Circuit Court for Baltimore County
Case No. C-03-CV-20-002049

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1521

September Term, 2021

IN THE MATTER OF DONALD
EXCAVATING, INC.

Kehoe,
Arthur,
Wilner, Alan, M.,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: October 6, 2022

This appeal arises out of a workplace safety citation issued by the Maryland Occupational Safety and Health Unit ("MOSH"), a unit of the Maryland Department of Labor, against Donald Excavating, Inc. ("Donald"). Donald challenged the citation, and the Commissioner of Labor and Industry referred the matter to the Office of Administrative Hearings. An administrative law judge, sitting as a hearing examiner, conducted a hearing, made findings of fact and conclusions of law, and recommended that the citation and proposed penalty be affirmed. Donald filed a petition for judicial review in the Circuit Court for Baltimore County. The court affirmed the administrative decision. To this Court, Donald Excavating presents three issues:

> (1) Is there an error as a matter of law where the ALJ found violation of C.F.R. § 1926.652(a)(1) where there was undisputed compliance under (c)(1)?
>
> (2) Is there an error as a matter of law where the ALJ failed to show a significant hazard under the general provision of C.F.R. § 1926.652(a)(1)?
>
> (3) Without identifying a specific violation of the standard under C.F.R. § 1926.652(c)(1) or a significant risk from which Employer can be put on notice, is there error where the ALJ found imputable knowledge?

We will affirm the decision of the administrative law judge.

BACKGROUND

On January 23, 2019, five of Donald's employees were working to install a new water valve on an existing water main located under Eastern Avenue near its intersection with Woodland Avenue in Middle River. At this location, Eastern Avenue is four lanes wide. In order to access the water main, Donald arranged for the more northerly of the

westbound lanes to be blocked off from traffic. Then Donald's employees dug a trench extending from the north side of Eastern Avenue to the location of the water main. The trench was ten feet, eight inches long, five feet, seven inches wide, and seven feet deep. The trench terminated at the water main, which was located about four to six feet from moving traffic on Eastern Avenue. MOSH inspectors Drew Dorbert and Charles Allan went to the location and inspected the site for compliance with workplace safety regulations. Their inspection disclosed the following:

The project was supervised by two foremen, Mark Winters and Justin Winters, who were also the designated competent persons[1] for the job site.

Prior to allowing employees to descend into the trench to work, the Messrs. Winters concluded that the soil was Type B[2] and therefore opted to use hydraulic jacks to hold finn boards[3] in place to shore up the east and west sides of the trench against cave-ins. The boards were secured in place with hydraulic shoring jacks manufactured by Griswold Machine & Eng., Inc. ("GME").

[1] A "competent person" is an individual "who is capable of identifying existing and predictable hazards or working conditions that are hazardous, unsanitary, or dangerous to employees and who is authorized to take prompt corrective measures to eliminate or control these hazards and conditions." 29 C.F.R. §1926.650(b).

[2] For purposes of cave-in protection, the Occupational Safety and Health Administration ("OSHA") classifies soils into four categories: "Stable Rock, Type A, Type B, and Type C, in decreasing order of stability." C.F.R. § 1926 Subpart P, Appendix A(a).

[3] "Finn boards" are sheets of heavy-duty plywood used in conjunction with hydraulic jacks to shore up walls of excavations. *See* C.F.R. § 1926 Subpart P Appendix D(g)(7).

However, neither the north nor south walls of the trench were shored, sloped, benched, or otherwise secured against cave-ins. No employees were in the trench at the time of the inspection, but one of the foremen, Mark Winters, told the MOSH inspectors that another of Donald's employees, William Maondufar, had been working at the south wall of the trench for approximately an hour earlier that day. There was no shoring or other protective measures on the south wall of the trench when this work was being done. Both Mark Winters and Justin Winters supervised Mr. Maondufar when he worked at the south end of the trench.

Mr. Dorbert took soil samples from the site which he sent out for testing. The results confirmed the Winters' conclusion that the soil was "Type B." Both of the Messrs. Winters acknowledged to Mr. Dorbert that some sort of protection against cave-ins was required because the excavation was more than five feet deep. However, in their view, the finn board/hydraulic jack system used to secure the east and west sides was sufficient. According to them, no cave-in protection was required for the north and south ends of the trench. This was so, they said, because the trench was dug in Type B soil.

As a result of the investigation, MOSH issued a citation charging Donald with violating the Maryland Occupational Safety and Health Act, Md. Code, Lab. & Empl. §§ 5-101–812 ("MOSHA") and, specifically, 29 C.F.R. § 1926.652(a)(l)). The citation characterized the violation as "serious," and proposed a penalty of $900. Donald filed notice of intent to contest the citation. Administrative law judge Susan H. Anderson, sitting as a hearing examiner, conducted a contested hearing on February 18, 2020. Two

witnesses testified at the hearing, Justin Winters for Donald and Mr. Dorbert for the Commissioner.

Pertinent to the issues raised on appeal, Mr. Winters testified that it was not necessary to protect against cave-ins at the south wall of the trench. However, he conceded that he would have used some sort of protection on the south wall if a worker was going to be in the trench for more than a few hours because soil had a tendency to "close itself back in." Based on this testimony, the administrative law judge concluded that "if the unprotected south wall posed a danger after a 'few hours,' it stands to reason that it could also pose a danger sooner." Mr. Winters also testified that if there had been a cave-in on the south wall, "it wouldn't have smashed [Mr. Maondufar]. There [was] room . . . to evade."

It was the Commissioner's position that hydraulic jack/finn board devices used by Donald were not appropriate to prevent cave-ins at the south wall. Mr. Dorbert testified that protection was needed to comply with federal regulations and that a suitable protective system would have been a modified version of a "trench box."[4] Mr. Winters

[4] The OSHA regulation distinguishes between "support systems," which are designed to prevent cave-ins from occurring and "shield systems," which are designed to protect workers from injury if a cave-in occurs. 29 C.F.R.§ 1926.650(b). The finn board/hydraulic jack system used by Donald in the present case is a support system.

Trench boxes are "structures [that] help prevent an employee from being swallowed up by a cave-in[.]" *Dakota Underground, Inc. v. Sec'y of Lab*., 200 F.3d 564, 568 (8th Cir. 2000); *see also* 29 C.F.R.§ 1926.650(b) ("Shield (Shield system) means a structure that is able to withstand the forces imposed on it by a cave-in and thereby protect employees within the structure. Shields can be permanent structures or can be designed to be portable and moved along as work progresses. [S]hields can be either premanufactured

disagreed, but his concerns were that inserting a trench box would be difficult and might damage the water main or other nearby utility lines. He did not testify that a trench box would be ineffective in protecting a worker from the results of a cave-in. His position was that it wasn't necessary to protect against a cave-in at the south wall.

Additionally, Mr. Winters conceded that traffic was passing within four to six feet of the south end of the trench but that the traffic on Eastern Avenue was 'light" and the surrounding neighborhood was residential. Therefore, he asserted, there was no danger that vibrations from passing traffic would trigger a cave-in. But Mr. Winters admitted on cross-examination that he did not know whether large trucks were prohibited from using Eastern Avenue. The administrative law judge concluded that "[s]ince Mr. Winters did not know whether trucks routinely travel on that section of the roadway, it was incumbent upon him to prepare the trench as if they did."

On April 23, 2020, the administrative law judge issued a thorough and well-reasoned written decision that recommended affirming the citation and proposed penalty. Pertinent to the issues raised by the parties in this appeal, the administrative law judge found that:

- The excavation was a "trench" as the term was defined in the regulation.
- 29 C.F.R. § 1926.652 required employers to provide protections for employees working in trenches against cave-ins when employees are working in the "zone of danger" created by the hazard.

or job-built in accordance with § 1926.652(c)(3) or (c)(4). Shields used in trenches are usually referred to as "trench boxes" or "trench shields."

- The zone of danger associated with a cave-in of the south wall of the trench was the area in its immediate vicinity.
- There had been no protective devices in place to protect Mr. Maondufar from a cave-in of the south end of the trench when he had been working there earlier in the day.
- The risk of a cave-in was increased because the south face of the trench was within four to six feet of the traveled portion of Eastern Avenue.
- Although Donald took the position at the hearing that the possibility of a cave-in at the south wall of the trench was so remote as to be speculative, its position was not supported by the testimony of its sole witness at the hearing, Justin Winters.
- Donald's designated on-site "competent persons," namely, the Messrs. Winters, were aware that there was no protection against a south end cave-in when Mr. Maondufar was working at that location.
- The Winters' knowledge was attributable to Donald.

Neither party requested review of the decision by the Commissioner pursuant to Lab. & Empl. § 5-214(e)(2)(ii), and the proposed decision became the final order of the Commission. Donald filed a petition for judicial review and the circuit court affirmed the decision. This appeal followed.

THE STANDARD OF REVIEW

The Court reviews the decision of the administrative agency and not the circuit court. *Commissioner of Lab. & Indus. v. Whiting-Turner Contracting Co.*, 462 Md. 479, 490 (2019). We will affirm an agency decision if it is not legally erroneous and is based upon substantial evidence. *Id.* "Substantial evidence" is "relevant evidence [that] a reasonable mind might accept as adequate to support a conclusion." *Motor Vehicle Admin. v. Barrett*, 467 Md. 61, 72 (2020) (quoting *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 512

(1978)). Our review is "narrow and highly deferential with regard to administrative fact-finding." *Kor-Ko Ltd. v. Maryland Dep't of the Env't*, 451 Md. 401, 412 (2017). Courts "defer to the agency's (i) assessment of witness credibility, (ii) resolution of conflicting evidence, and (iii) inferences drawn from the evidence." *Richardson v. Maryland Dep't of Health*, 247 Md. App. 563, 570 (2020), *cert. denied* 472 Md. 17 (2021).

ANALYSIS

The Court of Appeals has explained that "[b]ecause MOSHA is modeled after the Federal Occupational Safety and Health Act [29 U.S.C. §§ 651–678], Maryland courts frequently turn to Federal decisions for guidance in interpreting MOSHA." *Comm'r of Lab. & Indus. v. Whiting-Turner Contracting Co*., 462 Md. 479, 491 (2019) (citing *Md. Comm'r of Labor & Indus. v. Cole Roofing Co*., 368 Md. 459, 470 (2002)).

To establish a prima facie case that an employer violated an OSHA regulation imposing a specific safety standard, the agency must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) there was failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the employer either knew or could have known of the condition with the exercise of reasonable diligence. *ComTran Group, Inc. v. U.S. Dept. of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013); *Astra Pharm. Prod., Inc.*, (BNA) 2126 (1981) *aff'd in part, remanded in part*, 681 F.2d 69 (1st Cir. 1982). Maryland has adopted this approach. *See, e.g., Comm'r of Labor & Indus. v. Bethlehem Steel Corp*., 344 Md. 17, 34 (1996).

MOSHA imposes two categories of duties on employers. First, employers are under 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, Lab. & Empl. § 5-104(a). Second, employers must comply with rules and regulations addressing specific workplace hazards. Lab. & Empl. § 5-104(b).

The Commissioner has adopted many of the federal OSHA standards including the incorporation by reference of nearly all standards set out in 29 C.F.R. Parts 1910 and 1926. *See* Md. Code, Lab. & Empl. § 5-309(a)(1); COMAR 09.12.31. Among these regulations is C.F.R. § 1926.652, which sets out safety requirements for trenches and similar types of excavations. Section 1926.652 is at the center of the parties' contentions. Because the parties disagree as to the proper interpretation of the regulation, we will summarize it.

Section 1926.652(a) sets the standard: Employers must protect employees from cave-in hazards when employees are working in excavations of five feet in depth or more.[5] The

[5] 29 C.F.R. § 1926.652(a) states:

> Requirements for protective systems.
>
> (a) Protection of employees in excavations.
>
> (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:
>
> (i) Excavations are made entirely in stable rock; or
>
> (ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

regulation does not apply to excavations that are less than five feet deep or are dug in "stable rock." *Id.* The trench at issue in this case was more than five feet deep and was not dug in stable rock. Therefore, Donald was required to provide cave-in protection to its employees who worked in the trench.

Section 1926.652(b) sets out ways that an excavation itself may be designed to provide protection by using sloped or benched, as opposed to vertical, walls.[6] Subsection (b) doesn't apply this is case because the sides in Donald's trench were vertical.

Section 1926.652(c) provides standards for safety systems that either stabilize vertical walls or otherwise protect workers in excavations. These systems include "shield systems," "support systems," and "other protective systems." They are designed and fabricated for the specific purposes of either preventing cave-ins in the first place or providing protections to workers if cave-ins occur. The finn board/hydraulic jack system used by Donald is a support system. Subsection (c) applies to this case.

In summary, subsection (c) provides that such systems must be (1) designed in accordance with the manufacturer's tabulated data[7] (29 C.F.R. § 1926.652(c)(2));

[6] The administrative law judge explained that "'Sloping' is 'a method of protecting employees from cave-ins by excavating to form sides of an excavation that are inclined away from the excavation so as to prevent cave-ins'" and that "'[b]enching' is 'a method of protecting employees from cave-ins by excavating the sides of an excavation to form one or a series of horizontal levels or steps, usually with vertical or near vertical surfaces between levels.'" (quoting 29 C.F.R. § l926.650(b)).

[7] "'Tabulated data' means tables and charts approved by a registered professional engineer and used to design and construct a protective system." 29 C.F.R. §1926.650(b).

(2) designed in a manner consistent with generally available tabulated data (§ 1926.652(c)(3)); or (3) designed by a professional engineer for use at the specific site (§ 1926.652(c)(4)). As we have noted, the hydraulic jacks in this case were manufactured by GME. Therefore, Messrs. Winters, in their capacity as the competent persons at the jobsite, were obligated to use the jacks in a manner consistent with GME's tabulated data, which was introduced as an exhibit at the administrative hearing.

Donald presents three contentions as to why the decision of the administrative law judge should be reversed. We will discuss them in the order presented in Donald's brief.

A

The gist of Donald's first argument is that the administrative law judge erred when she concluded that Donald had violated CFR § 1926.652(a)(1). This is so, asserts Donald, because it was "undisputed" that it had complied with § 1926.652(c)(1) by using the finn board/hydraulic jack system to shore up the side walls of the trench. Donald argues that the GME tabulated data states "does not require end wall shoring or sheeting." Donald is wrong for two reasons.

The first is that Donald misreads GME's tabulated data. GME's guidelines do not state that it is unnecessary to support the end walls of a trench. Instead, the tabulated data makes it clear that its hydraulic jacks can be used "to support loads across the end of a trench" as long as the trench is less than seven feet eleven inches in length. (The trench in the present case was more than ten feet long.) That GME's hydraulic shoring system was not designed to shore up the ends of trenches as long as the one in the present case does

not mean Donald was relieved of the duty to provide protections against cave-ins at the end walls. It means that Donald was required to implement a different type of protection. *See P. Gioioso & Sons, Inc. v. Occupational Safety & Health Rev. Comm'n*, 115 F.3d 100, 108–09 (1st Cir. 1997) ("While [29 C.F.R. § 1926.652(a), (b) and (c)] are performance-oriented, they only allow employers to choose from a limited universe of acceptable procedures, not to jury-rig convenient alternatives and impose them on an imperilled work force.") In contrast to *Gioioso & Sons*, the Messrs. Winters did not attempt to "jury-rig" an alternative means of protection; they simply left it to the worker to scramble out of the way if a cave-in occurred.

Second, as the administrative law judge noted in her decision, the federal Occupational Safety Health Review Commission has consistently concluded that § 1926.652(a)(1) requires protection from cave-ins on *all* walls of an excavation. *See Griffin Contracting, Inc*., 22 BNA OSHC 1140, 1145 (No. 07-0788, 2007) ("Although only the north wall lacked cave-in protection, a violation of § 1926.652(a)(1) is established. The standard contemplates that each wall of an excavation is protected from a cave-in hazard. The potential cave-in hazard exists from any wall of an excavation more than 5 feet in depth.") (citing *Oklahoma Natural Gas Co*., 16 BNA OSHC 1278 (No. 90-1330, 1993); *Southwestern Bell Telephone Co*., 16 BNA OSHC 1021, 1022 (No. 91-1421, 1992); *S & H Construction Co*., 15 BNA OSHC 2094, 2096 (No.91-0404, 1992); *Underground Construction Inc*., 14 BNA OSHC 1795, 1796 (No. 89-0216, 1990); and *John R. Jurgensen Co*., 13 BNA OSHC 1830, 1832 (No. 87-1249, 1988).

B

Donald next argues that the administrative law judge's analysis was legally incorrect "because it did not require [the Commissioner to] sustain [its] burden of showing a violation of a specific standard or of a significant risk." This is so, says Donald, because it presented evidence that cave-in protections for the south wall of the trench were unnecessary in light "of the on-site conditions," namely, the trench was dug in Type B soil and there was limited truck traffic on Eastern Avenue in the vicinity of the project. In support of this contention, Donald cites *Pratt & Whitney Aircraft v. Secretary of Labor*, 649 F.2d 96 (2d Cir. 1981) ("*Pratt & Whitney I*"), and *Pratt & Whitney Aircraft v. Donovan*, 715 F.2d 57 (2d Cir. 1983) ("*Pratt & Whitney II*").

In the decision, the administrative law judge explained in detail why the *Pratt & Whitney* decisions were irrelevant to the present case. We agree.

The statute at issue in the *Pratt & Whitney* cases was the "general duty" provision of the Occupational Health and Safety Act, 29 U.S.C. § 654(a)(1) (1976). It stated:

> (a) Each employer
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

Pratt & Whitney I, 649 F.2d. at 97–98.

The Court of Appeals for the Second Circuit explained that the statute was "intended as a catchall provision to cover dangerous conditions of employment not specifically covered by existing health and safety standards promulgated by the Secretary of Labor

under the Act." *Id.* at 98. In order to prove "a violation of the general duty clause, 'the Secretary must prove (1) that the employer failed to render its workplace free of a hazard which was (2) recognized and (3) causing or likely to cause death or serious physical harm.'" *Id.* (quoting *Usery v. Marquette Cement Manufacturing Co*., 568 F.2d 902, 909 (2d Cir. 1977)).

C.F.R. § 1926.652 is not a catch-all general duty regulation—it explicitly requires employers to protect against cave-in hazards in excavations that are five feet or more in depth. *Gioioso & Sons*, 115 F.3d at 108. In such cases, and as long as the regulatory standard is specific, "the [Commissioner] need only prove a regulatory standard and its violation." *Pratt & Whitney II*, 715 F.2d at 64 (quoting *Super Excavators, Inc. v. Occupational Safety & Health Rev. Comm'n*, 674 F.2d 592, 595 (7th Cir. 1981)).[8] In the present case, the parties agree that C.F.R. § 1926.652 set out the relevant regulatory standard. We hold that the regulation sets out specific safety standards and that the Commissioner presented substantial evidence to show that Donald violated the regulation.

C

There are two parts to Donald's final contention.

Donald first asserts that the administrative law judge erred in imputing the Winters' knowledge of the violation of the regulation to Donald. As we have mentioned, in order

[8] The regulation at issue in *Super Excavators* was the same one that is at issue in the present case, that is, 29 C.F.R. § 1926.652.

to prove that an employer violated an OSHA regulation, the regulatory agency must show that the employer either knew or could have known of the condition with the exercise of reasonable diligence. *ComTran Group*, 722 F.3d at 1307. In this context, "the actions and knowledge of supervisory personnel are generally imputed to their employers [and the] employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel." *Empire Roofing Co. of Georgia, Inc*., 26 O.S.H. Cas. (BNA) ¶ 1811 (O.S.H.R.C.A.L.J. May 18, 2017). An employer rebuts this presumption when it shows that it:

> (1) established a work rule to prevent the reckless behavior and/or unsafe condition from occurring, (2) adequately communicated the rule to its employees, (3) took steps to discover incidents of noncompliance, and (4) effectively enforced the rule whenever employees transgressed it.

Maryland Com'r of Lab. & Indus. v. Cole Roofing Co., 368 Md. 459, 476 (2002) (quoting *Gioioso & Sons*, 115 F.3d at 109).

In *Cole Roofing*, the Court of Appeals held that when a citation for a violation of workplace safety

> is based upon a specific [regulatory] standard and the Commissioner establishes the violation and the employer's actual or constructive awareness of it, the defense that the conduct constituting the violation was unforeseeable or unpreventable is an affirmative one which the employer must plead and prove.

368 Md. at 478.

As we have explained, the citation in the present case is based upon a specific regulatory standard. The conditions giving rise to the citation were certainly clearly

visible to the supervisors. At the administrative hearing, Donald's counsel argued that the workplace violations should not be imputed to the employer because the Department failed to prove that any violations occurred in the first place. This is not the same thing as arguing that the violations should not be imputed to Donald because its on-site supervisors failed to follow Donald's own rules and policies. Nor did Donald present any evidence to rebut the presumption that what on-site supervisors observe is imputable to the employer. Donald has waived this defense.

Donald also asserts that the Commissioner "did not present [proof] of violation of the specific standard under subsection (c) nor substantial risk of hazard to put a competent person on notice." Donald continues:

> It is established there was an adequate cave-in protection under the specific regulation by use of hydraulic shoring and finn boards, although not required in a hard Type B soil, and no identified significant risk of cave-in is in the record. For that reason, it is impossible [to impute] knowledge to Employer.

Donald next argues that the Commissioner failed to present a legally-sufficient basis because, Mr. Dorbert was a "layperson" and that his testimony was "unsupport[ed], subjective, [and] erroneous," and whose "reading of the regulations [was] incorrect."

All of this is simply a rehash of Donald's first contention. It fails for the reasons that we have previously explained. We hold that the administrative law judge's interpretation of C.F.R. § 1926.652 was legally correct and that her resolutions of the factual disputes between the parties were supported by substantial evidence. The circuit court did not err in affirming the administrative decision.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1521s21cn.pdf