

STATE OF MICHIGAN
COURT OF APPEALS

OTIS ELEVATOR COMPANY,

Petitioner/Appellee-Cross
Appellant,

v

DEPARTMENT OF CONSUMER & INDUSTRY
SERVICES, BUREAU OF SAFETY
REGULATION, CONSTRUCTION SAFELY
DIVISION,

Respondent/Appellant-Cross-
Appellee.

UNPUBLISHED

August 10, 2004

No. 247344

Oakland Circuit Court

LC No. 02-043932-AA

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Respondent appeals by leave granted a circuit court order reversing the report of the Administrative Law Judge (ALJ) and remanding the matter for retrial before a different ALJ. Petitioner cross-appeals the circuit court's failure to dismiss the citation issued to petitioner by respondent. We affirm.

This matter arises from a citation issued by respondent to petitioner for a violation of Rule 408.44502, of the Construction Industry Standards, promulgated in connection with the Michigan Occupational Safety and Health Act (MIOSHA), MCL 480.1001, *et seq.*, for a violation of the fall protection standards in construction. Rule 408.44502 reads as follows:

Except as provided in 1926.500(a)(2) or in 1926.501(b)(1) through (b)(14), each employee on a walking/working surface 6 feet (1.8 m) or more above lower levels shall be protected from falling by a guardrail system, safety net system, or personal fall system.

Respondent asserts on appeal that the circuit court erred in finding that the ALJ impermissibly shifted the burden of establishing that petitioner was not protected by a guardrail system from respondent to petitioner. We disagree.

When reviewing a circuit court's decision regarding an appeal from an administrative agency we determine whether the circuit court applied correct legal principles and whether it

misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. *Motycka v General Motors*, 257 Mich App 578, 581; 669 NW2d 292 (2003). We review the circuit court's conclusions of law de novo and its findings of fact for clear error. *Hinky Dinky Supermarket, Inc v Dept of Community Health*, 261 Mich App 604, 605; ___ NW2d ___, (2004). A circuit court may set aside a decision of an administrative agency if the decision or order is: 1) in violation of the constitution or statute; 2) in excess of the statutory authority or jurisdiction of the agency; 3) made upon unlawful procedure resulting in material prejudice to a party; 4) not supported by competent, material, and substantial evidence on the whole record; 5) arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion; or 6) affected by other substantial and material error of law. MCL 24.306. In contested cases under the Administrative Procedures Act (APA), the proponent of an order or petition generally has the burden of proof. *Bunce v Sec of State*, 239 Mich App 204, 216; 607 NW2d 372 (1999).

As the issuer of the citation, respondent bore the burden of proving that petitioner's employee was not adequately protected from falling. Because the language of Rule 408.44502 provided that an employee had to be protected by a personal fall system *or* by a guardrail system, this proof would have to demonstrate the absence of a personal fall system *and* the absence of a guardrail system. In assigning in her decision the responsibility for proving the existence of a guardrail to petitioner, the ALJ, in her decision, committed a substantial and material error of law. The circuit court, in finding that the ALJ impermissibly shifted the burden to petitioner, applied the correct legal principle.

Respondent argues that the existence of a guardrail system is an affirmative defense which petitioner was required to prove and not an element of the original citation. An affirmative defense does not controvert the plaintiff's (or in this case respondent's) prima facie case; it concedes that the plaintiff had a cause of action but otherwise denies relief to the plaintiff. *Chmielewski v Xermac, Inc*, 216 Mich App 707, 712; 550 NW2d 797 (1996). Petitioner never conceded that there was a violation of the MIOSHA rule regarding fall protection. The existence of the guardrail system was an element of the rule violation requiring proof by respondent. Respondent's argument is without merit.

Respondent also argues that the circuit court erred in remanding this matter to a different ALJ and cites MCR 2.003 regarding judicial disqualification. There is no authority which states that MCR 2.003 applies to administrative hearings. The APA does not require that a hearing officer who presides at a hearing must also preside at any subsequent hearing. *Battiste v Dep't of Social Services*, 154 Mich App 486, 496-497; 398 NW2d 447 (1986). *Battiste* stated that, "[p]ractically speaking, a [hearing referee's] . . . jurisdiction substantially ends upon rendition of his decision following the hearing over which he presided." *Id.* at 496; see also MCL 24.279. The circuit court did not err in remanding this matter to be heard by a different ALJ.

On cross-appeal, petitioner asserts that the circuit court erred in failing to dismiss the citation where there was insufficient evidence that petitioner's employee was exposed to a fall hazard. We do not agree.

A circuit court may set aside a decision of an administrative agency if the decision or order is not supported by competent, material, and substantial evidence on the whole record. MCL 24.306. Evidence is substantial when it constitutes more than a mere scintilla, but it may

be substantially less than a preponderance of the evidence. *Citizens Disposal, Inc, v Dept of Natural Resources*, 172 Mich App 541, 553; 432 NW2d 315 (1988).

In considering whether there was insufficient evidence that petitioner's employee was exposed to a fall hazard, we set aside the question of whether petitioner's employee was exposed to a fall hazard on the right or left side of the elevator car as this question cannot be answered until it is determined whether there was a qualifying guardrail on these sides and determining this fact requires a new hearing. With regard to the rear of the elevator car, there was testimony that a counterweight was attached to this area and the distance between the wall and the counterweight was four inches. There was also testimony that the distance between the wall and portion of the rear of the car without the counterweight was twelve inches. The safety officer employed by respondent testified that a man could fall through a gap of twelve inches. This testimony, in conjunction with the statements of petitioner's employee at the hearing that his personal safety system was not hooked up when the safety officer first saw him, could well establish a violation of Rule 408.44502 because there was no guardrail along the back of the elevator car to protect petitioner's employee from falling through the gap. While petitioner attached the letters of compliance from OSHA which stated that fall protection was not required when working on scaffolding unless the gap between the scaffold and the nearby structure was greater than fourteen inches, and while it may be debatable whether a full-grown man can fall through a twelve-inch gap, there was more than a scintilla of evidence on the record before the ALJ which would have supported a finding that petitioner's employee was exposed to falling through a twelve-inch gap without either a personal safety system or a guardrail system protecting him. The circuit court correctly applied the substantial evidence test to the ALJ's findings of fact and did not err in finding that there may be sufficient evidence to uphold finding that petitioner violated Rule 408.44502.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad