Circuit Court for Harford County
Case No. C-12-CV-22-000078

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND**

No. 1195

September Term, 2022

IN THE MATTER OF DOUG'S TREE SERVICE, LLC

Beachley,
Shaw,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: June 2, 2023

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellant Doug's Tree Service, LLC ("Doug's Tree") appeals the judgment of the Circuit Court for Harford County, which affirmed the Commissioner of Labor and Industry's ("Commissioner") final order that Doug's Tree violated various regulations of the Maryland Occupational Safety and Health Act ("MOSHA"). Doug's Tree presents the following questions for our review, which we have rephrased as:[1]

1. Was there substantial evidence to support Doug's Tree's violations of MOSHA?

2. Was the civil penalty of $9,750 appropriate under the circumstances?

For the reasons that follow, we affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

Doug's Tree is a limited liability company owned solely by Douglas Gardner. On December 13, 2020, Mr. Gardner was working with two of his employees[2], Elmer Vasquez and Nicholas Padgett, to remove a 40-foot-tall tree from the yard of a residence in Harford County, Maryland. Mr. Vasquez "was working in the bucket of an aerial lift when the elbow of the boom broke, and [he] fell about 26 feet to the ground, and was seriously injured." The Maryland Occupational Safety and Health Unit ("MOSH") was notified of

[1] Doug's Tree presents the following questions:

1. Did Doug's Tree [] violate the Maryland Occupational Safety and Health Act?

2. If [Doug's Trees] violated the Maryland Occupational Safety and Health Act, what is the appropriate penalty?

[2] There was allegedly a third employee identified as "Rusty Driver" or "Rusty Boomer," but the agency never spoke with this employee.

the accident and sent a compliance officer, Drew Dorbert, to investigate the worksite. After investigating, Mr. Dorbert recommended that Doug's Tree be cited with the following eight violations of MOSHA:

> (1) The aerial lift was not operated by trained persons, 29 C.F.R. § 1910.67(c)(2)(ii);
>
> (2) The Employer did not provide employment and a place of employment free from recognized hazards that were likely to cause death or serious physical harm, Labor and Employment Article section 5-104(a);
>
> (3) The employees lacked appropriate head protection, Code of Maryland Regulations (COMAR) 09.12.28.05D(2);
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> (4) The employees lacked appropriate eye protection, COMAR 09.12.28.05D(3);
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> (5) The Employer did not maintain necessary first-aid supplies at the work site, COMAR 09.12.28.05F;
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> (6) The Employer did not use traffic hazard control while employees were working in the roadway, COMAR 09.12.28.05J(1);
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> (7) The employees exposed to vehicular traffic lacked reflective vests, COMAR 09.12.28.05J(2); and
>
> (8) Employees were not trained in basic first aid, COMAR 09.12.28.07F(1).

On May 20, 2021, MOSH cited Doug's Tree for the eight violations and issued a penalty of $9,750. Doug's Tree contested the citations and penalty.

On October 7, 2021, an Administrative Law Judge ("ALJ") with the Office of Administrative Hearings ("OAH") conducted a hearing. On January 10, 2022, the ALJ issued a proposed decision that upheld the MOSH citation in its entirety. Because Doug's

Tree did not request a review of the ALJ's decision, it became the Commissioner's final order.[3]

On February 7, 2022, Doug's Tree filed a petition for judicial review. After a hearing, the circuit court affirmed the administrative agency's decision by an order dated August 16, 2022. Doug's Tree filed this timely appeal. Additional facts will be provided as necessary.

STANDARD OF REVIEW

"We review an administrative agency's decision under the same statutory standards as the [c]ircuit [c]ourt. Therefore, we reevaluate the decision of the agency, not the decision of the lower court." *Comm'r of Lab. & Indus. v. Whiting-Turner Contracting Co.*, 462 Md. 479, 490 (2019) (alteration in original) (quoting *Gigeous v. E. Corr. Inst.*, 363 Md. 481, 495-96 (2001)). "We, however, 'may always determine whether the administrative agency made an error of law. Therefore, ordinarily, the court reviewing a final decision of an administrative agency shall determine (1) the legality of the decision and (2) whether there was substantial evidence from the record as a whole to support the

[3] Md. Code Ann., Lab. & Empl. § 5-214(e) provides:

> (2) A report that a hearing examiner submits shall become a final order of the Commissioner unless, within 15 work days after submission of the report:
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> (i) the Commissioner orders a review of the proceeding; or
>
> (ii) an employee, representative of an employee, or employer whom the report affects submits to the Commissioner a written request for a review of the proceeding.

decision.'" *Id.* (quoting *Balt. Lutheran High Sch. Ass'n, Inc. v. Emp. Sec. Admin.*, 302 Md. 649, 662 (1985)). "Substantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]'" *Id.* (quoting *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 512 (1978)).

DISCUSSION

I.

MOSH cited Doug's Tree for purportedly violating multiple safety regulations under the Code of Federal Regulations ("CFR"), the Maryland Code, and the Code of Maryland Regulations ("COMAR"). Chapter XVII of title 29 of the CFR sets forth standards under the federal Occupational Safety and Health Act of 1970 and allows states to propose plans to enact their own safety standards. 29 CFR § 1902.1. Maryland proposed its own occupational safety and health standards "modeled after the Federal Occupational Safety and Health Act" that are "at least as effective in providing safe and healthful employment and places of employment as any standard adopted under the federal Occupational Safety and Health Act of 1970[.]" *Comm'r of Lab. & Indus.*, 462 Md. at 491; Md. Code Ann., Lab. & Empl. § 5-309(a)(1). Maryland adopted these standards in MOSHA, which is codified under Title 5 of the Labor and Employment Article of the Maryland Code. Pursuant to MOSHA's enabling authority, Maryland has promulgated COMAR 09.12.28, which is titled "Tree Care and Removal" and "covers safety requirements for tools and equipment and the safe work practices used in tree care and the removal of trees[.]" COMAR 09.12.28.02(A).

A. There is substantial evidence to support the ALJ's finding that Doug's Tree violated the General Duty Clause.

We begin with the allegation that Doug's Tree failed to properly inspect the boom lift that malfunctioned in this case. MOSH cited Doug's Tree for a "serious violation"[4] of Md. Code Ann., Lab. & Empl. § 5-104(a). Md. Code Ann., Lab. & Empl. § 5-104(a) is known as the General Duty Clause, *Comm'r of Lab. & Indus.*, 462 Md. at 491, and provides:

> (a) Each employer shall provide each employee of the employer with employment and a place of employment that are:
>
> (1) safe and healthful; and
>
> (2) free from each recognized hazard that is causing or likely to cause death or serious physical harm to the employee.

"In order to establish a violation of the General Duty Clause, MOSH must prove: 1) some condition or activity in the workplace presented a hazard; 2) the hazard was 'recognized'; 3) the hazard was likely to cause death or serious physical harm; and 4) 'feasible means to eliminate or materially reduce the hazard existed.'" *Comm'r of Lab. & Indus.*, 462 Md. at 491 (quoting *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202,1207 (D.C. Cir. 2014)). "[A] hazard is 'recognized' under Lab. & Empl. § 5-104(a) when the employer has actual or constructive knowledge of the hazard." *Id.* at 492.

[4] "[A] violation is considered to be a serious violation if there is a substantial probability that death or serious physical harm could result from a condition that exists or a practice, means, method, operation, or process that has been adopted or is in use, unless the employer did not and with the exercise of reasonable diligence could not know of the violation." Md. Code Ann., Lab. & Empl. § 5-809(a)(1).

MOSH alleged that Doug's Tree did not provide a safe place of employment because it failed to perform "frequent and periodic inspections" of the boom lift. The ALJ found that Doug's Tree "did not regularly inspect the boom lift." The ALJ also found that "[t]he use of an uninspected boom lift would clearly present a recognized hazard." Specifically, the ALJ found that Gardner's "testimony reflected actual knowledge of the safety implications of inspecting equipment, and the warnings in the operating manual provided constructive knowledge[.]" Further, the ALJ found that "the hazard was likely to cause death or serious physical harm if an accident occurred" and "MOSH established that there were feasible means to eliminate or materially reduce the hazard."

Doug's Tree's only argument concerning this General Duty Clause violation is that "Gardner . . . testified that he in fact did indeed inspect the boom lift every 14 days" and that "[t]here was no evidence taken to contradict Gardner's testimony that appropriate inspection did occur."

The ALJ's findings undermine Doug's Tree's argument, with the ALJ concluding:

> I did not credit Mr. Gardner's testimony that he thoroughly inspected the boom lift truck every 14 days and prior to beginning work and did not observe any problems. Indeed, I found much of his testimony to lack credibility, as it was largely contradicted by other evidence from non-interested individuals.

"We will refrain from making our own findings of fact or substituting our judgment for that of the agency if the record contains substantial evidence supporting the agency's decision. We have no power to substitute our assessment of credibility for that of the agency if there was evidence to support the findings of fact in the record before the

agency." *Fire & Police Emps.' Ret. Sys. of City of Balt. v. Middleton*, 192 Md. App. 354, 359 (2010) (citing *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005); *Terranova v. Board of Trustees*, 81 Md. App. 1,13 (1989)). Although Doug's Tree claims "[t]here was no evidence taken to contradict Gardner's testimony that appropriate inspections did occur," the ALJ identified specific evidence that "support[ed] the conclusion that Mr. Gardner did not inspect the boom lift as required." This evidence included: (1) "Mr. Gardner did not have the operations manual [for the boom lift], which specifies the minimum required checkpoints for an inspection"; (2) "Mr. Gardner did not have any checklist for his inspection[s]"; (3) Mr. Gardner "did not have any documentation of the inspections [he] purportedly performed"; (4) "Mr. Vasquez advised Mr. Dorbert that neither he nor Mr. Gardner inspected the boom lift on the day in question"; and (5) "the areas [of the boom lift] photographed by MOSH reflected a lack of lubricant, which would have been seen by Mr. Gardner had he inspected the boom lift." In short, there was ample evidence in the record to support the ALJ's findings, and we decline Doug's Tree's invitation to substitute our assessment of credibility for that of the agency.

B. MOSH is not required to establish a casual nexus between the regulatory violation and the resulting injury.

MOSH cited Doug's Tree for numerous violations of specific regulatory standards. "To establish a[] [specific] OSHA violation, 'the [Commissioner] must prove by a preponderance of the evidence (1) the applicability of the standard, (2) the employer's noncompliance with the terms of the standard, (3) employee access to the violative condition, and (4) the employer's actual or constructive knowledge of the violation . . . .'"

New River Elec. Corp. v. Occupational Safety & Health Rev. Comm'n, 25 F.4th 213, 219 (4th Cir. 2022) (quoting *N & N Contractors, Inc. v. Occupational Safety & Health Rev. Comm's*, 255 F.3d 122, 125-26 (4th Cir. 2001)).

Doug's Tree argues that "[a]lthough there were some potential minor safety issues . . . the vast majority of those issues had absolutely no effect on the resulting injury in this case either with respect to cause or enhancement." Doug's Tree concludes: "In summary, the citations had little to nothing to do with the accident with the exception of the testimony regarding the [boom lift] fracture."

Doug's Tree's argument utterly fails to understand the purpose of the occupational safety and health regulations. MOSHA's purpose is "to ensure, to the extent practicable, that each working man and woman in the State has working conditions that are safe and healthful[.]" Md. Code Ann., Lab. & Empl. § 5-102(b). In order to fulfill this purpose, "[t]he Commissioner shall inspect, investigate, and review work practices and work sites of each employer and industry for evidence of excessive safety violations[.]" Md. Code Ann., Lab. & Empl. § 5-205(i)(1). "The Commissioner or authorized representative of the Commissioner may enter a place of employment where work is performed, without delay at any reasonable time" to conduct an inspection. Md. Code Ann., Lab. & Empl. § 5-208(a). And,

> if after an inspection or investigation, the Commissioner or authorized representative of the Commissioner is of the opinion that an employer has violated a duty under this title or an order passed under this title or an occupational safety and health standard or other regulation adopted to carry out this title, the Commissioner or authorized representative shall issue a citation to the employer[.]

Md. Code Ann., Lab. & Empl. § 5-212(a)(1). Contrary to Doug's Tree's argument, these regulations do not require the agency to demonstrate that "the resulting injury" was "caused or enhanced" by the alleged violation. Not only does Doug's Tree fail to cite any law to support its argument, the argument is antithetical to the express purpose of MOSHA to provide Maryland workers "working conditions that are safe and healthful." Md. Code Ann., Lab. & Empl. § 5-102(b). Indeed, we have stated that "the statute may be violated even though no accident or injury occurs."[5] *Brady v. Ralph M. Parsons Co.*, 82 Md. App. 519, 533 (1990). We therefore reject any assertion that MOSH must establish a nexus between the regulatory violation and the resulting injury.[6]

Unlike the General Duty Clause violation discussed in Part I.A. *supra*, Doug's Tree does not argue that the agency lacked substantial evidence to support its findings that Doug's Tree violated the other seven regulations.[7] Although we decline to address

[5] At the circuit court hearing, Doug's Tree admitted that "Mosh [has] the authority to make random inspections" and thus they could have investigated Doug's Tree even if no injury occurred.

[6] Additionally, even if this argument had merit, it is arguably not preserved because Doug's Tree did not argue it at the ALJ hearing.

[7] The other seven regulations that MOSH cited Doug's Tree for are:

(1) 29 C.F.R. § 1910.67(c)(2)(ii) which provides: "Only trained persons shall operate an aerial lift."

(2) COMAR 09.12.28.05(D)(2) which provides: "Head protection that meets the requirements of 29 CFR §1910.135" "shall be provided, used, and maintained[.]"

(continued)

arguments not presented on appeal, *Klauenberg v. State*, 355 Md. 528, 552 (1999), suffice it to state that our careful review of the record convinces us that the record contains substantial evidence to support each of the MOSHA violations charged.

II.

As to the penalty assessed against it, Doug's Tree argues that

> [g]iven the point . . . that the violations had nothing to do with the injury, given that this was an extremely small business with a shoestring operation, and given that Doug's Tree is being held responsible for six figures of damages for Workers' Compensation expenses combined with fees and penalties assessed by the Workers' Compensation Commission, an additional ten thousand dollars is incredibly overly punitive for the situation surrounding this injury.

The ALJ stated in her opinion that "[Doug's Tree] did not challenge MOSH's specific calculation of the penalty amount." Moreover, the circuit court likewise noted that "[t]here

(3) COMAR 09.12.28.05(D)(3) which provides: "Eye protection that meets the requirements of 29 CFR §1910.133" "shall be provided, used, and maintained[.]"

(4) COMAR 09.12.28.05(F) which provides: "An employer shall maintain the necessary first-aid supplies at each work site to address the potential hazards from the work to be performed."

(5) COMAR 09.12.28.05(J)(1) which provides: "When exposed to vehicular traffic on a public road, an effective means for controlling hazards created by vehicular traffic shall be instituted on every job site where necessary[.]"

(6) COMAR 09.12.28.05(J)(2) which provides: "When exposed to vehicular traffic on a public road, each employee shall wear as a minimum a Class II reflective garment when the employee will be exposed to vehicular traffic."

(7) COMAR 09.12.28.07(F)(1) which provides: "All employees shall be trained in basic first aid, including controlled bleeding and immobilization."

was no objection" interposed by Doug's Tree at the administrative hearing concerning the penalty. We therefore conclude that Doug's Tree has not preserved for review any challenge it may have to the assessed penalty. *See Marks v. Crim. Injs. Comp. Bd.*, 196 Md. App. 37, 75 (2010) ("Indeed, it is settled law in Maryland that a court ordinarily 'may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency.'" (quoting *Motor Vehicle Admin. v. Shea*, 415 Md. 1, 15 (2010))).

Doug's Tree would not prevail even if its challenge to the penalty issue were preserved. Md. Code Ann., Lab. & Empl. § 5-810 titled "Amount of civil penalty" provides:

> (b) Before the Commissioner assesses a civil penalty under § 5-809 of this subtitle, the Commissioner shall consider the appropriateness of the penalty in relation to:
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> (1) the size of the business of the employer against whom the penalty is to be assessed;
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> (2) the gravity of the violation for which the penalty is to be assessed;
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> (3) the good faith of the employer;
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> (4) the history of violations by the employer;
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> (5) the injury and illness experience of the employer;
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> (6) the existence and quality of a safety and training program;
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> (7) the actual harm to human health including injury or illness;
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> (8) the extent to which the current violation is part of a recurrent pattern of the same or similar type of violation; and
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> (9) the extent to which the existence of the violation was known to the employer but remained not corrected.

Mr. Dorbert testified extensively at the OAH hearing about how he calculated the penalties and provided penalty calculation worksheets for each violation. The worksheets indicated "No Actual Harm" occurred for all the citations except for the violation of Md. Code Ann., Lab. & Empl. § 5-104(a), which indicated "Actual Harm." Thus, MOSH considered whether there was "actual harm to human health including injury or illness" and only assessed an additional penalty for the one violation that did cause Mr. Vasquez's injury. In giving Doug's Tree "the maximum discount allowed for the size of the company" which was "60 percent," MOSH did consider "the size of the business of the employer against whom the penalty is to be assessed."[8] The worksheets and Mr. Dorbert's testimony demonstrate that MOSH considered the statutory factors that it was required to consider. Therefore, even if the issue were preserved, we discern no error in the assessment of the penalty against Doug's Tree for its MOSHA violations.

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

[8] Doug's Tree's only remaining argument is that MOSH failed to consider the workers' compensation expenses it incurred as a result of the accident. The simple answer to that argument is that the statute does not require MOSH to consider workers' compensation costs.