Circuit Court for Baltimore County
Case No. C-03-CV-19-002156

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1260

September Term, 2020

DONALD EXCAVATING, INC.

v.

COMMISSIONER OF LABOR AND INDUSTRY

Zic,
Ripken,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: February 2, 2022

Donald Excavating, Inc., appellant, was issued a citation by the Maryland Occupational Safety and Health Administration (MOSH) for violations of federal workplace safety standards adopted and enforced by the State. Appellant contested the citation and an administrative hearing was held. The Administrative Law Judge (ALJ) who presided over the evidentiary hearing issued a proposed decision upholding the citation. Appellant requested review and a hearing was held before the Commissioner of Labor and Industry (Commissioner). The Commissioner affirmed the citation.

Appellant filed a petition for judicial review of the Commissioner's decision in the Circuit Court for Baltimore County. The circuit court affirmed.

Appellant noted this timely appeal, presenting numerous questions[1] which we have distilled into one:

[1] The verbatim questions presented by appellant are:

1. Did the HE/Commissioner fail to include a determination of credibility or competency where conflicting testimony is present?
2. This is error [sic] as a matter of law where the HE/Commissioner applied the incorrect standard of review for the Agency to sustain a prima facie violation?
3. Is there substantial evidence in the record showing 29 C.F.R. § 1926.651(j)(2) applied as a matter of law?
4. Is there substantial evidence in the record that 29 C.F.R. § 1926.651(j)(2) was violated?
5. Did the HE/Commissioner apply the correct standard for MOSH to make a prima facie case that employee was exposed to a hazard?
6. Is there substantial evidence in the record that employee was exposed to a hazard in violation of 29 C.F.R. § 1926.651(j)(2) and/or 1926.100 (a)?
7. Is there substantial evidence in the record that [Appellant] had knowledge of the regulatory violations of 29 C.F.R. §[§] 1926.651(j)(2) and/or 1926.100(a)?
8. Is there substantial evidence in the record for a "serious" violation pursuant to 29 USC [sic] 666?
9. Is enforcement of the regulations arbitrary and capricious, in excess of statutory authority, and/or in violation of due process?

Was the Commissioner's decision supported by substantial evidence?

For the following reasons, we shall affirm the judgment of the circuit court.

REGULATORY FRAMEWORK

In 1970, Congress passed the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 et seq. OSHA permits states to regulate worker safety by developing and enforcing their own worker safety laws, provided that they are at least as stringent as federal law. *See* 29 U.S.C. § 667(c)(2). Pursuant to the Maryland Occupational Safety and Health Act (MOSHA),[2] which is a federally-approved worker safety plan, Maryland has adopted federal safety standards. *See Comm'r of Lab. & Indus. v. Bethlehem Steel Corp*., 344 Md. 17, 39 n.1 (1996) (J. Chasanow, concurring) (citing Code of Maryland Regulations (COMAR) 9.12.31. (1977, Supp.15-20).

Under MOSHA, an employer has a general duty to provide workplaces that are safe, healthful, and free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees. Md. Code (1991, 2016 Repl. Vol.), Labor & Employment Article (LE) § 5-104(a). In addition, employers have a specific duty to comply with the rules, regulations, and orders promulgated under the Act, including federal standards adopted by the State. LE § 5-104(b).

[2] Maryland Code (1991, 2016 Repl. Vol.), Labor and Employment Article (LE) § 5-101 et seq.

FACTS AND PROCEDURAL HISTORY

Inspection and Issuance of Citation

On April 12, 2018, MOSH conducted an inspection of a worksite in Towson, where appellant was excavating and removing an underground fuel tank. Following the inspection and further investigation, MOSH issued a citation charging appellant with a "serious" violation of two federal workplace safety regulations.[3]

The first regulation, 29 C.F.R. § 1926.100(a), requires that employees wear protective helmets (also referred to in the record as "hardhats") "in areas where there is a possible danger of head injury from impact, or from falling or flying objects[.]" The citation described the condition resulting in the alleged violation as follows: "[a]n employee without head protection was standing below a track hoe moving excavated materials."

The second regulation at issue, 29 C.F.R. § 1926.651(j)(2) is designed to protect employees working within an excavation. It provides:

> Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

[3] A violation that is categorized as "serious" is subject to a mandatory civil penalty. LE § 5-809(a)(2).

The citation described the condition resulting in that violation as follows: "[a]n employee was fueling a backhoe within an excavation . . . with the 13-foot spoil pile directly set against the excavation's edge."

Appellant contested the citation. A hearing before an ALJ was held on November 14, 2018.

Administrative Hearing

MOSH, as the party with the burden of proof, presented its case first.[4] Levi Lundell, a safety compliance officer for MOSH, testified that he and another compliance officer performed an inspection of appellant's work site on April 12, 2018. Inspector Lundell observed an employee standing in an excavated "trench," underneath the bucket of a moving track hoe that contained "slabs" of rock and other material. The employee was not wearing a hardhat.

As the track hoe moved, the bucket carrying the excavated material came within two feet of the employee's head. According to Inspector Lundell, it was possible that the employee could be struck in the head by debris falling from the bucket. He added that it was also possible for a head injury to occur if the bucket hit the employee as a result of an equipment malfunction or human error.

The excavated trench in which the employee was standing varied in depth, from three to five feet. The employee was standing within two to three feet of a "spoil pile" that

[4] *See Comm'r of Labor & Indus. v. Bethlehem Steel Corp*., 344 Md. 17, 34 (1996) ("the burden of proof is generally on the party asserting the affirmative of an issue before an administrative body.") (citation and quotation marks omitted).

consisted of excavated material including "broken up" rock and pavement, metal pipes, and "other materials and fragments[.]" The spoil pile, which measured 13 feet in height, was "directly flush against the dug-out excavation."

Inspector Lundell explained that the spoil pile at the edge of the excavation was a violation that presented a "cave in" or "struck by" hazard. He stated that the possibility that the spoil pile would collapse into the excavation and strike the employee was increased due to the presence of disturbed soil and vibrations of equipment at the work site.

Photographs taken during the inspection were introduced into evidence. Inspector Lundell explained that some of the photographs did not capture the violations he observed because both the equipment and the employee moved during the inspection.

Frank Donald, who was operating the track hoe on the day of the inspection, testified on behalf of appellant.[5] He stated that the helmetless employee was "close at one time … like 10 feet, 12 feet away" from the track hoe while it was moving. According to Mr. Donald, the employee did not walk underneath the bucket of the track hoe.

Mr. Donald did not dispute that the spoil pile was less than two feet from the edge of the excavation, but he claimed that the regulation applied only to excavations at least five feet in depth. He stated that the spoil pile was not steep, and that, although something could roll off of it, there was no risk that something could have fallen and hit the employee in the head.

[5] Mr. Donald referred to the equipment he was operating as an "excavator." To avoid confusion, we shall refer to it as a "track hoe" which is the term used in the citation to describe the equipment.

Appellant also called David Schoppert, who testified as an expert in the field of worksite safety, heavy equipment operation, and compliance with MOSHA and OSHA regulations. Mr. Schoppert visited the work site approximately a week after the MOSH inspection. By that time, however, the work site had been backfilled.

Based on his review of the photographs taken during the inspection, Mr. Schoppert opined that there was no danger that the spoil pile would cave in because the spoil pile was "sloped" and the excavation was not deep enough. He agreed that it was possible for material to have rolled off the spoil pile onto the employee's foot, but he did not think that would be a "substantial hazard."

According to Mr. Schoppert, the hardhat regulation did not apply because, based on his review of the photographs, the track hoe was not moving. Therefore, there was no possibility of a head injury.

Proposed Decision

Following the hearing, the ALJ issued a proposed decision which recommended that the violations be upheld. The ALJ found that MOSH properly cited appellant for a violation of § 1926.100(a),[6] noting that (1) the photographs in evidence showed an employee, without a helmet, standing near a track hoe, (2) the bucket of the track hoe was in the air, and (3) Inspector Lundell credibly testified that at one point, the employee was underneath the bucket of the track hoe. The ALJ concluded that the employee was "in an

[6] Unless otherwise indicated, all statutory references are to 29 C.F.R. (Code of Federal Regulations).

area where there is a possibility of head injury from [an] impact" with a part of the track hoe or from debris falling from the bucket overhead.

The ALJ further found that MOSH properly cited appellant for a violation of § 1926.651(j)(2), noting the undisputed evidence that the spoil pile was not more than two feet from the edge of the excavation and that it was possible for material to roll down into the excavation where the employee was standing. The ALJ expressly rejected the testimony of appellant's witnesses, who claimed that there was no hazard to the employee, finding, instead, that large rocks or pieces of debris from the "towering" spoil pile could fall or roll into the excavation, posing a hazard to the employee in the excavation.

Commissioner Review

Appellant requested a review of the ALJ's proposed findings and decision. The Commissioner held a hearing on April 17, 2019. On June 11, 2019, the Commissioner issued a Final Decision and Order affirming the citation.

With respect to the violation of § 1926.100(a), the Commissioner noted that the photographs show the bucket of the track hoe in the air, in close proximity to the helmetless employee, and that the ALJ had credited Inspector Lundell's testimony that he witnessed the bucket pass over the employee's head. The Commissioner concluded that this evidence demonstrated that the helmet regulation applied and that the employee was exposed to a hazard. The Commissioner further found that the evidence supported a conclusion that the violation posed a substantial possibility of death or serious physical harm and was properly determined to be a "serious" violation.

As to the violation of § 1926.651(j)(2), the Commissioner noted the undisputed evidence that the spoil pile was located at the edge of the excavation, and that appellant's witnesses conceded that it was possible for material to roll off the spoil pile. The Commissioner rejected appellant's argument that there was no hazard, finding that "[i]f material were to roll off the spoil pile, the employee would have been in its direct path and could have been struck by a slab of debris[,]" and that there was a substantial probability that such an event could cause serious injury or death.

Petition for Judicial Review

Appellant filed a petition for judicial review in the Circuit Court for Baltimore County. Following a hearing and review of the record, the circuit court affirmed the Commissioner's decision, concluding that it was legally correct and supported by substantial evidence. This appeal followed.

STANDARD OF REVIEW

This Court reviews a decision of an administrative agency under the same statutory standards as the circuit court. *Comm'r of Lab. and Indus. v. Whiting-Turner Contracting Co.*, 462 Md. 479, 490 (2019). "'Therefore, we reevaluate the decision of the agency, not the decision of the [circuit] court.'" *Id.* (quoting *Gigeous v. E. Corr. Inst*., 363 Md. 481, 495-96 (2001)).

"In reviewing an administrative agency decision, we are 'limited to determining if there is substantial evidence in the record as a whole to support the agency's finding[s] and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Maryland Div. of Lab. & Indus. v. Triangle Gen. Contractors, Inc*.,

366 Md. 407, 416 (2001) (quoting *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999)) (additional citation omitted).

In applying the substantial evidence test to questions of fact,

> a reviewing court decides whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. A reviewing court must review the agency's decision in the light most favorable to it; ... the agency's decision is prima facie correct and presumed valid, and ... it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence.

Id. (citation and internal quotation marks omitted).

"[W]ith regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts." *Id.* (citations omitted).

DISCUSSION

Appellant contends that the evidence in the record does not support the Commissioner's decision to uphold the citation for a serious violation of either § 1926.100(a) (also referred to as the "hardhat regulation") or § 1926.651(j)(2) (also referred to as the "spoil pile regulation").[7] We are not persuaded.

[7] Appellant also argues that the Commissioner's decision was premised on an error of law because "there was no finding that [MOSH] presented substantial evidence that [Appellant] committed the violation." Appellant confuses the standard of proof at the administrative agency level with judicial review of an administrative decision.

Pursuant to the Administrative Procedure Act, preponderance of the evidence is the correct standard of proof in a contested case before the Commissioner. Md. Code (1984,

To uphold a violation of a workplace safety standard, the Commissioner must find, by a preponderance of the evidence, '"(1) that the cited standard applies; (2) noncompliance with the cited standard; (3) access or exposure to the violative conditions; and (4) that the [appellant] had actual or constructive knowledge of the conditions through the exercise of reasonable due diligence."' *Angel Bros. Enters., Ltd. v. Walsh*, 18 F.4th 827, 830 (5th Cir. 2021) (quoting *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 734 (5th Cir. 2016). *See also Jacobs Field Servs. N. Am., Inc. v. Scalia*, 960 F.3d 1027, 1033 (8th Cir. 2020).[8]

To uphold a "serious" violation, the Commissioner must also find that an accident arising from the violation would present a "substantial probability that death or serious physical harm could result[.]" LE § 5-809(a)(1).

Appellant argues that the ALJ and/or the Commissioner failed to make a credibility determination when conflicting testimony was presented. The short answer is that the ALJ did consider the credibility of witnesses' testimony and the weight to be given to all evidence. The Commissioner found that the determinations were supported by the evidence.

2021 Repl. Vol.) State Government Article, § 10-217. On judicial review of a decision of the Commissioner, substantial evidence is the less stringent standard of review that is applied to the Commissioner's factual findings. LE § 5-215(c)(2).

[8] Because MOSHA is modeled after the federal OSHA, Maryland courts rely on federal cases interpreting OSHA. *Bethlehem Steel*, 344 Md. at 30.

Spoil Pile Regulation

As noted earlier in this opinion, § 1926.651(j)(2) requires that excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations be placed "at least two feet . . . from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary." An "excavation" is broadly defined as "any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." § 1926.650(b).

Appellant asserts that there was no evidence that § 1926.651(j)(2) applies because MOSH "failed to submit evidence of the 'edge' from which materials and equipment can roll or fall [from]." We disagree. Inspector Lundell's undisputed testimony that the spoil pile was "directly flush with the excavation," supports a finding that the spoil pile was at the edge of the excavation.[9]

Appellant insists that § 1926.651(j)(2) was not applicable because the evidence demonstrated the spoil pile was not at the edge of the excavation, but on a "ramp" within the excavation. Appellant asserts that Inspector Lundell testified that the spoil pile was on a ramp. To the extent this argument is properly before this Court, the portions of the record cited by appellant offer no support for this contention.[10] Inspector Lundell did not testify

[9] *Merriam Webster* defines "flush" as "directly abutting or immediately adjacent[.]" *Flush*, Merriam-Webster, https://www.merriam-webster.com/dictionary/flush (last visited 1/19/22).

that the spoil pile was on a ramp or was "'flush' to the ramp," as appellant claims, he only agreed that the location of the equipment within the excavation could be described as a ramp. Moreover, as the Commissioner found, the correct standard was applied to determine whether the spoil pile constituted a hazard.

Appellant next claims that there was no evidence of a violation because it was undisputed that the employee was two feet away from the spoil pile. The regulation, however, has nothing to do with how close a spoil pile may be to an employee. It provides that the spoil pile shall be at least two feet from the edge of an excavation.

Appellant further maintains that the Commissioner's decision affirming the citation for the spoil pile violation must be remanded or reversed because there was no finding as to the third element of proof, which, as noted earlier in this opinion, is "access or exposure to the violative condition[.]" As the Commissioner noted, however, the employee in the excavation was standing two feet from the spoil pile and was in the "direct path" of any material that might have rolled off the pile.[11]

[10] Appellee argued that this Court should not consider the belated "ramp" argument because it was not raised before the hearing examiner. The Commissioner addressed the merits of the argument, however, and the decision was supported by substantial evidence.

[11] Appellant suggests that there was no evidence of the hazard posed by the violation. As appellee maintains and appellant concedes, however, § 1926.651(j)(2) presumes that excavated material less than two feet from the edge of an excavation poses a hazard of falling or rolling into an excavation. *See Harry C. Crooker & Sons, Inc. v. Occupational Safety and Health Rev. Comm'n*, 537 F.3d 79, 85 (1st Cir. 2008) ("a standard that proscribes certain conditions *presumes* the existence of a safety hazard.") Therefore, MOSH was not required to prove that the violation was actually hazardous. *Id.*

In any event, there is substantial evidence in the record to support a finding that the employee was exposed to a hazard. As the Commissioner noted, the possibility that

Finally, appellant asserts that the record does not support the Commissioner's finding that the violation was "serious," that is, whether it was substantially probable that serious injury or death could result if material from the spoil pile were to roll into the excavation. The ALJ expressly disagreed with the opinion testimony of appellant's witnesses, who maintained that such an occurrence posed no significant risk of injury. Instead, the ALJ concluded that, if some or all of the "towering" spoil pile shifted into the excavation, the employee "in its path" was at risk of death or serious bodily harm.

The Commissioner agreed with that conclusion, pointing to evidence that the employee was two feet from a 13-foot spoil pile that was made up of recently disturbed soil and "slabs of debris." The Commissioner found that "[i]f material were to roll off the spoil pile," as the undisputed evidence demonstrated was possible, "the employee would have been in its direct path and could have been struck by a slab of debris." The Commissioner concluded that such an event could lead to lacerations or broken bones, and therefore that there was a substantial probability of serious injury or death. The Commissioner's findings are supported by substantial evidence in the record and we shall not disturb them.[12]

excavated material from the spoil pile could have rolled into excavation was not in dispute. From that evidence, the Commissioner reasonably inferred that the employee was exposed to a hazard, specifically, that the employee, who was standing two feet from the spoil pile, "could have been struck by a slab of debris."

[12] Appellant asserts that the record lacks substantial evidence to support a finding that appellant had knowledge of the violations of 29 C.F.R. § 1926.651(j)(2) and/or § 1926.100(a). Appellee maintains that, because the issue was not presented for the Commissioner's consideration, it is waived. We agree with appellee. *See Harry C. Crooker*, 537 F.3d at 85 ("objections not presented to the Commission cannot be advanced

Protective Helmet Violation

Section 1926.100(a) requires that employees wear protective helmets "in areas where there is a possible danger of head injury from impact, or from falling or flying objects[.]" Appellant asserts that the record does not support a finding that there was a possibility of head injury, that the employee was exposed to a hazard, or that there was a substantial probability of serious injury or death. We disagree.

Inspector Lundell testified that the bucket of the track hoe came within two feet of the employee's head and that, at one point, the bucket of excavated material was directly over the employee's head. The Commissioner noted that the ALJ found Inspector Lundell's testimony to be credible.[13] This evidence was substantial and supported a finding that the employee was working in an area where there was a possible danger of head injury from material falling from the bucket of the track hoe or from an impact with a part of the track hoe. We have no difficulty in concluding that the same evidence supported a finding

in a subsequent petition for judicial review.") (citing 29 U.S.C. § 660(a) and *P. Gioioso Sons, Inc. v. Occupational Safety and Health Rev. Comm'n*, 115 F.3d 100, 104-06 (1st Cir. 1997)). Accordingly, we do not address the issue of knowledge.

[13] Appellant suggests that the Commissioner erred in characterizing as "unrefuted" evidence that the track hoe was in motion and that the bucket was, at one point, over the employee's head. We disagree. Mr. Donald admitted that he continued to operate the track hoe while the employee was as close as 10-12 feet away. Furthermore, Mr. Donald did not dispute that the bucket was maneuvered over the employee's head at one point. He only agreed that the employee did not walk underneath the bucket.

that, in the event of such an injury, there was a substantial probability of death or serious injury.[14]

Appellant claims that the Commissioner made no finding as to the third element of proof, that is, that the employee was exposed to or had access to the violative condition, but "skipped" directly to the probability of serious bodily injury or death. The record does not support this claim. The ALJ found that the employee "was standing near the track hoe without head protection in an area where there is a possibility of head injury from impact." The Commissioner agreed, finding that "the employee clearly had access to the hazard and was in the zone of danger."

Appellant further contends that there is no substantial evidence that the employee was exposed to a hazard beyond Inspector's Lundell's "speculat[ive] and unsupported opinion" testimony that there was a possibility of head injury due to operator error or equipment malfunction. This argument lacks merit.

"[B]y its express language, [29 C.F.R. § 1926.100(a)] applies whenever employees are exposed to 'a *possible* danger of head injury.'" *Donovan v. Adams Steel Erection, Inc*., 766 F.2d 804, 811 (3d Cir. 1985) (emphasis in original). "The standard's language does not require that employees *actually* be exposed to head injury." *Id.* "Exposure can be shown even where 'the hazard of being struck ... was remote and [where] hardhats may not

[14] Appellee contends that, in addition to the possibility of head injury from the moving track hoe and/or excavated material falling from the bucket, appellant violated § 1926.100(a) when the employee stood "in close proximity to a tall spoil pile without wearing a helmet[.]" Because the protective helmet violation was not based on any danger from the spoil pile, this contention is not pertinent to the issue on appeal.

have offered much protection.'" *Sec'y of Lab. v. Altor, Inc.*, 23 O.S.H. Cas. (BNA) 1458, 1465 (O.S.H.R.C. Apr. 26, 2011), *aff'd*, 498 Fed. Appx. 145 (3d Cir. 2012) (citation omitted). As we have already concluded, there was substantial evidence in the record to support a finding that the employee was exposed to a possible danger of head injury.[15]

In sum, we conclude that there was substantial evidence in the record to support the Commissioner's decision that the citation for a serious violation of §§ 1926.100(a) and 1926.651(j)(2) be upheld. Accordingly, the circuit court did not err in affirming the Commissioner's decision.[16]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[15] Appellant's reliance on *Pratt v. Whitney Aircraft*, 649 F.2d 96 (2nd Cir. 1981) in support of its contention that something more than a possibility of head injury must be shown to prove a violation of § 1926.100(a) is misplaced. *Pratt* involves a violation of a different regulation that, unlike § 1926.100(a), does not employ the term "possible."

[16] Appellant asserts, generally, that, where safety regulations are "applied arbitrarily," the "burden of nonpersuasion" is improperly shifted to the employer in violation of due process and statutory authority. Other than the specific arguments addressed herein, Appellant does not articulate any facts or legal argument as to how this assertion entitles it to relief from this Court. *See Rollins v. Cap. Plaza Assocs., L.P.*, 181 Md. App. 188, 201-02 (2008) (the appellate court "cannot be expected to delve through the record to unearth factual support favorable to [the] appellant[,]" nor will it "seek out law to sustain [appellant's] position.") (citations, quotation marks, and emphasis omitted).