STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: CIVIL SERVICE EMPLOYEES ASSOCIATION, INC. (NIAGARA FALLS STATE PARK), Petitioner, To Review Under Section 101 of the Labor Law: A Final Investigation Narrative dated January 18, 2018, and a Notice of Violation and Order to Comply, dated February 1, 2018, - against - THE COMMISSIONER OF LABOR, Respondent,	DOCKET NO. PES 18-003 RESOLUTION OF DECISION

APPEARANCES

CSEA Local 100, AFSCME, AFL-CIO, Albany (*Aaron E. Kaplan, Senior Associate Counsel*), for petitioner.

Pico P. Ben-Amotz, *General Counsel*, *NYS Department of Labor*, Albany (*Steven J. Pepe* of counsel), for respondent.[1]

WITNESSES

Melissa Emhardt, Public Employee Safety and Health Bureau Inspector Teresa Clabeaux, and John Elia, for petitioner.

Supervising Public Employee Safety and Health Bureau Inspector Bret Schmidt, for respondent.

WHEREAS:

On April 2, 2018, petitioner Civil Service Employees Association Inc. (hereinafter "CSEA") filed a petition seeking review of a Final Investigation Narrative (hereinafter "Final Narrative") dated January 18, 2018 and a Notice of Violation and Order to Comply (hereinafter "NOV") issued on February 1, 2018 by the Public Employee Safety and Health Bureau (hereinafter

[1] Pico P. Ben-Amotz was respondent's General Counsel at the time of the hearing. Jill Archambault is respondent's Acting General Counsel at the time of decision.

"PESH") of the New York State Department of Labor (hereinafter "DOL"). Respondent answered the petition on June 6, 2018. Petitioner filed a reply to the answer on June 22, 2018. Petitioner filed an amended petition on November 20, 2018. Upon notice to the parties, a hearing was held on August 21, 2019 in Albany, New York, before Associate Counsel Matthew Robinson-Loffler, the designated Hearing Officer in this proceeding. The parties were afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

Respondent issued violations of the Public Employee Safety and Health Act, Labor Law § 27-a (hereinafter "PESH Act" or "PESHA"), including federal Occupational Safety and Health Act (hereinafter "OSHA") standards in the NOV on other issues raised in the underlying PESH complaint but did not issue a violation for the failure to require employees to use safety footwear when performing certain jobs, which is the issue relevant to this matter. Petitioner asserts that the employer, New York State Office of Parks, Recreation and Historic Preservation (hereinafter "State Parks" or "employer") conducted a hazard assessment finding that safety footwear was needed when performing certain jobs at the job site, a state park in Niagara Falls, but did not require the use of safety footwear in compliance with their own hazard assessment. Petitioner further asserts that respondent should have issued a violation to State Parks for failing to require the use of the safety footwear.

SUMMARY OF EVIDENCE

Melissa Emhardt

Melissa Emhardt (hereinafter "Emhardt") is the Regional Safety Manager and Emergency Manager for New York State Parks, Niagara Region. Emhardt testified that she has worked for the State Parks in the Niagara Region for approximately 16 years, with her position at the time of her testimony starting in October 2016. Emhardt is responsible for making sure all facilities are safe for patrons and employees of the state parks. Emhardt has a bachelor's degree in psychology and elementary education, and has OSHA certificates in construction, general industry and as a safety professional.

Emhardt created what she testified is "a preliminary analysis of jobs we have in the region and what they do." This was entered into evidence as the "hazard assessment" and for purposes of this decision will be referred to as "Emhardt's assessment." Emhardt created this document as part of her job duties by looking at positions, asking managers, and relying on her previous experience in State Parks and combining that with OSHA training to figure out what jobs people did and what potential work hazards existed. She then made recommendations. Emhardt's assessment lists numerous job titles which exist in the State Parks system, then lists the hazards specific to that job, including potential foot hazards. Emhardt recommended wearing steel toed boots or shoes with puncture resistant soles for some job titles that have foot hazards to prevent things such as falling tools or construction materials from causing a foot injury, or a sharp object puncturing the foot. Emhardt testified that a listed foot hazard and recommendation for a specific job title would have been based on an identified hazard. Emhardt could not recall when she created her assessment.

Emhardt testified that State Parks also had professional protective equipment (hereinafter "PPE") charts in place for the Niagara Region issued by the Albany office. These charts were

entered into evidence and list the various PPE required to be used by employees performing various duties when working for State Parks in that region. Emhardt testified that employees look at the charts to "gauge [ ] what type of PPE they are to be wearing on the job site." Emhardt testified that the first page of the four-page PPE chart represented the assessment of hazards at Niagara Parks at the time of the investigation, with the other pages of PPE charts representing updates in sequence. In the PPE charts, which Emhardt testified are posted in the workplace, some job duties list "work shoes" as mandatory. A "work shoe" is defined on the PPE charts as "any oxford-type shoe with hard soles. Sneakers, sandals, flip-flops, jogging shoes, et cetera are not work shoes." Emhardt testified that State Parks in the Niagara region does not require work shoes to have a steel toe or puncture resistant sole. She testified that there were also no requirements to have a shoe certified or pass a compression test and that a general leather shoe would suffice. Emhardt testified that as an example, according to the PPE charts, working with a pneumatic hammer only required "work shoes." The PPE charts did not state when an employee would be required to wear an OSHA compliant safety shoe. Emhardt testified that according to the PPE charts, an employee for State Parks in Niagara Falls would not be required to wear a safety toed shoe when performing demolition work, putting up insulation, framing or operating a wood chipper.

Emhardt testified that Teresa Clabeaux (hereinafter "Clabeaux") sent her an email requesting Emhardt's assessment focusing on safety shoes, which Emhardt provided to her. However, Emhardt's assessment was only preliminary and never finalized according to Emhardt. Emhardt testified that the job duties for each job title listed in her assessment were potential job duties, but not necessarily the job duties of every person who held that title at State Parks in Niagara Falls. She also testified that her assessment did not list the frequency with which a duty is performed. Emhardt testified that the potential hazards listed represented possible hazards someone with that job duty might come across, but not on a daily basis. According to Emhardt, the PPE charts were the active hazard assessment since the assessment that she created was never finalized. Emhardt testified that the PPE chart was designed in Albany, thus, she did not know why steel toed shoes were not required for all the job duties per the PPE chart.

Emhardt testified that during the investigation in this matter, the injury and illness records for employees at the state parks in the Niagara region were made available to the PESH investigator. Emhardt was not aware of those records documenting any injuries that would have been prevented with safety toed shoes.

Public Employee Safety and Health Bureau Inspector Teresa Clabeaux

Clabeaux testified that she works for the respondent in the PESH Bureau as a safety and health inspector, which involves inspecting state, local and county government facilities and enforcing OSHA regulations adopted by New York State. Clabeaux has a master's degree in education, and bachelor's degrees in geology, biology and chemistry. She also attended training at the OSHA Institute and received on the job training in regulations and standards.

Clabeaux was assigned to the matter after respondent received a complaint in 2017. Clabeaux testified that an inspection usually involves an opening conference where a sanitized version of the complaint is provided to, and reviewed with, the employer and the union representative. The sanitized version does not have the information about a particular complainant but has the summary of the complaint. After the opening conference, the inspector looks at the

safety programs and reviews any injury and illness records as part of the OSHA recording requirements. There is also an inspection of any complaints about a building that are raised by the complainant. Clabeaux testified that this can all take place at once or over several days. When the investigation is complete, a closing conference is held to discuss the findings. Witnesses can also be interviewed as part of an investigation.

Clabeaux testified that she interviewed employees as part of this investigation, including Melissa Emhardt and an electrical engineer. She created an inspection checklist, also entered into evidence. The checklist is used as a reminder to look for certain things. Clabeaux testified that she also took notes on the checklist, including some names of employees. Of the names on the inspection checklist, Clabeaux did not recall which had been interviewed. The only employee Clabeaux could recall asking about what types of shoes were worn was John Elia (hereinafter "Elia"). Clabeaux testified that Elia told her that he purchased his own safety toe shoes and wore them. Clabeaux did not recall Elia explaining why he wore safety shoes and did not recall his job function.

Clabeaux testified that she had a copy of Emhardt's assessment, which was attached to the PESH complaint, and Clabeaux discussed it with Emhardt. However, Clabeaux did not receive a complete hazard assessment document containing a header and a signature page from Emhardt. Clabeaux needed to figure out which jobs were being performed because there were multiple items in the complaint. The tasks being performed would determine which OSHA standards applied. Clabeaux testified that Emhardt stated that Emhardt's assessment was just a draft document which Emhardt was planning on changing before sending it to Albany. Clabeaux testified that Emhardt's assessment, even if only a draft, was still useful in helping to determine the types of tasks being performed by employees at the subject parks. Clabeaux also used the employer's posted PPE charts to see what tasks were being performed. Clabeaux looked at the charts to determine what type of footwear was required for each job. Clabeaux testified that the employer's description of a "work shoe" on the PPE chart does not satisfy the OSHA requirements where there are rolling, crushing or puncture hazards present. Clabeaux recalled speaking with chainsaw operators, who said they were given "chainsaw shoes" and employees who worked with electricity, who said that they were provided with "electrical-rated safety shoes" for those tasks. The employer did not require safety shoes for tasks involving rolling or crushing hazards. Clabeaux testified that some of the tasks on the PPE charts, such as using heavy equipment, using a stump grinder, striking tools, snow blowers, push mowers, potentially pneumatic hammers and potentially a concrete saw, could require the use of safety shoes but the use of safety shoes for those tasks was not required by State Parks at Niagara Falls.

Clabeaux testified that while she used Emhardt's assessment as an indicator that there were potentially tasks being done which require safety shoes, Emhardt's assessment did not mean that the duties were necessarily performed by each job title. Clabeaux used the inspection checklist to ask employees about their job duties to determine if the employees were actually performing tasks which would require safety shoes. In the instance of the auto shop, heavy tools and jacks were being used which could potentially be a hazard. Clabeaux also reviewed the illness and injury reports to determine whether there had been any actual foot injuries which would have been prevented by the use of a safety shoe. There were no recorded foot injuries in those reports. Clabeaux testified that OSHA standards do not require an injury to occur before a hazard is found as OSHA seeks to prevent injuries. In circumstances such as this where there did not appear to be any foot injuries, Clabeaux looked at the duties to see if the risk was still present. As an example,

an employee carrying heavy pipes would still be at risk of crushing or rolling and a safety shoe would be required. Clabeaux did not observe any such hazards but believed the potential hazards were still present. Clabeaux testified that she believed State Parks at Niagara Falls had identified a crushing or rolling hazard with respect to listed duties in Emhardt's assessment, but Emhardt told her that she intended to change the recommendation from a "safety boot" to a "work boot" in her draft hazard assessment before sending it to Albany. Clabeaux testified that Emhardt told her that she met with other regional safety managers and they came to the consensus that a "work boot" was sufficient for the listed tasks. Clabeaux testified that Emhardt did not specifically tell her that this meant there were no crushing or rolling hazards associated with the listed job duties. Clabeaux testified that another PESH employee, Jennifer Purner, who performed the initial inspection with Clabeaux wrote in notes during that inspection that both pneumatic and electric jackhammers were being used. Clabeaux believed either type of jackhammer posed a potential hazard to the foot. However, employees performing this work were required to wear "work boots," not a shoe with a safety toe.

At the time of the initial inspection, Clabeaux thought Emhardt's assessment, which was attached to the complaint, was the "official hazard assessment" and she only later learned from Emhardt that it was not the official hazard assessment that was submitted and approved by Albany. The PPE charts were the only official document Clabeaux had during the investigation. When asked if she had access to a copy of whatever "official hazard assessment" was in place at the time of the investigation, Clabeaux replied that she only had access to the PPE charts showing the PPE selections made by the employer. Clabeaux testified that the first page of the PPE chart was first posted at the workplace on the day that Clabeaux was conducting an inspection. The remaining pages were already posted at the workplace. The PPE chart did not identify where a particular task posed a rolling, crush or puncture hazard to the foot. A hazard assessment, if in writing, would, according to Clabeaux, state the hazards of performing a specific task.

Clabeaux testified that she interviewed some employees at the Niagara Falls electrical shop, trolley shop and whirlpool shop. No seasonal employees were interviewed. Clabeaux did not recall the details of the conversations. In an email to her supervisor, Bret Schmidt (hereinafter "Schmidt"), in evidence, Clabeaux wrote that since the employer acknowledged having completed the hazard assessment, this was a recognition of the foot hazard by the employer; yet, the employer was not ensuring the proper safety footwear was used. She wrote in the email that a violation could be issued for the employer's failure to ensure proper safety footwear was being used. Clabeaux testified that her recommendation was not followed because it was based on the incorrect assumption that the Emhardt's assessment, which was a draft, controlled, rather than the employer's PPE selection indicated in the PPE charts. Since there were no records of injuries, PESH could not prove that the employer chose the incorrect PPE by not requiring safety shoes. Clabeaux testified that Schmidt made the determination that PESH could not find that the employer's choice of required footwear was incorrect.

Clabeaux testified that she wanted to send a written request to the employer to get more information about whether there was anything which would indicate that safety toed boots should have been required, and whether there were injuries which had not been recorded in the injury and illness logs. Clabeaux testified that Schmidt told her that these questions should be asked in an interview. Clabeaux only spoke again with Elia but did not recall what he said. She also did not recall who else she may have spoken with after this email exchange with Schmidt.

Clabeaux testified that she attended a monitoring inspection of the subject site with Emhardt, Nick Reed (hereinafter "Reed") from CSEA and another PESH safety and health inspector on March 21, 2018. This was after the NOV was issued. The purpose of the meeting was to monitor the abatement progress for the violations that were issued. Clabeaux made a note that Reed asked about striking tools, such as hammers, chisels and sledgehammers, and inferred that the use of striking tools would require safety shoes. Clabeaux testified that Reed also stated, during a discussion about changing out compressed gas cylinders, that dropping such a cylinder on a foot could present a crushing hazard. Clabeaux testified that at the end of this monitoring inspection, Emhardt stated that her draft hazard assessment was being changed, and that she meant "work boots" where she indicated "safety shoes."

Clabeaux testified that she initially believed that there should have been a violation for the failure to require safety shoes; however, based on the employer's shoe selection on the PPE charts and the injury and illness records, Clabeaux no longer had that opinion.

John Elia

Elia testified that he is a park worker for State Parks in the Niagara Region and is also the local CSEA president. He began working for State Parks in 1989 and, at the time of his testimony, had been the local CSEA president for 7 years. As the local CSEA president, Elia was familiar with the duties of the employees working for State Parks in the Niagara Region. Elia testified he was also familiar with the PPE chart posted throughout the workplace.

Elia reviewed the various duties listed on the PPE charts, such as using a brush chipper, a cement mixer, concrete saws, grass trimmers with weed whips or circular blades, grinding wheels, hand held tools, snow blowers, hammers, chisels, jackhammers, ice choppers, stump grinders, aerial trucks, "Gator" all-terrain vehicles, fork lifts, riding lawn mowers, tampers and blacktop rollers. He explained the risks associated with each activity, including the weight of the tool or equipment being used, the manner in which it is used, and the weight of other materials used in conjunction with the tool. Elia testified that the employer did not require safety shoes for any of these activities and that PESH never asked about these activities during the investigation. Elia also testified that employees doing roofing work, setting up scaffolding, directing traffic, painting trucks on lifts, welding and changing welding tanks, working on vehicles on jacks or lifts, working in the vicinity of dump trucks and backhoes, and handling drums of chlorine were also not required to wear safety shoes. Elia testified that PESH also did not ask about these activities during the investigation. Elia testified that employees scaling the gorge walks on ropes to chip away loose rock did wear safety shoes.

Elia testified that he was present for the inspection at the trolley shop and the maintenance shop. He testified that Clabeaux interviewed three employees and discussed their job duties with them, but she did not discuss safety shoes with them. Elia testified that Clabeaux did not contact him with questions about the inspection. Elia knows Schmidt because Schmidt used to work for State Parks in the Niagara Region. Elia testified that he learned that the opening conference with PESH, at which Clabeaux and Schmidt were present, was taking place when he got a phone call from his boss on July 5, 2017, telling him to report to the main office for a meeting with the Department of Labor. Elia testified that Schmidt and Clabeaux reviewed the injury logs, which only contained injuries from the last five years, none of which were foot injuries.

Elia testified that he wears steel toe boots, which he purchased himself, to work on some days, depending on what he will be doing. Elia had not had any foot injuries but had "a couple of near misses over the years." He witnessed other near misses of foot injuries with other employees, none of which were reported to the employer because they did not result in an injury. Elia testified that he did not affirmatively raise the issue of safety toe shoes with the PESH investigators during the inspection, but during the inspection with the PESH investigators, Elia saw what he believed were hazards. Specifically, there was one employee greasing a lawn mower and there was a trolley on jack stands getting a new muffler.

Elia testified that after the closing conference and in the presence of Schmidt, Clabeaux apologized to Elia for not bringing up the boots issue at the conference, stating that she did not deem it necessary. Elia testified that no explanation was given as to why a footwear violation was not found.

Supervising Public Employee Safety and Health Bureau Inspector Bret Schmidt

Schmidt testified that he is a supervising safety and health inspector for PESH. His job duties include supervising field staff, reviewing cases and the law, performing complaint intakes and assigning complaints for investigation. Schmidt said he also occasionally goes into the field and conducts his own investigations. Schmidt testified that he took part in this inspection because Clabeaux was still relatively new and had very little experience investigating and substantiating health and safety complaints at the time.

Schmidt testified that he did not observe any potential rolling, crushing or piercing hazards at Niagara Parks during his inspection nor were any brought to his attention during the inspection, but that did not mean they did not exist. Schmidt testified that employees were interviewed regarding safety shoes, along with the other issues in the complaint. Schmidt testified that the complainant alleged that the employer conducted a safety toe footwear assessment, but did not implement it by requiring safety toe footwear. PESH reviewed the injury and illness records at State Parks in Niagara Falls to see if there was any evidence to support a more in-depth investigation.

Schmidt testified that State Parks conducted an assessment, implemented it and trained on it. State Parks was also in the process of completing new assessment paperwork, which was the basis of the complaints. Schmidt considered the PPE charts to be the current assessment in effect at the time of the investigation. When asked about which assessment was in place during the inspection, Schmidt testified that assessments did not have to be in writing. Something had to be posted so the employees understood the PPE requirements. Schmidt did not know who performed the hazard assessment in use during the investigation but he believed it was done by a group of managers who did an assessment which resulted in the posted PPE charts. When asked if the PPE charts contained the hazards which had been identified, and which the required PPE was meant to protect from, Schmidt testified that the hazards could be inferred. Schmidt stated, as an example, that a hazard to the head could be inferred by the requirement that a hard hat be worn when using a brush chipper,

According to Schmidt, if an employer identified hazards but did not require PPE to address them, PESH would learn about those hazards through employee interviews and observations. Schmidt acknowledged that there was no actual written document demonstrating which hazards

existed with relation to a job duty, other than the PPE charts, but he believed such a document was not necessary as long as the employer certified that an assessment had been conducted. PESH investigated the allegation of the incorrect PPE requirements by interviewing witnesses. When asked how he learned that a hazard assessment (other than Emhardt's assessment) was in place at the time of the investigation, Schmidt, referring to the PPE charts from which Schmidt testified that the underlying hazards could be inferred, testified "[b]ecause it was posted on the wall … the result of the assessment was posted on the wall,". Schmidt testified that once PESH realized the draft hazard assessment created by Emhardt was not the current and effective assessment, it was of "little relevance other than using it to identify positions and job tasks."

Schmidt testified that PESH would think about the realistic probability of any piece of equipment, without any other controls in place, falling and injuring someone's foot. Schmidt testified, "I would think about the probability of any part of that piece of equipment inadvertently, without any other controls, falling on the foot or striking the foot or puncturing the foot. You know, it's --- and we can't just hypothetically think about what-ifs all day long. It has to be kind of a reality that it could occur. There's got to be a probability there." Schmidt testified about an example of an employee using a snow blower, stating that while it is possible that the snow blower could be accidentally dropped, it would be unlikely that the employee would "stand there and keep their leg underneath the, you know, snow blower." Schmidt testified that in the example of a stump grinder, the way in which it was used would not require safety footwear unless someone were to "walk up and stick your foot" in it. Schmidt testified that other types of PPE and safety procedures, such as controlling hazardous energy and lockout/tagout procedures would address the safety risk to the foot. Schmidt testified that there are written procedures for tasks such as lifting a deck when changing blades or greasing a mower which, if followed, would prevent the deck from falling on someone's foot. "They're very specific on how to secure the deck, if someone is changing their blades or greasing the mower, et cetera. The probability of -- of a deck falling on an employee are zero if implemented fully." Schmidt testified that in the case of a bench grinder, if the OSHA standard were properly followed for anchoring it, it would not fall and there would be no need for safety footwear. Schmidt testified that as another "good example of that being could be my secretary, who handles heavy equipment that hygienist's use, where she picks up a box of paper. Let's say she drops the box of paper on her foot, and she breaks her foot. I will hedge my bets. We're not turning around, and then we're not going to require her to wear safety toed shoes." Schmidt also testified that the hazards with concrete saws involved eye and respiratory protection because it was unlikely that someone would drop one on their foot.

Schmidt testified that he made the determination to not issue a violation regarding footwear because they did not observe any hazards, the lack of "employees staking to their near misses," and because there were no records of actual injuries. Schmidt testified that the PESH field manual, which mirrors the OSHA field manual, provides that substantiating a violation when no hazard is observed requires witnesses and statements or other evidence in injury and illness logs. Schmidt testified that CSEA did not give him examples of what to observe that would indicate a rolling, crushing or puncturing hazard was present. According to Schmidt, CSEA was given a copy of the investigation narrative and was present for the explanation of the findings on all the issues at the closing conference and contacted PESH after the conference regarding the determination on safety toe shoes, requesting an informal conference. However, CSEA did not provide specific evidence to refute the determination at issue at the informal conference held after the closing conference. CSEA only presented a summary of injuries from other regions dealing mostly with lifeguards not

wearing footwear. Schmidt testified that there was evidence of an injury where a rock fell on someone's head, but Schmidt did not believe it was relevant because it indicated a head hazard.

Schmidt testified that working with a forklift, material handling and possibly working in the vicinity of heavy equipment, as listed on the PPE charts, could be potential hazards to the foot requiring safety shoes. However, PESH did not take any actions during this inspection to determine if these were actual hazards because, according to Schmidt, they were not referenced in the complaint. Schmidt testified that the complaint focused on the issue of whether or not there was a hazard assessment which had not been implemented. According to Schmidt, the part of the complaint that alleged there were rolling, puncture and crushing hazards could have included the forklift and material handling, and it was the duty of the person filing the complaint to specifically state the hazard. Schmidt testified that he could use his experience and knowledge to determine if there was an anticipated hazard, but only if he saw it.

Schmidt previously worked for State Parks in the Niagara Region. He never went to the Cave of the Winds but was somewhat familiar with the work performed there. Schmidt knew that workers presumably used lumber, screws and nails to build decking in the Cave of Winds, and that the decking also had to be removed each year. Schmidt testified that he did not know if the employees doing this work were required to wear safety shoes because "[i]t's not specific in the tables that we review." PESH did not take any steps to look into the hazards in the Cave of the Winds because that "area was not brought as a concern to us for a focus point during the inspection." Schmidt was asked if there were other safety procedures in place such as a lockout/tagout procedure. He replied that a citation had been issued for the lack of such a procedure, but that was not grouped into the issue of safety shoes because of the greater severity of not having a lockout/tagout procedure.

Schmidt testified that he did not ask Emhardt about the hazards she identified in her assessment because he believed that another inspector discussed Emhardt's assessment with Emhardt as a whole in terms of whether or not it was the hazard assessment in effect at that time. Schmidt testified that he did not ask Emhardt, nor did he know of any other inspector asking, about the findings upon which she based her assessment. According to Schmidt, were an employer to acknowledge an exposure to a hazard, the employer would be found to have knowledge of that exposure. Schmidt testified that acknowledgment would come in the form of a verbal statement to an inspector or records showing employees had been injured while working at certain tasks. Schmidt did not ask Emhardt, nor did anyone else that he was aware of, whether the hazards in her assessment were "real" hazards. Schmidt testified that PESH also did not look at any other work practice policies in place to mitigate hazards because they were not presented with an actual hazard, did not observe a hazard and no injuries were reported. Schmidt did not recall the conversation with Clabeaux and Elia after the closing conference.

Documentary Evidence

Petitioner entered into evidence the four PPE charts posted at the worksites, Emhardt's assessment, the PESH inspection checklist from July 5, 2017, a contact list from the PESH conference, and notes taken by Schmidt at the July 5, 2017 conference. Notes from "Prunner" were entered from an inspection on July 7, 2017, as well as notes from the informal conference on March 21, 2018, and other undated notes regarding Emhardt's assessment and injury and illness reports. Petitioner also entered emails between Clabeaux and Mark Stipano (hereinafter "Stipano"), from

CSEA, and between Elia, Stipano and Clabeaux from September 14, 2017, emails between Clabeaux and Emhardt from September 18, 2017, emails between Clabeaux and Schmidt from October 5, 2017, and emails between Schmidt and Clabeaux from October 13, 2017. Lastly, petitioner entered into evidence the OSHA PPE Manual, a United States Department of Labor Fact Sheet regarding footwear, the OSHA testing method for foot protection and the OSHA standard for toe cap footwear.

The email from Clabeaux to Schmidt dated October 13, 2017 proposes questions for Elia and Stipano which include "[a]re there any manufacturer user manuals that has recommendations for any equipment used at the park that would recommend or require safety-toe boots? Does the union have any evidentiary pictures of park workers carrying heavy tools or working with heavy equipment or industrial pipes or carrying heavy materials such as bricks, decks, heavy deck pieces … etc.?" The reply from Schmidt states, in part, that "these questions would be better asked during an interview, which could be done over the phone."

The handwritten notes from the informal conference held on March 21, 2018, start out with a notation that the notes are from a conference held on March 21, 2018, and reference the unrelated issues of confined space training, and off-site rescue. The notes then contain the heading "May-August 2017," and the entry "Current Hazard Assessment is being reviewed in Albany." Below this are notes indicating Emhardt submitted an assessment for review in "mid-August 2017." Further notes indicate that "Regional Safety Managers" created the PPE charts on display at the work site, followed by the note "some PPE isn't on chart that is required for Niagara Falls," and what appears to be "i.e. conflicts." Next is a page of notes regarding Emhardt using the word "safety" in her assessment to mean "work boot," and an assertion that dropping a compressed gas cylinder on a foot would be a crushing hazard. A third page of notes in the same exhibit contain a heading "3/12," followed by a note that Schmidt stated that there were no injuries in the injury reports which "would have been prevented by safety toe shoes." A participant named "Mark" asserted that "danger" meant potential for danger, and a participant referred to as "Nick R." stated that "1/2+ park members have voluntarily purchased their own protective footwear thereby preventing foot injuries (under reporting)."

Respondent entered into evidence the initial complaint, an investigation narrative from January 18, 2018, the four PPE charts referred to in testimony (same 4 charts entered into evidence by petitioner), injury and illness reports, the NOV date February 1, 2018, an informal conference report from March 12, 2018, an investigation narrative from March 21, 2018, and excerpts from the PESH Field Operations Manual.

Both parties entered the same PPE charts into evidence, and both sets of charts contained the same four individual PPE charts in the same order. The first PPE chart does not have a date printed on it, states that it was updated in 2017, and has a handwritten note at the bottom that states that it was distributed in the Niagara Region on July 7, 2017. The second PPE chart posted in the 1410 workshop location does not have a date printed on it but contains a handwritten note that it was displayed on July 5, 2017. The third PPE chart is also undated, and has a handwritten note indicating it was posted in the breakroom off the main hallway in the 14010 workshop on July 5, 1017. The fourth PPE chart is not dated and contains a handwritten note stating that it was displayed outside the breakroom of the "whirlpool workshop" on July 5, 2017.

The investigation narrative from March 12, 2018 refers to the PPE chart as a "Personal Protective Equipment (PPE) hazard assessment table." A note on the report from March 21, 2018 states that "[t]he inspection did not reveal any instances of underreporting," and that no violation would be found.

Emhardt's assessment is a 10-page document with no dates, signatures or other information identifying who created it or how the information in it was obtained although Emhardt testified that she created it. It contains job descriptions, each of which is followed by a list of "Potential Work" and "Potential Foot Hazards & Recommendations."

STANDARD OF REVIEW

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (*id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*id.* § 103 [1]). Petitioner has the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (Industrial Board of Appeals Rules of Procedure and Practice (hereinafter "Board Rules") [12 NYCRR] § 65.30; State Administrative Procedure Act § 306; *Matter of Angello v National Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to Board Rules (12 NYCRR) § 65.39.

The PESH Statutory Scheme

The federal Occupational Safety and Health Act, 29 USC §§ 651 – 678, was enacted "to assure so far as possible [to] every working man and woman in the Nation safe and healthful working conditions" (29 USC § 651 [b]). OSHA "was not enacted for the principal purpose of punishing employers . . . ; rather, '[i]t authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring'" *People v Pymm*, 76 NY2d 511, 518 [1990] quoting *Whirlpool Corp. v Marshall*, 445 US 1, 12 [1980]). OSHA permits states to seek federal approval for plans to develop and enforce safety and health standards for public employees (29 USC § 667 [b]). A state's plan will be approved if it contains "satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards" promulgated under OSHA (29 USC § 667 [c] [2] and [6]).

Pursuant to this federal mandate the New York Legislature enacted PESHA (Labor Law § 27-a) in 1980 to provide individuals working in the public sector with the same or greater workplace protections as are provided to employees in the private sector under OSHA (*Matter of Goldstein v New York State Indus. Bd. of Appeals*, 292 AD2d 706, 706 [3d Dept 2002]; *Hartnett v New York City Tr. Auth.*, 86 NY2d 438, 442 [1995]).

As required under the PESH Act, Labor Law § 27-a (4) (a), DOL has adopted the federal OSHA standards, including the General Industry Standards found in Part 1910 (29 CFR 1910). DOL has also adopted and publishes a Field Operations Manual for its PESH program, which sets forth DOL's policies and procedures regarding conducting inspections, issuance of violations and other PESH activities.

Every public employer in New York has the duty to comply with the safety and health standards promulgated under PESHA (Labor Law § 27-a [3] [a] [2]). Additionally, Labor Law § 27-a (3) (a) (1) requires employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm," "reasonable and adequate protection to … lives, safety or health," and compliance with safety and health standards by both public employers and public employees. PESH enforcement procedures are detailed in Labor Law § 27-a (6) and provide that "[i]f the commissioner determines that an employer has violated a provision of this section, or a safety or health standard or regulation promulgated under this section, he or she shall with reasonable promptness issue to the employer an order to comply which shall describe particularly the nature of the violation including a reference to the provisions of this section, standard, regulation or order alleged to have been violated . . . ."

OSHA Regulations for Hazard Assessment

The employer is required to conduct a hazard assessment pursuant to 29 CFR 1910.132 (d), which states:

> "(1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:
>
> (i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;
> (ii) Communicate selection decisions to each affected employee; and,
> (iii) Select PPE that properly fits each affected employee.
>
> Note: Non-mandatory Appendix B contains an example of procedures that would comply with the requirement for a hazard assessment.
>
> (2) The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment."

Respondent's Investigation was Insufficient to Support its Determination

Petitioner asserts that the employer's own hazard assessment requires safety shoes and that respondent did not conduct a sufficient investigation before issuing her determination to not issue a violation for the employer's failure to require safety shoes. We do not agree that Emhardt's assessment, which petitioner relies upon, was the hazard assessment in effect at the time of the investigation. Emhardt's unrefuted testimony was that her assessment was a work in progress completed as part of possible recommendations for a new hazard assessment which had not yet been finalized or adopted. Despite this factual error in petitioner's argument, we do find that the respondent's investigation as reflected in the evidence before us was not sufficiently complete to warrant its determination that there was no violation of required protective footwear standards.

From the record evidence, it appears respondent failed to inquire about or otherwise identify the hazard assessment in effect during the investigation. There is no evidence in the record of a written hazard assessment, or the certification that a hazard assessment had been completed, pursuant to the OSHA regulations in effect at the time of the investigation. The record shows, however, that respondent relied on the PPE charts in evidence and posted around the worksites to make its determination. We find respondent's reliance on these charts, under the circumstances and as discussed below, unreasonable.

The PESH Field Operations Manual Section D.3.j.4 instructs that if a hazard assessment has been performed pursuant to 29 CFR 1910.132 (d) (2), but is not in writing:

> "the CSHO shall ask the person who performed the hazard assessment to describe all potential workplace hazards and then select appropriate personal protective equipment. If there is no hazard assessment, the CSHO will determine potential hazards from sources such as the Log of Injuries and Illnesses and shall select personal protective equipment accordingly."

Clabeaux and Schmidt both testified that they relied on the PPE charts as a hazard assessment. The four separate PPE charts in evidence do not contain the required information for a hazard assessment under 12 CFR 1910.132, nor are the PPE charts a certification of a hazard assessment. Specifically, the charts do not appear to identify any specific hazard. Schmidt's own testimony corroborates such a finding. Schmidt acknowledged that there was no actual written document demonstrating which hazards existed with relation to a job duty but believed such a document was not necessary as long as the employer certified that an assessment had been conducted and that the identified hazards could be inferred from the chart.

In fact, the record is devoid of any evidence that respondent affirmatively identified the person or persons who conducted the alleged hazard assessment. Schmidt testified that he did not know who performed the alleged hazard assessment in use during the investigation, but he believed it was done by a group of managers who did an assessment which resulted in the posted PPE charts.

The record also demonstrates that respondent failed to take reasonable steps to gather certain information in the absence of a hazard assessment. Schmidt testified that he made the determination to not issue a violation regarding footwear because they did not observe any hazards, the lack of "employees staking to their near misses," and because there were no records of actual

injuries and that CSEA did not give him examples of what to observe that would indicate a rolling, crushing or puncturing hazard was present. Both Clabeaux and Schmidt, however, acknowledged in emails that further investigation in the form of interviews was required. Clabeaux testified that she proposed sending an email to CSEA representatives to ask specific questions to help her determine potential hazards. Schmidt replied to Clabeaux via email on October 13, 2017 stating that "some of these questions would be better asked in an interview, which could be done over the phone." There is no evidence that any further interviews about the questions documented by Clabeaux in her draft email ever occurred. The handwritten notes and investigation narratives from the March 12, 2018 and March 21, 2018 conferences do indicate that foot injury hazards were discussed during those conferences. Specifically, the notes document that CSEA representatives pointed out that changing out compressed gas cylinders represented a crushing hazard warranting use of safety shoe and that half the park employees purchased their own safety shoes to prevent injuries. Yet, there is no evidence that respondent considered this information in making their determination, nor took steps to gather information to determine what actual or potential hazards existed that may require the use of sufficiently protective footwear.

Based on a review of the evidence entered into the record at the hearing in this matter, we find that it was unreasonable for respondent to have determined that the employer did not violate 12 CFR 1910.132 or 12 CFR 1910.136 without confirming the hazard assessment in place at that time, or conducting further investigative in the absence of a hazard assessment. That determination is hereby revoked.

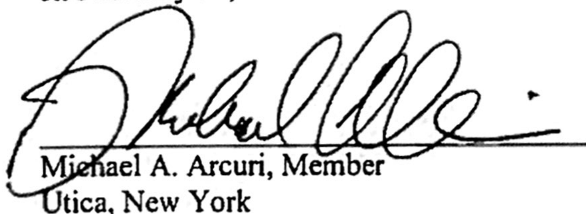
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The petition is hereby denied in part and granted in part; and

2. The determination that no violation occurred is revoked.

Dated and signed by the Members
of the Industrial Board of Appeals
on February 24, 2021.

Molly Doherty, Chairperson
New York, New York



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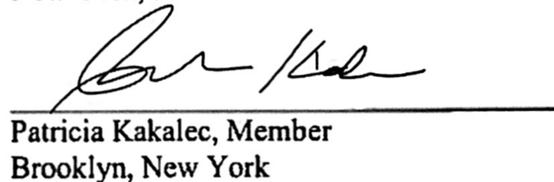
Utica, New York



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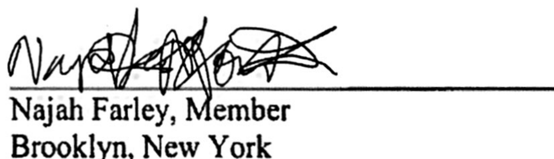

Najah Farley, Member
Brooklyn, New York