IN THE MATTER OF	*	**BEFORE THE**
	*	**COMMISSIONER OF LABOR**
MORGAN-KELLER, INC.	*	**AND INDUSTRY**
	*	
	*	**MOSH CASE NO. D6926-051-01**
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	*	**OAH CASE NO. DLR-MOSH-41-200100034**

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FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational Safety and Health Act, Labor and Employment Article, Title 5, *Annotated Code of Maryland*. Following an inspection, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH"), issued a citation to Morgan-Keller, Inc., ("Morgan-Keller" or "Employer"), alleging certain violations. On December 19, 2001, and January 10, 2002, a hearing was held at which the parties introduced evidence and presented witnesses, and later filed post-hearing briefs. Thereafter, Thomas G. Welshko, Hearing Examiner, issued a Proposed Decision recommending the citation be affirmed.

On May 20, 2002, the Employer filed a request for review. On June 27, 2002, the Commissioner of Labor and Industry held the review hearing and heard argument from the parties. Based upon a review of the entire record[1] and consideration of the relevant law and the positions of the parties, the Commissioner adopts, as modified below, the findings of fact and

[1] Herein, the citations to the transcript on the first and second day of the evidentiary hearing are referred to as "T1 at __" and "T2 at__", respectively; the Hearing Examiner's Proposed Decision and Order is referred to as "Proposed Decision at __"; the Hearing Examiner's findings of fact are referred to as "FF__"; and MOSH's exhibits are referred to as "MOSH #__" and the Employer's exhibits are referred to as "Employer #__".

Conclusions of law recommended by the Hearing Examiner, and affirms Citation 1, Item1, alleging a violation of 29 CFR §1926.502(i)(3), and the proposed penalty of $3,100.

DISCUSSION

The Employer was the general contractor for the renovation and addition to the C. Burr Artz Library in Frederick, Maryland. On March 16, 2001, at 6:30 a.m., the Employer's five-member steel reinforcing/re-bar (rod buster) crew, and their foreman, Juan Riojas, arrived at the penthouse deck to prepare the metal decking for the pouring of concrete. The work began at 7:30 a.m. At 7:40 a.m., crew member Raynaldo Tovar was using a tape measure near one of three holes on the penthouse deck. The holes were covered with plywood that was held in place by cinderblocks. Tovar stepped backwards onto the plywood and fell more than 15 feet to a concrete floor below. Tovar sustained lacerations to his chest and his arm. MOSH cited the Employer for violating 29 C.F.R. §1926.502(i)(3) for failing to ensure that all holes in floors, roofs, and other walking/working surfaces were properly secured to prevent accidental displacement.

The Employer contests the Hearing Examiner finding that the Employer knew, or with the exercise of reasonable diligence should have known, of the violative condition. First, the Employer contends that in Finding of Fact 14, the Hearing Examiner inappropriately attributed to Foreman Riojas a statement alerting employees to "keep an eye" floor hole covers that had not been secured to prevent accidental displacement. In reaching this factual finding, the Hearing Examiner relied upon a statement of employee Rafael Cruz recorded by the MOSH Inspector during the investigation on a "MOSH Interview Worksheet," and certain testimony of MOSH Inspector Fedrowski. FF 14. The MOSH worksheet states, in relevant part, "15. HAVE YOU TALKED WITH ANYONE ABOUT ….? IF SO WHO AND WHAT WAS." The recorded

Response states: "No didn't actually talk about it but the holes (sic) covers didn't seem adequate. Did say to crew keep an eye on holes because covers may not be right." MOSH #7. Inspector Fedrowski testified that he understood Cruz's statement to mean that Cruz warned the crew, "referring to the gentlemen you work with on a daily basis," to keep an eye on the holes. T.1 197-99. Based on this testimony, and the absence of any evidence specifically linking Riojas to this warning, the Commissioner attributes this warning to Cruz rather than Riojas.[2] Finding of Fact 14 is therefore modified, and shall read: "The rod buster crew began work at 7:30 a.m. Before the accident discussed in Finding of Fact 15, Rafael Cruz, a new member of the crew, warned the crew to "keep an eye" on the openings because he was not sure if they were secure. Mr. Riojas, the foreman, did not inspect the coverings to determine if they were secure. MOSH #7; T1 at 197-99."[3]

The Employer also contends that knowledge cannot be attributed to the Employer through Foreman Riojas because MOSH has failed to establish that Riojas is a supervisor. With respect to Riojas's authority over the activities and safety of the rod buster crew, the investigation disclosed that Riojas, who apparently considers himself to be a supervisor, conducts weekly tool box meetings, and is regularly relied upon by the Employer to translate safety material from English into Spanish and read it to employees. MOSH #10. As noted by the Hearing Examiner, OSHA has repeatedly found that knowledge of a foreman can be imputed

[2] The Hearing Examiner cites T1 at 228-32, in support of his finding attributing this remark to Riojas. In that portion of the transcript, Counsel for MOSH asked Inspector Fedrowski whether he had testified in direct and under cross-examination that Riojas was aware of the holes and the covers, and Fedrowski answered yes. This testimony does not support a finding that the warning was issued by Riojas.

[3] As modified, Finding of Fact 14 does not require reversal of the Hearing Examiner's finding that Employer knew, or with reasonable diligence should have know, of the hazard. It establishes that even before the accident, employee Cruz, who had been working for the Employer only five days, observed that the covers appeared inadequate and issued a general warning to the entire crew to be watchful. MOSH #7. There is no evidence that Riojas was out of range of hearing this warning. Further, it is uncontested that as employee Tovar stepped back onto the hole cover, and before he fell through, Foreman Riojas shouted "be careful," from 30 feet away. FF 15. Cruz's

to an employer. *Dun-Par Engineered Form Co.*, 12 O.S.H. Case (BNA) 1962, 1965-66 (1986). Delegation of authority over employees, even if temporary, is sufficient to impute knowledge to an employer. *Secretary of Labor v. A.P. O'Horo Co.*, 14 O.S.H. CASE (BNA) 2005, 2007 (1991). This is especially true if the foreman has been designated by the Employer to convey safety information to employees. *Bob's Tool and Supply Company*, 4 OSH Case 1445, 1446 (1976). In this case, it is undisputed that Riojas is the working foreman of the Employer's rod buster crew and that he disseminated safety information to employees in his crew on behalf of the Employer. T1 at 89; 127; 268; MOSH #7. Giovani Iocco, general superintendent of the Employer's concrete division, oversees all region-wide facilities where the concrete division is functioning. T1 at 270-71. The record does not identify anyone in the company between Iocco and Riojas, suggesting that as foreman, Riojas reports directly to the concrete division head. Based on the above evidence, the Commissioner considers Riojas to be supervisor.

Concerning the exercise of reasonable diligence, the Employer contests the Hearing Examiner's finding that it did not formulate a safety program requiring routine inspection before work began, and that hole coverings be screwed or bolted down. Proposed Decision at 17. The Employer relies upon its "excellent" safety program (T1 at 238), and specifically on the "Material Handling, Storage & Disposal" provision of its Safety "Policies and Procedures Manual" in place at the time of the accident. That provision states that "all openings greater than two inches (at the least dimension) must be protected." Employer #2. The Employer further argues that to the extent its written safety program does not require daily inspections or securing hole covers, its employees understood such practices were expected, and that any failure to adhere to these non-written standards is the result of employee misconduct.

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general alert to the entire crew and Riojas's spontaneous warning of imminent danger, discredit any claim by the Employer that Riojas had no actual knowledge of the hazard before the accident.

The existence and effectiveness of written safety practices and procedures related to a cited hazard remains relevant, even though an employer has not specifically been cited for safety program deficiencies or enforcement failures. These factors form the foundation of the reasonable diligence defense. *Floyd S. Pike Electrical Contractor*, 6 O.S.H. Case 1675 (1978). Where, as here, an employer recognizes the existence of a hazard, and fails to develop a work rule to address it, knowledge may be imputed to the employer. *Pierce Packing Company*, 6 O.S.H. Case (BNA) 1849, 1850 (1978).

Further, an excellent overall safety program does not surmount evidence that an employer did not have safety procedures in place that substantially reduced the risk of employee exposure to the cited hazard. *Secretary of Labor v. Gary Concrete Products Inc.*, 15 O.S.H. CASE (BNA) 1051, 1055 (1991).[4] Here, a crew of five men and a supervisor were exposed to a serious fall hazard, and yet there was no violation of any written safety rule, and no employee was disciplined. At the time of the accident, the fall protection section of the Employer's safety manual made no reference to floor hole coverings. The Employer none the less alleges that it has a rule that addresses this hazard and requires that all openings greater than two inches, including open pits, floor opening, etc, be protected with covers or guards. Employer #2, Section 7000, No. 7280. That rule, tucked away in the "Material Handling, Storage & Disposal" provisions of its safety manual, says nothing about securing covers against accidental displacement as required by 29 CFR §1926.502(i)(3). Further, the unwritten safety practices relied upon by the Employer are no substitute for written policies and procedures, even if, as the Employer claims, they are understood and adhered to by employees most of the time. Without reducing policies and procedures to writing and incorporating them in an existing safety manual, an employer is not

[4] The effectiveness of the overall safety program is factored into the penalty provision. In this case, the penalty was reduced to give the Employer credit for it overall safety program. T1 at 145-46; MOSH #5 and #17.

likely to bring, or to capably enforce, disciplinary action. For, without written policies and procedures, there is no standard against which to gauge an employee's conduct or to site as the basis for an infraction. Thus, contrary to the Employer's contention, the safety policies and procedures in place at the time of the accident do not support a finding that the Employer acted with reasonable diligence in preventing the hazard.

The Employer further argues that even with the exercise of reasonable diligence, it could not have known that the plywood hole covers were not secured by anything other than the cinder blocks to prevent slipping. The Commissioner disagrees. MOSH does not contest the fact that a visual inspection of the holes from a distance would not establish whether they were secured from accidental displacement. However, the improbability that concrete blocks would have been put on top of plywood that had been fully secured with screws, should have provided notice that further inspection was required. The concrete block arrangement was in plain view and suspicious enough to raise caution in an employee with less than a week's experience. MOSH # 7. "An employer with notice that a hazard may exist must make reasonable efforts to ascertain if, *in fact*, the hazard does exist". *Baroid Division of NL Industries, Inc.*, 7 O.S.H. CASE (BNA) 1466, 1469 (1979). The Employer could easily have inspected the covers, discovered the hazard, and properly secured the covers before work commenced. As found by the Hearing Examiner, no such inspection was made by the Employer's supervisory personnel. Decision at 14, 15. The Commissioner therefore affirms the Hearing Examiner's conclusion that the Employer could have known, through the exercise of reasonable diligence, of the existence of the hazard.

Regarding the issue of employee misconduct, the Commissioner adopts the Hearing Examiner's finding that under any standard of proof, and particularly given the Employer's burden under the Court of Appeals decision in *Maryland Commissioner of Labor & Industry v.*

Cole Roofing, 368 Md. 459 (2002), the violation stands. On review, the Employer requests that the case be remanded to the Hearing Examiner, and that the record be reopened to take evidence in support of its claim that the accident was the result of employee misconduct. It is well settled that a "court must apply the law in effect at the time it renders its decision." *Landgraf v. USI Film Products*, 511 U.S. 244, 245, 114 S.Ct. 1483, 1486 (1994); *Brady v. School Board of Richmond*, 416 U.S. 696, 94 S.Ct. 2006 (1974). The Commissioner finds that at the time of the evidentiary hearing, the Employer was aware that the question of the burden of establishing the presence or absence of employee misconduct was on appeal, and therefore in a state of flux. T1 at 247, T2 at 20-23. If a party chooses to present its case relying on the standard ultimately rejected by the highest court, due process does not require that the record be reopen to give that party a chance to present evidence in support of the winning standard. *Bradley v. School Board of Richmond*, 416 U.S. at 721, 94 S.Ct. at 2021. Under *Cole Roofing*, the Court of Appeals held that it is the Employer that must establish that it maintains and communicates work rules, takes reasonable steps to discover violations, and effectively disciplines employees who do not comply. As found by the Hearing Examiner, and as discussed above, the Employer did not have work rules in effect that were designed to prevent the violation in this case. Accordingly, the Commissioner adopts the Hearing Examiner's recommendation to enforce the violation and penalty.

ORDER

For the foregoing reasons, the Commissioner of Labor and Industry, on the 31st day of October, 2003, hereby **ORDERS:**

1. Citation 1, Item 1, alleging a serious violation of 29 CFR §1926.502(i)(3), with a penalty of $3,100.00 is **AFFIRMED**.

2. This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for review in the appropriate circuit court. Consult Labor and Employment Article, §5-215, Annotated Code of Maryland, and the Maryland Rules, Title 7, Chapter 200.

Keith Goddard
Commissioner of Labor and Industry