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STATE OF MICHIGAN

COURT OF APPEALS

ASPLUNDH CONSTRUCTION COMPANY, Petitioner-Appellee, v MICHIGAN OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, Respondent-Appellant.	UNPUBLISHED November 13, 2026 1:31 PM No. 377448 Wayne Circuit Court LC No. 25-004067-AA

Before: LIEVENSE, P.J., and SWARTZLE and MARIANI, JJ.

PER CURIAM.

In this administrative law case, respondent, the Michigan Occupational Safety and Health Administration (MIOSHA), issued several citations to Asplundh Construction Company (Asplundh) following the electrocution death of one of Asplundh's employees, Samuel Lerch. After an investigation and several years of prior appeals before the Michigan Board of Health and Safety Compliance and Appeals (the Board), the Wayne Circuit Court, and this Court, five of those citation items remained. Ultimately, on September 3, 2025 the Wayne Circuit Court reversed the Board's decision to uphold the citation items.

MIOSHA now appeals that order on leave granted,[1] arguing the circuit court erred because it engaged in an improper de novo review of the Board's decision to uphold the issuance of the five remaining citation items. We agree with MIOSHA, reverse the circuit court's order, and remand for the circuit court to enter an order reinstating citation 1, Items 2, 5, 6, 8, and 9 against Asplundh.

[1] *Asplundh Constr Co v MIOSHA*, unpublished order of the Court of Appeals, entered February 25, 2026 (Docket No. 377448).

I. FACTUAL BACKGROUND

The facts of the incident resulting in Lerch's death were disputed. On July 18 and 19, 2017, Lerch was working on a three-man Asplundh crew with an apprentice named Michael Quain, and their crew leader David Edgerton, to replace an electrical pole in a residential neighborhood in Romulus. The work involved ascending and descending in a bucket truck with various electrical lines and wires. As crew leader, Edgerton was the "qualified observer" whose job was, among other things, to "keep a good eye on workers in [the] air." The project required the crew to install a guy wire, a tensioned cable, between two electrical poles to stabilize them.

Before beginning work on each shift, the crew was required to conduct a job briefing on the task ahead, which included performing a "detailed hazard assessment," and having each crew member sign the job briefing form after the briefing is complete. In a written questionnaire Edgerton later filled out for MIOSHA, Edgerton was asked whether a job briefing occurred before work commenced on July 18 and 19, 2017. First, Edgerton wrote "yes, on 7-18-17, [Lerch] didn't want [unintelligible]." Edgerton then crossed that out and wrote "partial, yes." In response to a question about job briefing further down the questionnaire, Edgerton wrote "[Lerch] did not participate" in the job briefing, and that it lasted 10-15 minutes, and the briefing consisted of "describ[ing the] job scope and what our task [was]." In a final question asking whether a job briefing was conducted on July 18, 2017, and July 19, 2017, Edgerton wrote "7-18-17 [Lerch] didn't want to participate. 7-19-17 yes there was a tail board."[2] Quain answered a similar questionnaire from MIOSHA and was asked about whether a job briefing occurred. He stated he did not remember whether a job briefing occurred on July 18, 2017, but that one occurred on July 19, 2017.

Another requirement before beginning work was an "insulate and isolate performance check," which required crew leaders to ensure all crew members were wearing personal protective equipment (PPE), such as rubber gloves and sleeves, to protect themselves from conducting and grounding parts. Edgerton admitted that such a check was not performed before beginning work on July 19, 2017. Edgerton and Quain understood that, per Asplundh's safety policies, employees were required to wear PPE from "cradle to cradle," i.e. from the time the bucket left the cradle until it returned, to protect from harm by energized electrical lines and parts. Edgerton stated that PPE was provided to Lerch but he refused to wear it; Quain confirmed Lerch was not wearing proper rubber gloves or sleeves at the time of the incident but was only wearing "FR [flame resistant] pants and a cotton t-shirt, not an FR shirt."

Finally, employees knew to be careful when working within the minimum approach distance (MAD), which is the calculated safe working distance designed to protect employees when working on or in the vicinity of energized electrical lines and equipment. Employees could still be electrocuted even if they were within the MAD with grounding parts or uninsulated mechanical parts but were not physically touching live electrical lines because "the electricity

[2] A "tail board" meeting is another common term for the job briefing required at the start of each shift. Compsource Mutual Insurance Company, *Tailboard Meetings and Their Benefit with Sample Form*, <https://www.compsourcemutual.com/resources/safety-library/tailboard-meetings-and-their-benefit-with-sample-form/> (accessed November 6, 2026).

[could] jump[] through space." The MAD, which is calculated based on the voltage of the "exposed energized part(s)" involved in a particular job, was established by Asplundh as 2.3 feet, meaning the crew should not have been, or taken a conductive object, within 2.3 feet of exposed energized part(s) without PPE. See 29 CFR 1926.959(d)(1).

The first day, July 18, 2017, passed without incident. When the job resumed on the morning of July 19, Quain said that Lerch was supposed to be ascending in the bucket to unpin the guy wire and relocate it to the "other side of the secondary." And according to Edgerton, "[Lerch] was drilling new pole for new hardware and waiting on me to get guy [wire] ready. [Quain] was getting his tools ready to go in the backyard to attach guy [wire]." When asked why Lerch was in the location he was at the time of the incident, Edgerton wrote "[Lerch] was framing new pole. Don't know why he was where he was, we just talked about doing the guy wire . . . . " Edgerton and Quain explained that no one was watching Lerch at the time because the "job task we just talked about," relocating the guy wire, "should not [have] required a spotter." Edgerton explained there was "no designated ground observer" to watch Lerch at the time of the incident because he was "not supposed to be in primary zone. [Quain] was getting his tools for back yard work. I was rerouting guy wire." Lerch "was supposed to be moving guy wire."

But for reasons unbeknownst to them, and without wearing PPE, Lerch instead began ascending in the bucket with a 1/4" copper ground wire in his bare hand. A ground wire is an uncharged conducting wire used as a common current return for an electric circuit and extends into the ground to give excess electrical charges a safe place to go. The safe work practices manual that Asplundh employees adhered to directs employees to treat all unattached ends of ground cables as if they are energized and to keep them outside the MAD. Using his right hand to control the bucket, Lerch ascended into the MAD with the ground wire in his left hand. While in the air and within the MAD, his right shoulder made contact with a charged electrical primary, and he was fatally electrocuted.

Edgerton said he did not know why Lerch decided to take up the ground wire and approach the MAD, that it was not part of the crew's plan at the time, and that no one was watching Lerch when he ascended with the ground wire. When asked what he would do differently if he had a chance to "do the day of 7-19-17 over again," Quain wrote that he would have "demanded [Lerch] put up a line hose,[3] instead of him saying he didn't need one." When Quain was asked whether and why Lerch was holding the ground wire, what the MAD was on that job, where Edgerton was, and who was watching Lerch, Quain wrote "I don't know" in response to each question.

On July 31, 2017, Edgerton provided, in relevant part, the following written statement to Asplundh:

When we started job, we de-energized transformer and removed from service.

We then dig and set pole.

[3] A line hose is an insulating cover-up device used by employees to electrically insulate energized lines and wires while they perform maintenance, repairs, or construction.

> Then [Lerch] installed hardware on new pole for [] guy [wire] while I was rolling it out. [Lerch came] down and told me it wouldn't work on that side of secondary. I then told him to go unpin it and move it to other side of bell and secondary. While I was [deciding] to through [sic: throw] rope over bell drops or use squirt truck to pass guy over bell drops, I had my back turned and I heard the electrical contact, I saw Sam drop to bottom of the bucket.
>
> I immediately called 911.

Quain also provided a written statement to Asplundh on July 31, 2017:

> We got to the job that morning and prepared the old guy pole for the setting of the new pole. We took an old transformer down to make room for the new pole. After the new pole was set, we began to move up material for the new pole. Sam went up and began to frame the new pole as we [laid] out the [] guy [wire] from pole to pole the [] guy [wire] was [laid] out to go up on the north side of the secondary. It was determined that the [] guy [wire], for clearance purposes, would work better on the south side of the secondary. There were phone drops on the south side of the secondary so ropes were needed to pull the guy wire over them. [Edgerton] went to get ropes out of the truck. I went to get my climbing tools out of a bin to climb stub pole and [Lerch] went up to unpin the guy and take it on the south side of the secondary. As I was in my tool bin I heard the electrical contact and looked up to see the bucket with nobody visible in it. I ran up to the lower controls and performed the rescue. I pulled [Lerch] from the bucket and began performing CPR.

Quain was suspended for two days after the incident. Edgerton was suspended for five days and was eventually terminated at the end of July 2017 for failing to properly supervise other employees and compel them to wear PPE during an incident that occurred just one week after Lerch's death. In August 2017, Asplundh suspended three more employees for failing to wear rubber gloves and sleeves while transferring cables in the bucket. Later evidence also showed Edgerton was supervising a job a few weeks before, on June 27, 2017, and was corrected for allowing employees he was supervising, which "likely" included Lerch, to work without wearing rubber gloves and sleeves on that job.

II. PROCEDURAL HISTORY

Following an investigation into Lerch's death by MIOSHA Safety Officer George Pushies, MIOSHA issued the following 10 citation items to Asplundh in November 2017 for violating rules under the Michigan Administrative Code and the Code of Federal Regulations:

> Citation 1, Item 1: Failure to require Lerch to wear PPE in violation of Mich Admin Code, R 408.40617(2).
>
> Citation 1, Item 2: Failure to conduct an employee job briefing on the date of the incident in violation of 29 CFR 1926.952(a)(2).

Citation 1, Item 3: Failure to require an observer and provide warnings before Lerch reached the MAD of overhead energized electrical lines in violation of 29 CFR 1926.959(d)(2).

Citation 1, Item 4: Failure to have at least two employees present observing Lerch while working from an elevated aerial bucket truck within the MAD in violation of 29 CFR 1926.960(b)(3)(i)(E).

Citation 1, Item 5: Failure of the employer to ensure that Lerch did not breach the MAD without proper PPE or other insulation in violation of 29 CFR 1926.960(c)(1)(iii).

Citation 1, Item 6: Lerch was working within the MAD without proper PPE or insulating equipment covering energized parts in violation of 29 CFR 1926.960(d)(2).

Citation 1, Item 7(a): The employer failed to provide a copy of the aerial work platform permit for Lerch in violation of Mich Admin Code, R 408.43207(1).

Citation 1, Item 7(b): Failure to properly train Lerch on the use of an aerial bucket truck in violation of Mich Admin Code, R 408.43207(8).

Citation 1, Item 8: Proper clearance distance from the live wire was not maintained by Lerch, and Lerch was holding a ground wire in his bare hand at the time of the accident in violation of Mich Admin Code, R 408.43209(2).

Citation 1, Item 9: Lerch was in the area of a primary zone and was not wearing proper PPE in violation of Mich Admin Code, R 408.43209(4).

Asplundh sought dismissal of all MIOSHA's citations by appealing to an administrative law judge (ALJ) in the Michigan Department of Licensing and Regulatory Affairs. For each citation item, Asplundh asserted the "unpreventable employee misconduct" defense[4] and argued "the evidence makes clear that this tragic incident was a result of Mr. Samuel Lerch's deviation from and violation of Asplundh's rules and regulations."

A. EVIDENTIARY HEARING BEFORE THE ALJ

The ALJ reviewed exhibits that Asplundh and MIOSHA provided and heard testimony from Pushies and Edgerton at an evidentiary hearing held in July 2019 and February 2020, where new information about the incident was revealed. Pushies was at the scene of the incident immediately after it occurred and testified that Edgerton told him that Lerch was wearing gloves,

[4] The unpreventable employee misconduct defense applies when an employer "has established work rules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered." *Secretary of Labor v Jenson Const Co*, 7 OSH Cas (BNA) 1477 (1979) (1979 WL 8461).

a hard hat and eye protection at the time of the incident but was not wearing the required rubber sleeves. Pushies also identified the full scope of the project the Asplundh crew was hired to perform: changing out an electrical pole for a higher electrical pole *and* upgrading a conductor from copper to aluminum, which included installing a ground wire. Pushies testified that according to the narrative of the accident that Asplundh provided to him during the investigation, Quain handed the ground wire to Lerch before he ascended into the MAD, and then Quain went to retrieve his gear to install the guy wire. Further, Asplundh told Pushies that Lerch was not wearing rubber gloves or sleeves even though they were provided and were on the floor of the bucket when he was electrocuted. Pushies also said the physical injuries Lerch sustained, a partial amputation of his right arm at the shoulder and burns on his left hand, were not "consistent with use of full PPE," specifically rubberized gloves and sleeves.

Edgerton's and Quain's written statements from July 31, 2017, also raised concerns. Pushies testified that if Edgerton wrote that Lerch "installed hardware on new pole for [] guy [wire] while I was rolling it out," and "I had my back turned and I heard the electrical contact," it meant that Edgerton was not watching Lerch when he was in the bucket. And if Quain wrote that "[Edgerton] went up to get ropes out of the truck . . . " and "I went to get my climbing tools out of a bin to climb a step pole, and [Lerch] went up to unpin a guy [wire]," it meant each crew member was doing different things while Lerch was in the bucket.

Edgerton testified at the evidentiary hearing that Lerch did not participate in the job briefing on July 18, 2019. He explained:

> For some reason [Lerch] thought it was . . . we [had] just come off a big job, he thought we should all sit back and relax and just kind of hang out for the day, I'm like, "No, we have a job to do." He did not want to participate, so I just told him to stay in the truck, we don't need you out here . . . you know, we don't need you participating today, and then, kind of, like, blew off the day basically . . . .

Edgerton said a job briefing also was conducted the day of the incident, July 19, 2017, and everyone including Lerch participated in it. However, on cross examination, Edgerton was presented with an email to Pushies from Asplundh's Safety Supervisor Tony Mangabat[5] from July 26, 2017, that explained which job briefing document was for the day of the incident and why:

> George
>
> According to what we see and verbal interview with Dave Edgerton, the document dated for 7/19/17 represents both 7/18/2017 and 7/19/2017. Dave said that he forgot to do one for the day of the incident so we went ahead and re-dated the previous day's (7/18/2017), to reflect 7/19/2017. . . . No distinct entry was observed specific to 7/18/2017.

[5] Mangabat is a Corporate Safety Consultant at UtiliCon Solutions, Ltd., the company Asplundh worked with to create and enforce safety measures at job sites consistent with MIOSHA and federal safety standards.

The explanation suggested Edgerton did not conduct a job briefing on the 19th but improperly dated the document he filled out on the 18th to reflect that a briefing occurred on the 19th. Edgerton denied knowing Mangabat or ever speaking to him and explained, "I recall making [a report] the day before and [Lerch] didn't participate, so the next day we had the same type of work so we just used the same [report] over and everybody agreed [] we'd use the same one." Edgerton apparently did this even though Lerch had not participated in the briefing the day before.

Edgerton also testified Lerch was wearing the "proper PPE" required for working on the guy wire the last time Edgerton observed him before he was electrocuted. According to Edgerton, proper PPE for working on the guy wire was a "hardhat, safety glasses, shirt and harness." Edgerton said he never saw Lerch working without those items but could not recall if Lerch was wearing rubber gloves. Edgerton admitted, during questioning by the ALJ, that Lerch was not wearing rubber gloves and sleeves during the job briefing that morning, but explained it was not yet required because Lerch had not begun working in the bucket, and the bucket was still sitting at ground level. On cross-examination, Edgerton agreed that even if Lerch were just working on the guy wire, he was required to wear rubber gloves and sleeves because he would be working in the bucket. He agreed with the ALJ's characterization that the crew was "operating on the trust system" with wearing PPE, and he "just assumed Lerch would put on his PPE," without checking if he actually did.

Finally, Edgerton testified that he did not direct Lerch to ascend with the ground wire into the MAD, and that working with the ground wire "was not part of our job task at that part of the day." He maintained that Lerch was supposed to be ascending in the bucket to unpin the guy wire and move it to the other side of the electrical pole, which did not require a spotter, and he did not know why Lerch had a ground wire in his hand. But Edgerton later admitted the full scope of the project was to set the new electrical pole, install the guy wires, and start transferring conductors and transformers, and that Lerch was holding the ground wire because "[i]t was for the transformer which was the later—later task to do that day, not at that particular moment." At some point that day, a ground wire would be installed, and Lerch ascended in the bucket with it before he should have.

On July 29, 2020, the ALJ issued an extensive decision detailing his factual findings, the evidence in support of his findings, and his legal conclusions. The ALJ recommended that citation Item 7a be affirmed, but that the remaining citations items be vacated because either MIOSHA failed to establish the violations by a preponderance of the evidence (Items 2, 3, and 7b), or Asplundh established that the unpreventable employee misconduct defense applied (Items 1, 4, 5, 6, 8, and 9).

B. FIRST APPEAL TO THE BOARD, THE CIRCUIT COURT, AND THIS COURT

In October 2020, MIOSHA filed exceptions to the ALJ's proposed decision with the Board, claiming that all citation items should be affirmed because "Asplundh failed to demonstrate an employee misconduct defense and the ALJ misapplied MIOSHA standards." In March 2021, the Board issued a decision that adopted the ALJ's recommendation to vacate Item 1 and to uphold Item 7a, but disagreed with the ALJ's recommendation to vacate Items 2-6, 7b, 8, and 9, and thereby reinstated those citation items. For each citation, the Board recited the applicable rules, MIOSHA's allegations, and the ALJ's conclusions, and then made legal determinations without

supporting factual analysis. For Items 1 and 7a, the Board stated: "The Board agrees with the ALJ's conclusion." For Items 2-6, 7b, 8, and 9, the Board concluded that the proposed penalties should be imposed because MIOSHA proved the violations by a preponderance of the evidence. The Board also stated that the unpreventable employee misconduct defense did not apply to Items 3, 4, 5, 6, 8, and 9.

Asplundh appealed the Board's decision on Items 2-6, 7b, 8, and 9, to the circuit court. Asplundh sought reversal of the Board's decision and argued the Board should have given deference to the ALJ's recommendation and, among other things, that the Board's decision lacked "reasoning and analysis," and "was not supported by competent, material and substantial evidence on the whole record." During a hearing in October 2021, the circuit court agreed with Asplundh that Items 3, 4, and 7b were unsupported by competent, material, and substantial evidence. The circuit court also stated the Board did not conduct "an exhaustive analysis" like the ALJ did but ultimately concluded that the Board "did enough to sustain [its decision]" on Items 2, 5, 6, 8, and 9. After the hearing, the circuit court entered an order that reversed the Board's determination and vacated Items 3, 4, and 7b, but affirmed the Board's decision to uphold Items 2, 5, 6, 8, and 9.

Asplundh applied for leave to appeal the circuit court's order affirming Items 2, 5, 6, 8 and 9, and this Court denied the application. *Asplundh Constr Co v MIOSHA*, unpublished order of the Court of Appeals, entered September 20, 2022 (Docket No. 361211). Asplundh then applied for leave to appeal to our Supreme Court, which, in lieu of granting leave, remanded the case to this Court for consideration as on leave granted. *Asplundh Constr Co v MIOSHA*, 511 Mich 902 (2023). MIOSHA did not cross-appeal the circuit court's decision to vacate the citations for Items 3, 4, and 7b.

In an unpublished per curiam opinion, this Court agreed with Asplundh's argument that the Board's decision did not "include *any* factual findings or explain what evidence it relied on in support of its determinations," and thereby failed to provide a "concise and explicit statement of the underlying facts supporting its decision" as required by MCL 24.285. *Asplundh Constr Co v MIOSHA (Asplundh I)*, unpublished per curiam opinion of the Court of Appeals, issued April 25, 2024 (Docket No. 361211), pp 4-5, quoting MCL 24.285. This Court held that the Board's departure from the ALJ's conclusions as to Items 2, 5, 6, 8, and 9 revealed it did not agree with the ALJ's recommendation, but "[b]ecause the Board did not provide any explanation or support for its departure, its decision prevented the circuit court from determining whether the Board's conclusions were supported by competent, material, and substantial evidence," which is the applicable standard of review, and thus, the circuit court erred by concluding the Board "did enough to sustain [its decision]." *Asplundh I*, unpub op at 5. This Court vacated the circuit court's order affirming the citations for Items 2, 5, 6, 8 and 9, and remanded the case to the Board "to make sufficient findings and conclusions of law, in accordance with MCL 24.285, to facilitate appellate review." *Asplundh I*, unpub op at 6.

C. SECOND APPEAL TO THE BOARD AND THE CIRCUIT COURT

On September 13, 2024, the Board held a hearing outside the presence of the parties and again voted to overturn the ALJ's recommendation and reinstate citation Items 2, 5, 6, 8, and 9. On January 17, 2025, the Board issued a final order on remand from this Court reinstating citation Items 2, 5 ,6, 8, and 9. Asplundh appealed to the circuit court again to "reinstate the decision," or

rather, follow the recommendation, of the ALJ to vacate those five citation items. Asplundh argued citation Item 2 should be vacated because there was at least oral discussion on July 18 or 19, 2017 about the job to be performed, which sufficed as a job briefing. It also argued that the Board's decision was inconsistent; because MIOSHA did not appeal the ALJ's recommendation to vacate citation Item 1, which concerned Asplundh's "failure to require Lerch to wear PPE" based on the "unpreventable employee misconduct" defense, citation Items 5, 6, 8, and 9 also should be vacated because they pertain to PPE. MIOSHA argued that the inconsistencies between Edgerton's written statements closer to the time of the incident, and his testimony at the evidentiary hearings, at minimum, established Edgerton was not telling the truth about what happened leading up to Lerch's death, and that "competent, material, and substantial evidence" supported the Board's decision.

At the hearing on Asplundh's second appeal on August 7, 2025, the circuit court misinterpreted our prior decision in *Asplundh I* as a holding that "there was insufficient evidence to support the finding of the Board . . . . " Regarding citation Item 2, the circuit court went on to reason:

> It requires a job briefing discussion with the employees involved before they start each job. The ALJ, after hearing direct testimony from witnesses, found that a briefing was held on both days. MIOSHA argues that [Mangabat], . . . who corresponded with MIOSHA following the incident, wrote in his email that Edgerton conducted a pre-job briefing on July 18th but forgot to conduct one on July 19th.
>
> . . . [W]hereas in Edgerton's later statement to MIOSHA, he stated that Mr. Lerch refused to participate in the pre-job briefing on July 19th, the day Mr. Lerch was killed. So either Mr. Lerch refused to participate in the pre-job briefing on July 19th, or Mr. Edgerton never gave a briefing on July 19th. However, what is not disputed is that Mr. Edgerton gave a briefing on July 18th; and, therefore, the Court is vacating this citation, item two.

Regarding citation Items 5, 6, 8, and 9, the circuit court agreed with Asplundh that because citation Item 1 had been vacated, "any contrary findings or conclusions are suspect. The Board has consistently contradicted itself on this point by mentioning that PPE should have been worn but was not provided, then admitting that some PPE was provided." The circuit court went on to hold:

> Therefore, it was settled that it was not the failure of Asplundh that Mr. Lerch was not wearing his PPE equipment on the day in question, and [as] pointed out by Asplundh, even Mr. Pushies, MIOSHA's investigator, admitted that all necessary rubber glove[,] sleeves and all PPE were in the bucket with Mr. Lerch. Hence, it was clear that PPE was indeed provided to Mr. Lerch, and it was, in fact, in his bucket when he was doing the job. So the Court believes that the ALJ's determination that Asplundh established . . . the unpreventable employee misconduct defense in this case; and, therefore, . . . it cannot be argued that Asplundh failed in its responsibilities. Hence, all four of these citations, items five, six, eight, and nine relate to the same fact pattern, and the core facts that Mr. Lerch

> was not . . . wearing PPE. And so, therefore, the Court believes those citations should be reversed.

The circuit court issued a final written order dismissing citation Items 2, 5, 6, 8, and 9 and closing the case. MIOSHA now appeals, arguing the circuit court erred by engaging in de novo review of the Board's decision.

III. STANDARDS OF REVIEW

As stated in *Asplundh I*, the standards of review applicable to this case are twofold. First, the circuit court's review of the Board's decision is "limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002). "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence." *Vanzandt v State Employees Retirement Sys*, 266 Mich App 579, 584; 701 NW2d 214 (2005) (quotation marks and citation omitted). "If there is sufficient evidence, the circuit court may not substitute its judgment for that of the agency, even if the court might have reached a different result." *Id*. "An agency's findings of fact are afforded deference, particularly with regard to witness credibility and evidentiary questions." *Id*. at 588. "It is not a reviewing court's function to resolve conflicts in the evidence or to pass on the credibility of witnesses." *Id*.

Our review of "a circuit court's ruling on an appeal from an administrative decision is [also] limited." *Buckley v Prof Plaza Clinic Corp*, 281 Mich App 224, 231; 761 NW2d 284 (2008). We review the circuit court's decision to determine whether it "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Dignan*, 253 Mich App at 575 (cleaned up). "This standard is synonymous with the clear-error standard of review. Under this standard, this Court will only overturn the circuit court's decision if, on review of the whole record, it is left with a definite and firm conviction that a mistake has been made." *Buckley*, 281 Mich App at 231 (cleaned up). "The trial court has committed clear legal error if it erred in its choice, interpretation, or application of the law." *Nock v Miranda-Bermudez*, 347 Mich App 623, 627; 16 NW3d 522 (2023).

IV. ANALYSIS

As clarified in *Dignan*, when an administrative decision is on appeal to the circuit court, the circuit court must review the Board's decision, not the Board's rejection or acceptance of the ALJ's conclusions. The ALJ's decision is only "a proposal for the [Board] to consider," a recommendation. *Dignan*, 253 Mich App at 577-578. The Board "was not required to accept the [ALJ's] proposed findings even if those findings were supported by substantial evidence. [The Board] was free to accept, reject, or modify the [ALJ's] proposals." *Id*. at 578.

As an initial matter, and as stated above, it appears the circuit court mischaracterized our prior holding in *Asplundh I* as a decision that "there was insufficient evidence to support the finding of the Board . . . . " But our prior opinion never reached the merits. We previously held that "[b]ecause the Board's [first] opinion cite[d] no evidence and provide[d] no analysis in support of

its legal conclusions, we [could not] properly address the merits of Asplundh's additional contention that the Board's decision was unsupported by competent, material, and substantial evidence." *Asplundh I*, unpub op at 6. Now that the Board has articulated its reasons for rejecting the ALJ's recommendations as to the citations, we review the record to determine whether the circuit court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the [Board]'s factual findings." *Dignan*, 253 Mich App at 575 (cleaned up).

Doing so, we agree with MIOSHA's argument that the circuit court clearly erred by conducting a de novo review of the Board's decision instead of evaluating whether the Board's decision was supported by "competent, material, and substantial evidence" that was "more than a mere scintilla, but less than a preponderance of the evidence," *Vanzandt*, 266 Mich App at584, an error that may have stemmed from a misunderstanding of our holding in *Asplundh I*.

In its second decision to uphold citation Items 2, 5, 6, 8 and 9, the Board agreed with the ALJ that the basic undisputed facts were that Lerch was working with Edgerton and Quain to replace an electrical pole when, on July 19, 2017, Lerch was electrocuted and died when "he elevated in a bucket truck without wearing [PPE], breached the [MAD], and contacted a live electrical line while holding a ground wire in his bare hand." With that in mind, we review the circuit court's decision based on the Board's findings and stated disagreements with the ALJ's findings and legal conclusions based on the record.

A. CITATION ITEM 2

Citation Item 2 concerns whether Edgerton adequately conducted a job briefing on the day of the accident under 29 CFR 1926.9529(a)(2) (emphasis added), which requires the employer to ensure that the employee in charge (here, Edgerton) "conducts a job briefing that meets paragraphs (b), (c), *and* (d) of this section with the employees involved before they start each job." MIOSHA's argues that there is substantial evidence that Lerch did not attend such a briefing on the day of this accident.

The Board's decision explained:

> The ALJ concluded that the Singe Day Job Briefing form provided during the investigation was not altered to falsely reflect that a job briefing was performed on July 19, 2017 (the day of the fatality), a job briefing did in fact occur on that date, and Lerch participated in that briefing. . . . The Board disagrees. . . . Asplundh's own investigation concluded that [] Edgerton forgot to conduct a job briefing on July 19. . . . Edgerton's written account . . . stated that he conducted a briefing, but Lerch refused to participate. . . . And Edgerton admitted to re-dating the job briefing document from July 18 to July 19. . . . It was not until his testimony two years after Lerch's death that Edgerton claimed Lerch participated in a July 19, 2017 job briefing. . . . The Board finds Asplundh's own investigation and Edgerton's prior written statement to be more credible than Edgerton's testimony at the hearing and concludes that the preponderance of the evidence shows that either no job briefing occurred on July 19, 2017, or that the briefing occurred without Lerch's attendance.

The Board disagreed with the ALJ's finding that Edgerton, Lerch, and Quain's conversation about the work to be done just before the accident, which came from their written accounts on July 31, 2017, constituted a job briefing. The Board concluded that because the testimony the ALJ relied on to make that conclusion, which was Edgerton's testimony at the evidentiary hearings, contained no evidence that this conversation included a discussion of "[h]azards associated with the job, work procedures involved, special precautions, energy source controls, and personal protective equipment requirements" as required under 29 CFR 1926.9529(b), the ALJ's finding that a job briefing occurred was not supported by the evidence.

The Board's decision to reinstate citation Item 2 because a job briefing that met the requirements of the regulation did not occur is supported by substantial evidence. When asked about re-dating the job briefing to July 19, Edgerton admitted the email was an accurate description of what he did: "I recall making [a report] the day before and [Lerch] didn't participate, so the next day we had the same type of work so we just used the same [report] over and everybody agreed [] we'd use the same one."

When the circuit court vacated citation Item 2 because "what is not in dispute is that Mr. Edgerton gave a briefing on July 18th," the circuit court essentially substituted its judgment as to the weight of certain evidence and credibility of certain witnesses for that of the Board, which is beyond a reviewing court's function. *Vanzandt*, 266 Mich App at 588. It engaged in no analysis as to whether substantial evidence supported the Board's finding that either Edgerton never conducted a briefing on July 19, or Lerch refused to participate. Accordingly, the circuit court failed to apply the substantial evidence test to the Board's decision and essentially conducted a de novo review to reach its own conclusion relying on its choice of facts. This error in the application of the law constituted clear error. *Nock*, 347 Mich App at 627. We vacate the circuit court's decision as to citation Item 2.

B. CITATION ITEMS 5, 6, 8, AND 9

We review these remaining citation items together because they concern the same facts: the circumstances surrounding Lerch's ascension in the bucket truck. Citation Item 5 alleges a violation of 29 CFR 1926.960(c)(1)(iii), which requires employers to "ensure that no employee approaches or takes any conductive object closer to exposed energized parts than the employer's established [MAD] . . . . " The exceptions to this rule require that the employee wear rubber gloves and sleeves, be insulated from the energized part, or that the energized part is insulated from the employee (like by using a line hose). 29 CFR 1926.960(c)(1)(iii)(A)-(C). Citation Item 6 alleges a violation of 29 CFR 1926.960(d)(2), which requires that an employee not wearing PPE or insulated from energized parts work from a position where they cannot reach into the MAD. Citation Item 8 alleges a violation of Mich Admin Code, R 408.43209(2), requiring linemen to stay outside the MAD unless they are protected by insulated PPE or other insulating equipment. Finally, citation Item 9 alleges a violation of Mich Admin Code, R 408.43209(4), requiring linemen to wear insulated gloves and sleeves sufficient for the voltage they may come into contact with.

Regarding these facts and alleged violations, the Board explained:

> In June 2017, Edgerton was cited in an Asplundh safety report for failing to ensure that Lerch used rubber gloves and sleeves on a work site when necessary. . . . In

other words, Edgerton was aware of Lerch's prior recent failure to use appropriate PPE, and his own corresponding duty to ensure that Lerch did so.

> In Edgerton's first written statement after the incident, made on July 31, 2017, he wrote that he told Lerch to "go unpin" the guy wire so it could be installed on the other side of the pole. . . . This was corroborated by crew member Michael Quain's written statement following the incident, which stated that Lerch "went up to unpin the guy and take it on the south side of the secondary." . . . In Edgerton's August 2017 written statement, he said he wished he had insisted that Lerch put up a line hose, rather than acquiescing to Lerch's opinion that he did not need one. . . . Before Lerch went up in the bucket, Lerch asked Quain to hand him the ground wire, and Quain retrieved it and handed it to Lerch in the bucket. Edgerton walked off in the opposite direction "to inspect a possible anchoring point for the pole-to-pole guy wire." . . .
>
> The Board finds Edgerton's earlier written statements, corroborated by Quain's own written statement, to be more credible than Edgerton's testimony relied on by the ALJ that he instructed Lerch to wait on the ground while he inspected a possible anchoring point. The Board concludes that the preponderance of the evidence supports the conclusion that Edgerton knew that Lerch was not wearing PPE and that he was going to ascend in the bucket truck when Edgerton turned his back and walked away.

The Board went on to disagree with the ALJ that the "unpreventable employee misconduct" defense applied to vacate each of these remaining citations. It did so because "1) Edgerton was aware of Lerch's failure to wear PPE just a few weeks before the incident; 2) Edgerton was aware of Lerch's refusal to install a line hose; 3) Edgerton did not conduct a job briefing with Lerch; and 4) Edgerton took no actions to supervise Lerch when he knew that Lerch was not wearing PPE and that he was going to ascend in the bucket truck when Edgerton turned his back and walked away."

Based on the record, the Board's decision to reinstate citation items 5, 6, 8, and 9 is supported by substantial evidence. With regard to the Board's first conclusion, Edgerton testified that it was "more than likely" that Lerch was working on his crew in June 2017 when Edgerton was corrected for not requiring crew members to wear PPE. The Board's second conclusion is supported by Edgerton's written statement that if he could "have a do over of 7-19-17" he would have made Lerch use a line hose. The Board's third conclusion is supported by the discussion in Section IV.A of this opinion, that Edgerton either allowed Lerch to work the day of the incident without participating in a job briefing, or without conducting a briefing at all. That the Board found Edgerton's testimony at the evidentiary hearings incredible is supported because it contradicts the statements he made earlier, multiple days after the accident and a month after the accident. Finally, the Board's fourth conclusion is supported by the repeated written and verbal statements that Edgerton had his back turned when he heard Lerch was electrocuted.

It is reasonable to conclude from this evidence, as well as other evidence elicited during the investigation and hearing,[6] that there was a culture at Asplundh of noncompliance with MIOSHA and federal regulations about wearing PPE and insulating from exposed energized parts. The Board's conclusion that the "unpreventable employee misconduct" defense did not apply was therefore supported by substantial evidence.

The circuit court disagreed with the Board and vacated citation Items 5, 6, 8, and 9, agreeing with Asplundh that because citation Item 1, which concerned Asplundh's failure to require Lerch to wear PPE, had been vacated, "any contrary findings or conclusions are suspect." The circuit court reasoned it was clear that PPE was provided to Lerch, and it was entirely Lerch's fault that he was not wearing PPE on the day in question, so the "unpreventable employee misconduct" defense applied.

In doing so, however, the circuit court again substituted its judgment for that of the Board and vacated the citations simply because it would have reached a different conclusion based on the evidence. This error in the application of the law constituted clear error. *Nock*, 347 Mich App at 627. It also ignored the language of the cited violations, which fault a supervisor for allowing a crew member to either not wear PPE, work without insulation, or approach the MAD without PPE or insulation. Knowing Lerch was working without PPE and a line hose, Edgerton turned his back as Lerch did all three. And contrary to the circuit court's decision, MIOSHA's decision not to appeal the Board's decision to adopt the ALJ's recommendation to vacate Item 1 does not mean that there is not substantial evidence to support the Board's decision to uphold Items 5, 6, 8, and 9; Asplundh requiring Lerch to wear PPE does not conflict with the other items. Ultimately, the Board's findings support its conclusion that Lerch did not engage in "unpreventable employee misconduct."

We reverse and remand for the circuit court to enter an order reinstating remaining citation Items 2, 5, 6, 8, and 9 against Asplundh. We do not retain jurisdiction.

/s/ Andrew J. Lievense
/s/ Brock A. Swartzle
/s/ Philip P. Mariani

[6] There is evidence in the record that Edgerton was suspended for five days and was later terminated at the end of July 2017 for failing to properly supervise other employees and compel them to wear PPE just one week after Lerch's death. The evidence also shows other Asplundh employees (crew leaders and members alike) did not enforce or adhere to wearing the required PPE. In August 2017, Asplundh suspended three more employees for failing to wear rubber gloves and sleeves while transferring cables in the bucket.