cited standard requires a competent person inspect a ladder for visible defects. The photographic evidence reveals that the ladder had six consecutive bent and damaged rungs, and a frame that was clearly bent. MOSH Ex. 5, Photographs 28 & 29. It cannot be disputed that bent and damaged rungs and frame are visible and obvious defects. The issue then is whether the ladder was inspected by a competent person. Both the employees and the foreman told MOSH that the ladder had not been inspected. There are no records to indicate that the ladder was inspected. This evidence supports the conclusion that the Employer violated this standard. The Commissioner affirms this citation.

Finally, MOSH argues that the citation under 29 C.F.R. 1926.1060(a) for failure to provide a training program for each employee using ladders and stairways should be

affirmed. At the time of the inspection, the MOSH Inspectors interviewed the foreman and three other employees who stated that they had not received ladder training. Tr1 at 180. Despite ample opportunities to do so, the Employer never provided any training records either to MOSH prior to the hearing or as evidence during the hearing. Based upon this evidence, the Commissioner affirms the citation under 29 C.F.R. 1926.1060(a).

On review, the Employer challenges the penalty amounts (not the penalty calculations), and appeals to the Commissioner on the basis that the penalties are not reasonable. More specifically, the Employer asserts that MOSH failed to take into consideration its abatement in determining the penalty amounts. A review of the record reveals that the Employer received full credit for purposes of penalty adjustment calculations for abating “most of the alleged violations during the violation.” MOSH Ex. 6. The Employer’s abatement included installing new cables, making fire extinguishers immediately available, replacing ladders, and up-righting and securing compressed gas cylinders. *Id.* MOSH applied this credit despite the fact that the Employer did not abate all of the violations – namely there is no evidence of fall protection training, no annual inspection sticker for the crane, no replacement of a cracked windshield in the crane (prior to the issuance of the citations), and no replacement of the threaded rod with a smooth rod on the crane. Additionally, in at least two telephone calls, MOSH encouraged the Employer to take pictures or provide receipts of further abatement for the informal conference to further lower the penalty amounts, which the Employer did not do. MOSH Ex. 6. Even as late as the administrative hearing, the HE provided the Employer with yet another opportunity to provide evidence of abatement relating to the

crane by allowing the submission of such evidence after the hearing concluded. Tr2 at 151. Again, the Employer failed to do so.

Having reviewed the evidence relating to the penalty amounts, the Commissioner finds that MOSH properly used established statutory penalty factors in setting the amounts and that the penalties assessed are appropriate and reasonable. *See* § 5-810(b), *Labor and Employment Art., Annotated Code of Maryland*; COMAR .09.12.20.12; MOSH Exs. 7A-7U, & MOSH Ex. 6.

ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on the 28 day of November, 2005, hereby **ORDERS**:

1. Citation 1, Item 1(a), alleging a serious violation of 29 CFR 1926.102(a)(1,) and Citation 1, Item 1(b), alleging a serious violation of 29 CFR 1926.300(b)(1) with a penalty of \$1,250.00 are **AFFIRMED**.

2. Citation 2, Item 1, alleging a serious violation of 29 CFR 1926.351(b)(2), with a penalty of \$875.00 is **AFFIRMED**.

4. Citation 3, Item 1, alleging a serious violation of 29 CFR 1926.352(d), with a penalty of \$875.00 is **AFFIRMED**.

5. Citation 4, Item 1(a), alleging a serious violation of 29 CFR 1926.501(b), Citation 4, Item 1(b), alleging a serious violation of 29 CFR 1926.501(b)(4)(i), Citation 4, Item 1(c), alleging a serious violation of 29 CFR 1926.501(b)(11), Citation 4, Item 1(d), alleging a serious violation of 29 CFR 1926.503(a)(1), and Citation 4, Item 1(e), alleging a serious violation of 29 CFR 1926.503(b)(1), with a penalty of \$1750.00 are **AFFIRMED**.

6. Citation 5, Item 1(a), alleging a serious violation of 29 CFR 1926.550(a)(7)(ii), Citation 5, Item 1(b), alleging a serious violation of 29.CFR 1926.550(a)(6), Citation 5, Item 1(d), alleging a serious violation of 29 CFR 1926.550(a)(12), Citation 5, Item 1(e), alleging a serious violation of 29 CFR 1926.550(a)(14)(i) are **AFFIRMED**, with a penalty of \$1750.00.

7. Citation 5, Item 1(c), alleging a serious violation of 29 CFR 1926.550(a)(7)(ii) is **DISMISSED**.

8. Citation 6, Item 1(a), alleging a serious violation of 29 CFR 1926.1053(b)(15) and Citation 6, Item 1(b), alleging a serious violation of 29 CFR 1926.1060(a) with a grouped penalty of \$875.00 are **AFFIRMED**.

9. Citation 7, Item 1, alleging a serious violation of 29 CFR 1926.350(a)(9) with a penalty of \$125.00 is **AFFIRMED**.

10. Citation 7, Item 2, alleging a serious violation of 29 CFR 1926.405(g)(2)(iv) with a penalty of \$550.00 is **AFFIRMED**.


11. Citation 7, Item 3, alleging a serious violation of 29 CFR 1926.416(e)(1) with a penalty of \$550.00 is **AFFIRMED**.

12. Citation 7, Item 4, alleging a serious violation of 29 CFR 1926.550(a)(5) with a penalty of \$250.00 is **AFFIRMED**.

13. Citation 7, Item 5, alleging a serious violation of 29 CFR 1926.1053(b)(4) with a penalty of \$250.00 is **AFFIRMED**.

14. 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.


ROBERT L. LAWSON
Commissioner of Labor and Industry