| IN THE MATTER OF   | * | BEFORE THE DEPUTY COMMISSIONER       |
|--------------------|---|--------------------------------------|
|                    | * | OF LABOR AND INDUSTRY                |
| THE ROOFING CENTER | * | <b>HEARING DETERMINATION NO.98-9</b> |
|                    | * | MOSH CASE. NO. J-2659-010-97         |
|                    | * | OAH NO.97-DLR-MOSH-41-012031         |
|                    | * |                                      |
|                    | * |                                      |
|                    |   |                                      |

## FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational and Safety Health Act, Labor and Employment Article, Title 5, *Annotated Code of Maryland*. Following an inspection, the occupational safety and health unit of the Division of Labor and Industry ("MOSH") issued a citation to the Roofing Center, Inc. ("Roofing Center" or "Employer") alleging violations of the MOSH safety standards. The Employer contested the citation. Following an evidentiary hearing, Hearing Examiner Michael J. Wallace issued a Proposed Decision dismissing the citation. The Deputy Commissioner of Labor and Industry ordered review of the Hearing Examiner's decision. The Deputy Commissioner heard oral argument from the parties. Based upon a review of the entire record, consideration of the relevant law, and the parties' arguments, the Deputy Commissioner affirms the Hearing Examiner's findings of fact and conclusion that the citation is dismissed.<sup>1</sup>

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<sup>&</sup>lt;sup>1</sup> Although the Deputy Commissioner agrees with the Hearing Examiner's dismissal of the citation, she does not adopt portions of the Hearing Examiner's legal analysis. First, the Deputy Commissioner concludes that Baker was a supervisor with knowledge of the violation, and therefore, the Employer had knowledge of the violative condition. *See Sec. Of Labor v. Jersey Steel Erectors*, 16 OSHC 1162, 1164 (1993)(actual or constructive knowledge of supervisor or foreman imputed to employer). Second, the Deputy Commissioner notes that it is the Employer's burden to plead, and prove, unpreventable employee misconduct as an affirmative defense. *See Cole Roofing Co. Inc.*, MOSH Case No. A5478-006-98 (1998); *Explosive Experts, Inc.* MOSH Case No.V2246-027-93 (1994). The record in this case supports the conclusion that the Employer successfully met its burden of establishing that Baker engaged

## ORDER

The Deputy Commissioner of Labor and Industry hereby ORDERS, this  $\underline{27}^{\underline{\text{th}}}$ \_day of January, 1999, that:

- 1. Citation 1, alleging a SERIOUS violation of MOSH Standard 29 C.F.R. 1926.501(b)(4)(I), is DISMISSED;
- 2. This Order becomes final 15 days after its issuance. Judicial review may be requested by filing a petition for judicial review in the appropriate circuit court. *See Labor and Employment Article*, § 5-215, *Annotated Code of Maryland*, and Maryland Rules, Title 7, Chapter 200.

Oleana C. O Brien

Ileana C. O'Brien

Deputy Commissioner of Labor and Industry

in unforeseeable employee misconduct.