STATE OF MARYLAND
DLLR
DEPARTMENT OF LABOR, LICENSING AND REGULATION

DIVISION OF LABOR AND INDUSTRY
MATTHEW HELMINIAK, COMMISSIONER
1100 N. EUTAW STREET, ROOM 600
BALTIMORE, MD 21201

July 10, 2018

Thomas Strong, Esquire
Venable, LLP
750 E. Pratt Street, Suite 900
Baltimore, MD 21202

Re: Morgan – Keller, Inc.
MOSH Case No. x4586-028-17
OAH No. DLR-MOSH-41-17-16531

Dear Sir:

Enclosed is the Final Decision and Order of the Commissioner of Labor and Industry issued today in the above-captioned matter.

Sincerely yours,

Ashley T. Hicks
Administrative Officer
Division of Labor and Industry

cc: Jenny Baker/Sarah Harlan, Assistant Attorneys General
Hilary Baker, Assistant Attorney General
MOSH Office of Review

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

IN THE MATTER OF	*	BEFORE THE
MORGAN-KELLER, INC.	*	COMMISSIONER OF LABOR
	*	AND INDUSTRY
	*	MOSH CASE NO. X4586-028-17 OAH CASE NO. 41-17-16531
	*	

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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*. On March 23, 2017, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH") issued a citation to Morgan-Keller, Inc. (hereafter "employer" or "Morgan-Keller") for a violation of 29 C.F.R. §1926.501(b)(10) and assessed a penalty of $1,275.00.

The employer contested the citation and a hearing was held on August 9, 2017 at the Office of Administrative Hearings office in Hunt Valley, Maryland. William Summerville, Administrative Law Judge, presided as the Hearing Examiner ("HE"). On November 6, 2017, the HE issued a proposed decision affirming the citation. The employer requested review and a review hearing was held before the Commissioner of Labor and Industry on February 8, 2018.

Based upon a thorough review of the factual record, the relevant law, and the arguments made by both parties, the Commissioner affirms the citation

FINDINGS OF FACT

Morgan-Keller was engaged as the general contractor for repair work to be performed at a BB&T bank branch located on Liberty Road in Eldersburg, Maryland. LP Roofing was engaged as a subcontractor of Morgan-Keller to perform repair work on the roof over the drive-thru portico. On February 22, 2017, two MOSH compliance officers were on a random safety hazard patrol in Carroll County when they passed the bank branch that was under construction. (FF 3; Tr. 1 18-19)[1] The building was about 100 to 125 feet from the road and the compliance officers observed workers on the flat roof of the drive-thru portico that was attached to the bank building. The compliance officers decided to investigate the situation further and pulled into the bank's parking lot. From the parking lot, the compliance officer took photographs of the workers on the roof. (FF 3)

The four workers on the roof were employees of LP Roofing. (FF 6) They were removing roofing material from the drive-thru roof. The roof was approximately 14 feet, 8 inches from the concrete ground below. (FF 14) The employees were not wearing fall protection. (FF 8) Approximately ten minutes before the compliance officers arrived, Morgan-Keller's maintenance supervisor raised himself in an aerial lift device near the workers to assist the workers in removing roofing debris. (FF 5) He noticed that the workers were not wearing their personal fall protection devices that they had worn the previous day. (FF 5)

[1] "FF" refers to the findings of fact made by the Hearing Examiner in the Proposed Decision. "Tr. 1" refers to the transcript of the August 9, 2017 OAH hearing. Tr. 2 refers to the February 8, 2018 review hearing before the Commissioner.

Shortly after 10:00 a.m., a MOSH compliance officer approached the four roofers who were on the roof. (FF 8) The Morgan-Keller maintenance supervisor was still in the aerial lift near the workers. (FF 8; Tr. 31.) The MOSH compliance officer observed that the maintenance supervisor was wearing his personal fall protection device but the other workers were not. (FF 8; Tr. 32.) When asked how long the roofers had been working on the roof without their personal fall protection, the maintenance supervisor said about an hour. (FF 9) The compliance officer conducted an opening and a closing conference. On March 23, 2017, MOSH issued a citation to Morgan-Keller as a controlling employer under the multi-employer worksite doctrine.

DISCUSSION

In order to uphold the citation, the Commissioner must find that MOSH has demonstrated by a preponderance of the evidence that: (1) the standard at issue applies; (2) the Employer failed to comply with the standard; (3) employees were exposed to the violative conditions; and (4) the Employer knew or with the exercise of reasonable diligence should have known of the condition. *See, e.g., Astra Pharmaceutical Products, Inc.,* 9 O.S.H. Cas. (BNA) 2126 (R.C. 1981), *aff'd in part* 681 F.2d 69 (1st Cir. 1982).

Morgan-Keller argues that the citation should be vacated because (1) a more specific standard applies; (2) the inspection was initiated on improper grounds; and (3) MOSH improperly applied the multi-employer worksite doctrine. For the reasons set forth herein, the Commissioner rejects these arguments and affirms the citation.

The Cited Standard Applies

MOSH cited Morgan-Keller under 29 C.F.R. §1926.501(b)(10). This standard provides:

> (10) Roofing work on Low-slope roofs. Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected

> from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and safety monitoring system.

Morgan Keller argues that because the bank drive-thru was a flat roof, the cited standard does not apply. Morgan-Keller argues a more specific standard, 29 C.F.R. §1926.501(b)(1), applies.

29 C.F.R. §1926.501(b)(1) provides:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems or personal fall arrest systems.

The federal regulations distinguish between low-slope roofs and steep-slope roofs. A "steep-slope" roof has a slope ratio greater than 4 in 12 (vertical to horizontal) and a "low slope" roof has a slope ratio less than or equal to 4 in 12 (vertical to horizontal). The standard that Morgan-Keller argues applies is a more general standard for walking/working surfaces. The employees were engaged in roofing activities. A flat roof has a slope ratio less than or equal to 4 in 12. The standard referenced by Morgan Keller is less specific because it applies to any walking/working surface and is not limited to roofing. Moreover, several federal Occupational Safety and Health Review Commission cases cite 29 C.F.R. §501(b)(10) where the employees were engaged in roofing activities on a flat roof. *See e.g., Secretary of Labor v. Evelyn D. Komes d/b/a Economy Roofing and Sheeting*, 19 OSCH 2031 (2002); *Secretary of Labor v. Pete Miller, Inc.*, 19 OSCH 1257 (2000). *See also Maryland Commissioner of Labor and Industry v. Cole Roofing*, 368 Md. 459 (2002) (company engaged in installing or repairing flat roof on a high school cited under §1926.501(b)(10)). Accordingly, the Commissioner rejects Morgan-Keller's argument that a more specific standard applies.

The Inspection was Proper

Morgan Keller takes issue with the inspection on two grounds. First, Morgan-Keller argues that the compliance officer improperly entered the bank property and took pictures before conducting an opening conference. Morgan-Keller suggests that the compliance officer's testimony that he observed workers on the roof without fall protection from Liberty Road should not be credited and that the compliance did not have the right to enter the bank parking lot and begin taking photographs. Second, Morgan-Keller argues that the MOSH Field Operations Manual only provides for programmed and unprogrammed inspections and the inspection of the bank worksite did not meet the criteria for a programmed inspection because it was not based on "objective or neutral" criteria.

The compliance officer testified that at the time of the inspection, he and another compliance officer were on a routine safety hazard patrol in the Eldersburg area. (Tr. 51.) He offered uncontroverted testimony that as the passenger in a car driven by another compliance officer, he observed what appeared to be four workers on a roof without fall protection. (Tr. 18-19; 51.) The Hearing Examiner credited the compliance officer's testimony. (FF 3). Morgan-Keller offered no evidence to suggest that the compliance officer was not able to observe the roof from the road. In fact, the bank and the drive-thru are visible from the road in the pictures the employer offered into evidence. (Emp. Ex. 1.) The Hearing Officer further found that the bank parking lot was a public place.

Morgan-Keller argues that MOSH improperly relied on the photographs taken from the parking lot prior to initiating an opening conference. In support of its position, Morgan-Keller cites COMAR 09.12.20.03 and argues that the regulation provides the employer with an opportunity to object prior to the initiation of an inspection. Md. Code Ann., Lab. & Empl. §208(a) provides that "the Commissioner or authorized representative of the Commissioner may enter a place of employment where work is performed, without delay at any reasonable time, to (1) inspect the place of employment; (2) investigate all pertinent apparatus, conditions, devices, equipment, materials, and structures at the place of employment; and (3) question an agent, employee or employer."

The law gives the Commissioner or his representative the right to enter a workplace ***without delay at any reasonable time.*** Contrary to Morgan-Keller's argument, the regulations do not give an employer the right to "object" to an opening conference. Rather, the regulations set forth the procedures to be followed by an inspector "if an employer refuses to permit an inspector to conduct an inspection in accordance with the Act..." COMAR 09.12.20.03 (B)(1). Moreover, there is no evidence that Morgan-Keller objected or even attempted to object to the initiation of an opening conference. Finally, there is no requirement that evidence relied on by MOSH be acquired after an opening conference has been initiated. Accordingly, the Commissioner rejects this argument.

With regard to Morgan-Keller's second argument related to the selection criteria for the inspection, the MOSH Field Operations Manual ("FOM") provides for two general types of inspections. Unprogrammed inspections are conducted in response to hazardous conditions at a worksite and include allegations of imminent danger, catastrophes, and fatalities. Programmed

inspections are generally conducted in high hazard industries and are not conducted in response to allegations of hazardous conditions, injuries or other events that precipitate an unprogrammed inspection. The FOM also provides for Special Emphasis Programs which involve programmed inspections that may be limited in scope geographically or by other factors and are aimed at high hazard industries. The compliance officer testified that the inspection was part of a Local Emphasis Program which is a type of special emphasis program. The FOM expressly provides for special emphasis programs. The inspection was part of a local emphasis program in high hazard industries and the employer was engaged in a high hazard industry. Accordingly, the inspection was consistent with the MOSH FOM and was proper.

The Multi-Employer Doctrine Applies

COMAR 09.12.20.07(E) provides that on a multi-employer worksite, more than one employer may be cited for a violation of the MOSH Act or of a standard or regulation promulgated under the Act. The following employers may be cited: (a) the exposing employer; (b) the creating employer; (c) the controlling employer and (d) the correcting employer. Morgan-Keller was cited as the controlling employer. Morgan-Keller argues that it was not the controlling employer and that MOSH misapplied the multi-employer doctrine.

The regulations define a "controlling employer" as one "who is responsible, by contract or through actual practice, for safety and health conditions on the worksite, whether or not its own employees are exposed, such as an employer who has authority for ensuring that hazardous conditions are corrected." COMAR 09.12.20.07(B)(1). Morgan-Keller was the General Contractor for the project. It had a subcontractor safety policy that allowed it to remove anyone from the work site who violated Morgan-Keller's safety rules. Morgan-Keller's maintenance

supervisor acknowledged that he had the authority to stop the subcontractor's roofing work and require an employee of the subcontractor to leave the site for failure to abide by occupational safety and health rules. The maintenance supervisor was on an aerial lift next to the roofers assisting them with removing roofing debris. The Commissioner finds that Morgan-Keller was a controlling employer for purposes of the multi-employer doctrine.

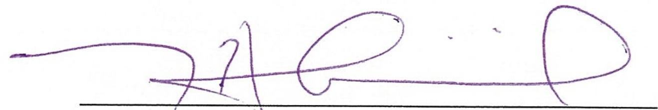
Morgan-Keller further argues that even if it could be considered a controlling employer within the meaning of the regulation, imposition of multi-employer liability is improper because none of Morgan-Keller's employees were exposed to the hazard and the hazard was not a physical condition of the worksite. It is undisputed that the only employees exposed to the hazard (lack of fall protection) were those of LP Roofing. The multi-employer doctrine does not require that the exposed employees be those of the controlling employer. The multi-employer doctrine does not make a distinction between physical conditions of the worksite and hazards that are personal to the employee such as a lack of fall protection. *See Secretary of Labor v. Summit Contractors*, 558 F.3rd 815 (8th Cir. 2009). In *Summit Contractors*, Summit was the general contractor for the construction of a college dormitory in Little Rock, Arkansas. An OSHA compliance officer observed the employees of a masonry subcontractor working on scaffolding 12 feet above the ground without fall protection. Summit was cited as a controlling employer under the multi-employer doctrine. The Eighth Circuit Court of Appeals held that Summit could be cited for the lack of fall protection even if Summit did not create the hazard and Summit's employees were not exposed to the hazard. *See also Secretary of Labor v. Evergreen Construction Company*, 26 OSCH 1615 (OSHRC 2017) (citation upheld by Occupational Safety and Health Review Commission where a general contractor was cited under the multi-employer

doctrine for the failure of a subcontractor's employees to wear fall protection.) Accordingly, the Commissioner rejects the employer's argument that MOSH misapplied the multi-employer doctrine.

Therefore, on this 10th day of July, 2018, the Commissioner hereby ORDERS:

1. Citation 1, Item 1 for a serious violation of 29 C.F.R. §1926.501(b)(10) with a proposed penalty of $1,275.00 is AFFIRMED.

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.



Matthew Helminiak
Commissioner of Labor and Industry