| IN THE MATTER OF | * | BEFORE THE |
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| | * | COMMISSIONER OF LABOR |
| WILLIAMS STEEL ERECTION | * | AND INDUSTRY |
| COMPANY, INC. | * | |
| | * | MOSH CASE NO. H1442-005-01 |
| | * | OAH CASE NO. DLR-MOSH-41-200000112 |

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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 Williams Steel Erection Company, Inc. ("Williams Steel" or "Employer"), alleging certain violations. On April 12, 2001, a hearing was held at which the parties introduces evidence, presented witnesses, and then filed post-hearing briefs. Thereafter, Yvette N. Diamond, Hearing Examiner, issued a Proposed Decision recommending affirming in part, and dismissing in part.

On August 17, 2001, the Employer filed a request for review. On October 25, 2001, 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, as recommended by the Hearing Examiner, Citation 1 for violation of 29

CFR 1926.501(b)(2)(i) is DISMISSED and Citation 1 for a violation of 29 CFR 1926.105(a) is AFFIRMED.[1]

## DISCUSSION

This case arises from a MOSH Inspector observing two employees installing roof decking approximately 48 feet above ground level. While the MOSH Inspector was observing and taking pictures of these employees, the inspector observed a third employee on the roof, who was later identified as the foreman. The Employer was cited for failing to have the necessary fall protection.

On review, the Employer challenges the Hearing Examiner's recommendation to find a violation of 29 C.F.R. 1926.105(a) on two grounds. First, the Employer contends that the Hearing Examiner erred in concluding that MOSH satisfied its burden of proving the prima facie elements of employee exposure.[2] Second, the Employer argues that the Hearing Examiner erred

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[1] Commissioner Kenneth Reichard ordered review and presided over the review hearing. Since Reichard is no loner Commissioner, James D. Fielder, Jr., Secretary of Labor, Licensing and Regulation has carefully reviewed the record in this case and issues this decision.

[2] At the review hearing, the Employer also challenged the fact that at the close of the inspection, the MOSH Inspector did not identify the apparent violations. An employer is provided the requisite due process notice of a violation upon receipt of the written citation. The fact that an inspector does not identify possible violations at the close of an inspection does not invalidate the inspection or any resulting citation. *Kisco Co. Inc.*, 3 O.S.H. Case (BNA) 1200, 1202 (1975). (compliance officer failure to tell employer of any known violations at the time of closing conference does not invalidate citation).

in assigning to the Employer the burden of proof in establishing the affirmative defense of employee misconduct.

To establish a violation, MOSH is required to prove, among other elements, that the "employees were exposed to or had access to the violative condition." *Dun-Par Engineered Form Co.*, 12 O.S.H. Case (BNA) 1962, 1965 (1986). The Employer challenges the issuance of the citations solely based upon the Inspector's observations, his pictures and his conversation with the foreman. The Employer argues that to establish exposure, the MOSH Inspector should have spoken with the two employees he observed on the roof, and asked them if they were wearing fall protection.

The Employer also contends that the MOSH Inspector should have asked the foreman how long he was on the roof, where he was located on the roof, and whether he was wearing fall protection. The MOSH Inspector asked none of these questions.

It is well established that MOSH must show "only the existence of the hazardous condition and its accessibility to employees to 'satisfy its burden of proving exposure.'" *Daniel Intern. Corp.*, 11 O.S.H. Case (BNA) 1305, 1309 (1983). In this case, the MOSH Inspector interviewed the Employer's foreman who identified the individuals on the roof as employees of the Employer.[3] The foreman also conceded that the employees were not wearing fall protection when he informed the MOSH Inspector that he did not think fall protection was necessary. Tr.at 34, 44; FF 10 &11. This evidence, and the testimony of the MOSH Inspector, is corroborated by

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[3] There is no requirement that MOSH establish the identity of the employees only that MOSH establish that the employees work for the cited employer. *R. Colwill Excavating Co.*, 5 O.S.H. Case (BNA) 1984, 1985-86 (1977) (not necessary to prove the personal identify of employee as long as employee exposure established).

photographic evidence that establishes two employees were installing metal decking on the roof of a 48 foot tall building and that they were not wearing fall protection. MOSH Ex 6. The questions to employees that the Employer contends should have been asked were therefore nonessential to a finding of exposure. Questions to the foreman regarding the duration of his stay or his exact location on the roof were also unnecessary to establishing exposure. The MOSH Inspector's photographs show an employee bending over at the edge of the roof. Further, the MOSH Inspector credibly testified that he observed the foreman on the roof within the zone of danger.[4] The evidence therefore establishes exposure of an employee, no matter how fleeting. *See Walker Towing*, 14 O.S.H. Case (BNA) 2072 (1991) (violation based on fact that exposure occurred, not on duration of exposure). Based upon this evidence, MOSH has demonstrated that in the course of the installation of the metal roof decking, it is "reasonably certain that some employee was or would be exposed to that danger." *Daniel*, 11 O.S.H. Case (BNA) at 1309.

The Employer's second challenge to the Hearing Examiner's decision relates to the burden of proof in establishing the affirmative defense of employee or supervisor misconduct. While this case was pending, the Maryland Court of Appeals affirmed the Commissioner's position that employee or supervisor misconduct if an affirmative defense which the employer is obligated to plead and prove. *See Commissioner of Labor and Industry v. Cole Roofing*, 368 Md. 459 (2002). The Employer did not introduce any evidence on this issue, and therefore, has failed to prove this affirmative defense. The Hearing Examiner's recommended conclusion that

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[4]There are no strong reasons to overrule the Hearing Examiner's credibility determination. *Anderson v. Dep't of Public Safety and Correctional Services*, 330 MD. 187, 216-17 (1993).

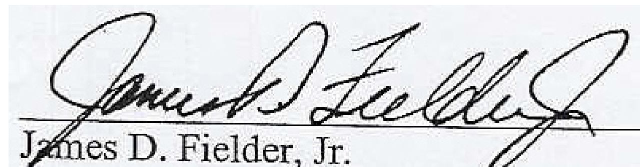
MOSH has proven the *prima facie* elements to establish a violation of 1926.105(a) is therefore affirmed.

**ORDER**

For the foregoing reasons, the Secretary of Labor, Licensing and Regulation on the 16th day of October, 2003, hereby **ORDERS**:

1. Citation 1, alleging a serious violation of 29 CFR 1926.501(b)(2)(i) **DISMISSED** and the alternative Citation 1 alleging a serious violation of 29 CFR 1926.105(a) with a penalty of $2,400.00 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.




Secretary, Department of
Labor, Licensing and Regulation