IN THE MATTER OF	*	**BEFORE THE**
	*	**COMMISSIONER OF LABOR**
HARDESTY, INC.	*	**AND INDUSTRY**
	*	**MOSH CASE NO. L4102-056-02**
	*	**OAH CASE NO. DLR-MOSH-41-200200088**
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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 accident inspection, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH"), issued three citations to Hardesty, Inc. ("Hardesty" or Employer"), alleging various violations. A hearing was held on July 29, 2003, at which the parties introduced evidence, presented witnesses, and made arguments; subsequently, the parties filed limited post-hearing briefs. Thereafter, Administrative Law Judge Lorraine Ebert Fraser, sitting as Hearing Examiner, issued a Proposed Decision recommending that one citation be affirmed, with a modified penalty, and that two citations be dismissed.

The Employer filed a timely request for limited review and the Commissioner exercised his authority pursuant to Labor and Employment Article, § 5-214(e), and ordered review. On January 29, 2004, the Commissioner of Labor and Industry held the review hearing and heard argument from the parties. Based upon a review of the entire record and consideration of the relevant law and the positions of the parties, for the

reasons set forth below, the Hearing Examiner's recommendations are affirmed in part and reversed in part.

DISCUSSION

The facts in this case are not in dispute. Hardesty was the heating, ventilation and air conditioning ("HVAC") subcontractor for a Pet Smart store under construction in Hanover, Maryland, Jennings, Inc. ("Jennings"), was the general contractor. Plans for the HVAC system required that certain holes be placed in the roof for both air conditioning units and exhaust fans. Project manager David Schmidt was personally responsible for reviewing the blue prints, determining where holes were to be placed, and marking the holes for cutting. Tr. at 165, 171. Schmidt testified that to mark the location for the holes, "you drill holes up from underneath" and the punctures made by the drill mark the perimeter of the hole. Tr. at 164.[1]

Some time in late May, 2002,[2] a crew of Hardesty employees, headed by Schmidt, cut and curbed two sets of holes for the future installation of air conditioner units. FF 4. At that time, the Hardesty employees wore personal fall arrest systems (PFAS). *Id.*Jennings installed covers over the curbs. *Id.*

Since Hardesty did not at this time have the curbs for the exhaust fans, the employees did not prepare the exhaust fan holes. Tr. at 168. Schmidt admitted that

[1] Herein, the Hearing Examiner's Findings of Fact are referred to as "FF" and the transcript of the July 29, 2003 hearing as "Tr.", and MOSH Exhibits from the hearing as "MOSH Ex."
[2] All dates are in 2002 unless otherwise indicated.

before he left the job, he observed employees of Jennings cut at least one of the exhaust fan holes. Tr. at 174. He also testified that it was his understanding that Jennings would cut the remaining exhaust fan holes in preparation for work to be done by the roofing contractor. Tr. at 175.

About a week later, on May 31, Schmidt and another Hardesty employee Keith Kahler returned to the job site to insert mechanical drops into the air conditioner holes. The landscape of the roof had totally changed. FF 5; Tr. at 179. Roofers had installed white roofing material over the gray metal deck present the previous week and a lot of debris was strewn about the roof. Tr. 179. Schmidt admitted being in a hurry to install the drops. Tr. at 177-78. He testified that he did not inspect the roof for additional holes, and that he made no attempt to contact Jennings to report the condition of the roof or to inquire into whether additional exhaust fan holes had been cut. Tr. at 176-77, 180-81.Under these conditions and without wearing a PFAS, Schmidt and Kahler unscrewed and removed the covers from the air conditioning holes and inserted the drops. FF 6 & 7. Noticing that one of the covers for the air conditioning hole was not quite large enough to completely cover the hole, Schmidt and Kahler picked up a nearby irregular piece of plywood measuring about 4 feet by 8 feet. Tr. at 179, 194. The plywood was not marked or secured and it covered an uncurbed exhaust fan hole. Tr. at 180. As they walked, Schmidt fell through the exhaust fan hole to a concrete floor 21 feet below, sustaining fractures to his hip and wrist. FF 8.

MOSH issued three citations against Hardesty. Citation 1, Item 1, alleges that Employer engaged in a serious violation of 29 CFR 1926.501(b)(4)(i) when employees

failed to use a PFAS while installing duct work in a roof hole.[3] Citation 2, Item 1, alleges that the Employer engaged in a serious violation of 29 CFR 1926.502(i)(3) because the exhaust fan hole was covered by an unsecured sheet of plywood. Citation 3, Item 1, alleges that the Employer engaged in a serious violation of 29 CFR 1926.502(i)(4) because the exhaust fan hole was covered with an unmarked sheet of plywood. The Hearing Examiner recommended sustaining Citation 1, Item 1, and dismissing the remaining citations based on her finding that "MOSH failed to demonstrate that the Employer should have known there were unsecured, unlabeled holes on the roof." Proposed Decision at 9-10. The Employer excepts to the violation finding asserting, *inter alia*, that PFAS's were not required for the duct work being performed. MOSH excepts to the dismissal of Citation 2 and 3, claiming that the Hearing Examiner failed to apply the reasonable diligence standard for determining constructive knowledge as set forth in *Ames Crane & Rental Service, Inc.*, 3 O.S.H. Case (BNA) 1279 (1975), and its progeny, and that had she applied this test, she would have found that MOSH had met its burden of proof and recommended these citations be sustained.

For the reasons set forth by the Hearing Examiner, the Commissioner finds the standard applies, there was a failure to comply with the standard, employees were

[3] MOSH Inspector David Latham testified, without contradiction, that on the day of the accident he spoke with Mr. Adkins, Jennings representative at the opening conference, and that based on this conversation was led to believe that all the holes in the roof were 21 inches by 21 inches. Accordingly, each of the Citation and Notification of Penalty forms incorporates this dimension as part of the "condition." The record establishes that the actual size of the air conditioner hole was approximately 28"-30"x 12"-14". FF 6. The Employer asserts that by virtue of MOSH's failure to provide an accurate measurement for the air conditioner hole that MOSH now alleges is the subject of Citation 1, Item 1, it was denied due process because it was led to believe that all citations referred to the exhaust hole that Schmidt fell through, the subject of Citation 2, Item 1 and Citation 3, Item 1, dismissed by the Hearing Examiner. The Commissioner finds no merit to this contention. Citation 1, Item 1, in describing the condition, clearly identifies and differentiates the hole at issue as the one in which employees were "installing duct work." MOSH Ex. 9.

exposed to the hazard, and the Employer had knowledge of the hazardous condition. Citation 1, Item 1 cites Section of 29 CFR 1926.501(b)(4)(i). That standard requires protection from falling through holes on walking/working surfaces more than six feet above lower levels. The Commissioner finds no merit to the Employer's contention that employees were not required to wear PFAS while installing the drops into the air conditioner hole. The air conditioner hole was minimally 28"x12", sufficient in size for an employee to fall through. *See Beech Haven Assoc. Inc*., 2 O.S.H. Case (BNA) 3289 (1975) (14" x 20" unguarded floor openings presented hazard); *Julius Nasso Concrete Corp.*, 3 O.S.H. Case (BNA) 1146, 1147 (1975) (opening 21" x 20" large enough to present a hazard of employee falling). The lower level concrete floor was 21 feet below. Employees removed the secured cover to perform their work, and during the period the hole was uncovered, the employees were exposed to the possibility of incurring a severe injury from falling through the hole. The brevity of exposure does not exonerate the absence of fall protection. *Walker Towing Corp*. 14 O.S.H. Case (BNA) 2072, 2074 (1991) (exposure proved even though fleeting). Schmidt, the Employer's project manager, was fully aware of the condition. Employees under his supervision wore PFAS's during the installation of the hole and curb only a week earlier. Accordingly, the Commissioner adopts the Hearing Examiner's recommended finding affirming Citation 1, Item 1.[4]

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[4] The Hearing Examiner agreed with MOSH's penalty calculations except the good faith adjustment calculations. Since the Hearing Examiner recommended affirming only Citation 1, Item 1, involving a hole where no injury occurred, she found defective the good faith adjustment, calculated in part on an injury having occurred, and recommended remanding the calculation to MOSH. The Commissioner agrees that the good faith adjustment should be modified to reflect no injuries for this citation. Revising the employer injury and illness experience factor within the good faith calculations to zero due to the lack of an injury related to this citation results in an

Concerning Citation 2, Item 1, and Citation 3, Item 1, there is no dispute that the exhaust fan hole covers were neither marked nor secured, both measures required by the cited standards. The Employer urges adoption of the Hearing Examiner's finding that MOSH failed to establish knowledge with respect to these citations. The Hearing Examiner based her finding on the fact that the Employer had not created the hazard, Schmidt had not been at the job site for a week, the holes were not visibly marked or secured, Schmidt had no knowledge that they were there, and that had he known, he would have secured the covers.

The Commissioner finds other record facts, not given sufficient weight by the Hearing Examiner, support a finding of constructive knowledge. The standard for establishing constructive knowledge was recently reiterated in *N&N Contractors Inc*., 19 O.S.H. Case (BNA) 1401, 1403 (2001).

> "An employer has constructive knowledge of a violation if the employer fails to use reasonable diligence to discern the presence of the violative condition. *Secretary of Labor v. Pride Oil Well Service*, 15 OSHC 1809 (1992). Factors relevant to the reasonable diligence inquiry include the duty to inspect the work and anticipate hazards, the duty to adequately supervise employees, and the duty to implement a proper training program and work rules."

Thus, a failure to inspect is relevant to the reasonable diligence inquiry even in a case such as this where the employer is not specifically cited for violating an OSHA inspection requirement.

Here, the Employer's supervisor Schmidt, was responsible for marking all holes related to the HVAC system, including those for the exhaust fans. Schmidt admitted

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increase in the good faith adjustment from five percent to fifteen percent, resulting in a decrease in the penalty for this citation from $1225.00 to $875.00.

following the blue prints and marking the exhaust holes on his first site visit. There is evidence that the Employer was unwilling to cut the exhaust fan holes before curbs were available. This did not deter general contractor Jennings from making the cuts to keep the job moving. Schmidt anticipated this. He testified that when he left the job site a week before the accident, he knew the roofing contractor was expected and thought Jennings would cut the exhaust system holes before the roof was laid. Tr. at 171-72. In fact, Schmidt observed Jennings cutting the exhaust fan holes before his departure. Tr. at 174.

When Schmidt returned to the site on May 31, by his admission, the landscape had changed dramatically. The roofing surface was different, making it clear the roofer had been there, and debris was scattered about. Against this backdrop, reasonable diligence would dictate that Schmidt inquire with Jennings whether the exhaust fan holes had been cut or complain about the debris. Alternatively, Schmidt could have inspected the roof himself to determine whether and where the exhaust fan cuts were made before Hardesty's employees were permitted to work on the roof. Such precautions were reasonable to prevent employees from being exposed to the obvious and foreseeable hazard of falling through an exhaust fan hole to a cement floor 21 feet below. By his admission, Schmidt conceded he was not looking for holes or dangers, and took none of these actions. Tr. at 183-84, 185-86. Accordingly, the Commissioner finds that MOSH established its burden of proof concerning Citation 2, Item 1, and Citation 3, Item 1, and affirms these as serious violations.

ORDER

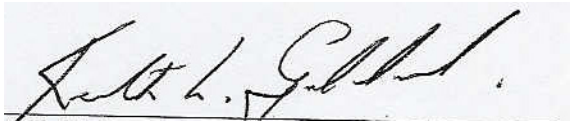
For the foregoing reasons, the Commissioner of Labor and Industry on the 28th day of April, 2004, hereby **ORDERS**:

1. Citation 1, Item 1, alleging a serious violation of 29 CFR 1926.501(b)(4)(i), with a penalty of $875.00, is **AFFIRMED**.

2. Citation 2, Item 1, alleging a serious violation of 29 CFR 1926.502(i)(3), with a penalty of $2225.00, is **AFFIRMED**.

3. Citation 3, Item 1, alleging a serious violation of 29 CFR 1926.502(i)(4), with a penalty of $2225.00, is **AFFIRMED**.

4. 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.



Dr. Keith L. Goddard,
Commissioner of Labor and Industry