IN THE MATTER OF	*	**BEFORE THE MARYLAND**
	*	**COMMISSIONER OF LABOR**
U.S. HOME CORPORATION	*	**AND INDUSTRY**
	*	**MOSH No. P5723-020-00**
	*	**OAH No.DLR-MOSH-41-200000057**

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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 U.S. Home Corporation (the Employer), alleging a violation of certain standards. Following an evidentiary hearing, Michael J. Wallace, Hearing Examiner issued a Proposed Decision affirming the citations.

The Employer filed a timely request for review. The Commissioner of Labor and Industry (the Commissioner) held a hearing and heard argument from the parties on March 29, 2001. Based upon a review of the entire record and consideration of relevant law and the parties'arguments,[1] the

[1] Herein, the Hearing Examiner's Proposed Decision is referred to as "Proposed Decision"; the Hearing Examiner's Findings of Fact as "FF"; the transcript of the record before the Hearing Examiner as "T.__"; MOSH's exhibits as "MOSH Ex.__;"and the transcript of the March 29, 2001, review hearing as "Rev. T. __."

Commissioner has decided to affirm the Hearing Examiner's findings of fact,[2] and to adopt his conclusions of law, as modified.

CONCLUSIONS OF LAW

The Employer, a building contractor, maintained control over a townhouse construction project in Harmons, Maryland, where B&G Roofing LLC (B&G) was the roofing subcontractor. The citation alleges that employees of B&G were working on a steep roof without fall protection in violation of 29 CFR 1926.501(b)(11). The credited evidence establishes that on December 2, 1999, two B&G employees were on the roof of a townhouse under construction applying shingles, in plain view, without fall protection. FF 5, 6, 8, and 13; Proposed Decision at 9; MOSH Ex. 4. When MOSH Inspector Pursley advised the Employer's construction manager, Anthony Gourley, that the employees working on the roof without fall protection, Gourley replied that the workers had been warned previously about this conduct. FF 13.

Based on this credited evidence, the Hearing Examiner found that MOSH met its burden to establish a *prima facia* case. Specifically, he found the cited standard applies, the terms of the standard were not met, employees were exposed to the violative condition, and the Employer knew, or with reasonable care should have known of the condition with the exercise of reasonable diligence. *See, Daniel Intern'l Corp.*, 9 OSHC 2027, 2030 (1981). The Hearing Examiner further found that the Employer failed to establish and affirmative defense under *Anning-*

[2] In his findings of fact, the Hearing Examiner found that MOSH Inspector Jesse Pursley arrived at the job site at 12 noon and at that time observed the two employees working on the roof. FF5 and 6. Elsewhere in his decision, the Hearing Examiner found that Pursley observed the workers "placing and affixing shingles to the roof at approximately 2 p.m….." Proposed Decision at 9. Pursley's credited testimony supports a finding that he observed the employees working on the roof at about 2 p.m. Finding of Fact 5 is therefore

Johnson/Grossman,[3] and therefore recommended that the violation and the proposed penalty of $2,450 be sustained. The Employer seeks reversal. The Employer excepts to the Hearing Examiner's credibility findings and argues, *inter alia*, that had the Hearing Examiner credited construction manager Gourley and applied OSHA's multi-employer citation policy, he would have found the Employer exercised reasonable care to prevent the violation and dismissed the citation. MOSH urges adoption of the Hearing Examiner's proposed decision.

With respect to the credibility determinations, the Hearing Examiner found MOSH Inspector Pursley to be a "candid and consistent" witness and credited his testimony over that of the Employer's construction manager Gourley, whose testimony he found "largely self-serving and not credible." The Hearing Examiner found that Gourley inspected the work site at about 9 a.m. and 12:30 p.m. FF 12. He discredited Gourley's claim that at the time of these inspections, B&G employees were wearing fall protection equipment. Proposed Decision at 8. The Hearing Examiner also discredited Gourley's testimony that at the time of the MOSH inspection, these employees were ending their work day and no longer working on placing shingles on the roof. Id. at 8-9. Additionally, the Hearing Officer discredited Gourley's denial that he told Pursley during the

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corrected to reflect that Pursley arrived at about 2 p.m.

[3] *Anning-Johnson Company*, 4 O.S.H.C. (BNA) 1193 (1976); *Grossman Steel & Aluminum Corp*., 4 O.S.H.C. (BNA) 1185 (1976). In *Commissioner of Labor and Industry v. Bragunier*, 111 Md. App. 698, 717-18 (1996), the Court of Special Appeals described this test as a "common-sensical" approach to evaluating the responsibility of any given employer on a multi-employer work site. To successfully defend against a citation, an employer must establish that it neither created nor controlled the hazard. Further, the Employer mush show "either that its exposed employees were protected by other realistic measures taken as an alternative to literal compliance with the cited standard or that it did not have, nor with the exercise of reasonable diligence could have had notice that the condition was hazardous." *Id.* at 717.

inspection that he was aware the employees were on the roof without wearing fall protection and had warned them earlier about working without fall protection. *Id*. at 9.

The Commissioner has carefully reviewed the record, and finds no strong reasons why the Hearing Examiner's credibility findings should be reversed. *Anderson v. Department of Public Safety & Corrections Servs.*, 330 Md. 187, 216-17 (1993). The Hearing Examiner's finding that employees were working at the time of the December 2 MOSH inspection, is supported by the written warning issued by the Employer to B&G just three days before the MOSH inspection, charging B&G with "not using safety lines." MOSH Ex. 6. That warning, supplied to MOSH by the Employer, places the time of the violation at 2 p.m., about the same time MOSH inspection, Pursley observed the workers laying shingles without fall protection equipment. Gourley's testimony is also contradicted by photographs taken by Pursley showing employees working on the roof without fall protection, and by Pursley's uncontradicted testimony that after the workers were directed to come down, one returned to the roof donning fall protection equipment. MOSH Ex. 5a and B; T. 24, 28-30, and 69. The Commissioner therefore finds the record as a whole supports the Hearing Officer's finding that employee were working on the roof without fall protection equipment. Accordingly, the Commissioner affirms the Hearing Examiner's finding that the terms of the standard were not met and that employees were exposed to the hazard.[4]

[4] Moreover, 29 C.F.R. 1926.501(b)(11) plainly states that "*[e]ach employee* on a steep roof…shall be protected from falling…" [emphasis added]. In contrast, 29 CFR 1926.501(b)(10), entitled "Roofing work on Low-slope roofs," the standard immediately preceding the cited standard, expressly limits its applicability to roofing work. Thus, even if the employees had taken the harnesses off and "were finishing up" as they reported to Pursley during his investigation T.42), they were not complying with the standard. *Secretary of Labor v. Field & Associates Inc.*, 19 OSHC 1379, 1380 (2001).

With respect to knowledge, the credited evidence establishes that B&G employees were working on a roof without fall protection in plain view of the Employer's trailer. The Employer was aware of the B&G employees' noncompliance with the cited standard. Just a few days before the MOSH inspection, the Employer had issued B&G a warning for the same infraction. Gourley admitted conducting multiple site inspections on December 2, before the MOSH inspector arrived. The Hearing Examiner discredited Gourley's testimony that employees were wearing fall protection at time of his inspections. Further, when Pursley advised Gourley of the violation, the latter replied that workers had been warned previously about their failure to wear fall protection. Based on this evidence the Commissioner affirms the Hearing Examiner's finding that the Employer knew or should have known of the violation, and that MOSH established all elements of a *prima facia* case.

The Commissioner finds no merit to the Employer's contention that the Hearing Examiner should have applied the multi-employer work-site policy rather than assessing the evidence under the *Anning/Johnson* standard. The multi-employer work-site policy, published by OSHA directive after the citation in this case issued, provides a gauge to determine whether or not an employer on a multi-employer work site should be cited for the violation of a specific standard. OSHA Directive No. CPL 2-0.124 (December 10, 1999). The policy does not state any intention to change the standard of proof necessary for OSHA to establish a *prima facia* case. The multi-employer citation policy, in relevant part, explores whether there is evidence that the controlling employer has failed in its duty to prevent and detect violations on the site. If the investigation shows that the employer has met this duty, a citation should not issue. In this sense, the policy explores whether the controlling employer could reasonably defend its conduct at at hearing on the grounds that it took

realistic measures to protect exposed employees, or that it could not have noticed the hazardous condition as the *Anning/Johnson* defense provides. The Commissioner finds that the Hearing Examiner applied the proper standard in assessing the merits of the instant case, and for the reasons set forth in the Proposed Decision, finds that the Employer failed to present adequate evidence to support the *Anning/Johnson* defense.

For the reasons set forth above, and by the Hearing Examiner, the Commissioner finds that MOSH has met its burden of proof to establish the violation alleged, and that the Employer has failed to sustain its burden under *Anning/Johnson Grossman*. Accordingly, the Commissioner sustains the citation and the proposed penalty.

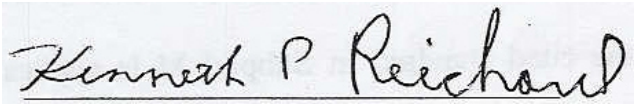
ORDER

For the foregoing reasons, the Commissioner of Labor and Industry, on the 21st day of October, 2002, hereby Orders:

1. The Citation alleging a serious violation of MOSH Standard 29 C.F.R. §1926.501(b)(11) by U.S. Home Corporation is AFFIRMED.

2. The penalty of $2,450.00 for the Citation, is AFFIRMED.

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



KENNETH P.REICHARD
Commissioner of Labor and Industry