COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4133-04, 4131-04

COMMISSIONER OF DEPARTMENT OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

MOREL CONSTRUCTION CO, INC
KOKER DRILLING COMPANY — RESPONDENTS

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes to us on petitions for discretionary review[1] filed by complainant and respondent Morel after the hearing officer issued her recommended order. In addition to briefs filed by the parties, the department of labor moved to strike a portion of Morel's brief. Morel then responded to the motion to strike.

At the time of the inspection in this case, performed by a compliance officer for the executive director of the office of occupational safety and health[2], Morel worked on a project as a general contractor for the Kentucky Fair and Exposition Center in Louisville. Koker at the same time was a subcontractor for Morel. GEM Engineering had contracts both with Morel and the fair and exposition center. All three companies received citations; GEM has settled its case with the department of labor. Recommended order, page 2 (RO 2).

Before disposing of this case on the merits, we will briefly outline the function of the review commission. KRS 338.071 (4) authorizes the review commission to "...hear and rule on appeals from citations..." KRS 338.081 (3) then says "After hearing an

[1] Section 48 of our rules of procedure, 803 KAR 50:010.
[2] KRS 338.041 and KRS 338.101.

appeal, the review commission may sustain, modify or dismiss a citation or penalty." This means when the commission calls the case for review, either on its own motion or that of a party, the commission becomes the ultimate fact finder. The commission may adopt the hearing officer's recommended order or reject it and make its own decision. In Brennan, Secretary of Labor v Occupational Safety and Health Review Commission and Interstate Glass Co[3], 487 F2d 438, 441 (8th Cir. 1973), CCH OSHD 16,799 at page 21,538, the eighth circuit said, interpreting a federal statutory scheme almost identical to Kentucky's, when the federal commission reviews a case, it does so "de novo[4]."

Morel at the time of the inspection was installing piers for a new building at the fair and exposition center. Prior to erecting the piers, it was necessary to dig round footings or caissons into which bases for the piers would be built. Transcript of the evidence, pages 154, 163-165 (TE 154, 163-165). On March 18, 2004, and at other times before that, Koker used a 50 ton crane to lift a GEM employee into a 30 foot caisson to test the rock socket, the bottom of the hole, to see if it was sound so that concrete could be poured. TE 72-73, 107, 133. Mr. Rodriguez, the lifted GEM employee, testified he wore a harness[5] at the time he entered the hole. TE 107-108. He testified he was lifted into approximately 150 holes and each time a crane was used. TE 108. During the lift into the caisson on March 18, 2004, Mr. Rodriguez experienced breathing difficulty. TE 27. Mr. Rodriguez said he was overcome by carbon monoxide while inside the hole on

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[3] In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2001), the supreme court said "As KOSHA [KRS chapter 338] is patterned after the federal act...KOSHA should be interpreted consistently with federal law." See footnote 4.

[4] See Accu-Namics, Inc v OSHRC, 515 F2d 828, 834 (5th Cir. 1975), CCH OSHD 19,802 at page 23,611, where the court said "the *Commission* is the fact-finder."

[5] Compliance officer Nelson said Mr. Rodriguez sat on a seat board built into the harness. TE 141.

March 18 and was taken to Jewish Hospital; he remained off work for two days. TE 110.

Complainant department of labor charged both Morel and Koker with using a crane to lift an employee "into numerous 20-40 feet drilled piers." Exhibits 3 and 4. The cited standard, 29 CFR 1926.550 (g) (2)[6], says in part:

> *General requirements.* The use of a crane...to hoist employees...is prohibited, except where the erection, use, and dismantling of conventional means of reaching the worksite, such as a personal hoist, ladder, stairway, aerial lift, elevating work platform or scaffold, would be more hazardous, or is not possible because of structural design or worksite conditions. (emphasis added)

Mr. Rodriguez testified a crane was always used to lift him. TE 108. Compliance officer Nelson testified a manlift was safer than a crane because the manlift operator would stand at the top of the hole and because the movement of the lifted employee would be slower and more controlled than when using a crane. TE 95-97. The compliance officer said the terrain at the worksite was flat, making the use of a man lift possible and safer than a crane. TE 94, 97. Mr. Kennedy, a GEM employee, told the compliance officer a crane "was quicker and they could get the job done faster." TE 95.

The compliance officer said the tripod that should have been used would have three legs and a cable attached to a winch. TE 95-96.

Before the hearing began, the department of labor amended the citations against Morel and Koker to include a confined space violation. See labor's motion of December 20, 2004 and the order of January 13, 2005. Morel filed an amended answer which referred to the amendment.

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[6] Incorporated by reference in Kentucky by 803 KAR 2:413.

A confined space is a place having limited means for exit and entry; it has the potential for an inadequate or toxic atmosphere. 803 KAR 2:200 , section 1. Basically, a confined space is hard to get in and out of. If an employee is injured or becomes unconscious, rescue is difficult. Sections 1 and 4.

Labor's amended citation said "Ladders or other safe means were not used to enter or exit confined spaces exceeding four...feet in depth."

In her recommended order Hearing Officer Susan Durant found Morel was the controlling employer meaning it could have prevented the "in-hole testing if it had desired." RO 5. Our hearing officer found Koker was the employer who created the hazard when it lifted Mr. Rodriguez, a GEM employee, into the holes. RO 6. We agree.

Hearing Officer Durant sustained the serious citations issued to Morel and Koker, as amended, but modified the penalties as is her prerogative. Sections 36 and 47, 803 KAR 50:010. She found Morel to be the controlling employer because it could have prevented the "in-hole testing." RO 5.

When labor issued Morel's citation, it carried a penalty of $3,250; Koker's proposed penalty was $4,000.

To fix penalties for both companies, labor's compliance officer first determined the gravity based penalty which has two factors: the seriousness of an injury and the probability of an injury. She rated the seriousness of the injury as high (high, medium and low being the choices for severity) for both companies because the work took place inside the caisson where it was possible the worker could be caught. The caisson could, and here did, contain carbon monoxide gas. And the crane, as explained by the compliance officer, was too powerful we infer to be used to lift a worker. Compliance

officer Nelson said, about using a winch on a tripod versus a crane, "it's [the winch] going to come up much slower. That crane's just going to bring him out." TE 98, 100, 101.

Then the compliance officer discussed the probability of an injury, the second factor which makes up the gravity based penalty. She said she could award either greater probability or lesser. She found greater probability of an injury because the employee had to be taken to the hospital for exposure to carbon monoxide. TE 101.

Once the gravity based penalty is set, using the factors of seriousness of an injury and the probability of an injury, then the penalty may be adjusted downward according to certain credits: the size of the employer measured by the number of employees, the good faith of the employer measured primarily by the existence and utilization of an employer's safety and health programs, and the history of prior serious violations. 803 KAR 2:115 (2)

Before the hearing officer discussed the various credits for the two employers, she concluded the severity assessment should be medium rather than high because she said the most likely injury would be bruises from hitting the smooth sides of the caissons. RO 6. She also reduced the probability to lesser; she said, "Because there were the reasonable explanations of industry practice [use of the crane to hoist employees], precision of testing, and wet ground, the choice of using the crane was not illogical or overly hazardous." She said Mr. Rodriguez was harmed, not by the use of the crane, but by the carbon monoxide gas. RO 7.

Our hearing officer found the "unadjusted penalty for medium severity, lesser probability...is $2,000." RO 7. Although 60% is the highest credit offered a business for

size, the division of compliance awarded only 10% for credit to Morel and Koker. As explained by Steve Sparrow, director of compliance, the field operations manual called for the 10% for history "when a small business has one or more serious violations with high gravity...indicating a lack of concern for employee safety..." TE 118.

Compliance officer Nelson awarded Koker 25% credit, the maximum permitted, for good faith (the presence and implementation of employee safety programs) and 15% to Morel. Each company got 10% for past citation history, the maximum permitted by the compliance manual. Our hearing officer accepted those figures.

But our hearing officer found 60% for size should have been awarded because as she said, "there was no evidence as to why these citations were so egregious as to merit such a minor reduction." RO 8.

Morel had credits of 60% for size, 15% for good faith and 10% for history which, with an unadjusted penalty, resulted in a penalty of $300 as established by the hearing officer. Koker with a 25% credit for good faith, as well as 60% for size and 10% for history, received a penalty of $100 from the hearing officer. RO 8 and 9.

In its brief to us Morel asks whether there was a violation of 29 CFR 1926.550 (g) (2) at all? To answer that question, we must first reexamine the cited standard which for the purposes of this case says in part:

> The <u>use of a crane is prohibited</u> except where...use...of conventional means of reaching the worksite, such as a personal hoist, ladder...would be more hazardous...
>
> 29 CFR 1926.550 (g) (2)
> (emphasis added)

According to a plain reading of the standard, "use of a crane is prohibited" with exceptions. Although the complainant has the burden of proof in these cases (803 KAR

50:010, section 43 (1)), when a standard contains an exception, "...the burden of proving the exception lies with the party claiming the benefit of the exception." Metric Constructors, Inc[7], a federal administrative law judge decision, CCH OSHD 30,241. It falls, then, to Morel and Koker to prove the use of a personnel hoist or a ladder would be more hazardous than the crane. Morel in its brief says use of a crane is "accepted industry practice." At page 5. Industry practice, however, is not one of the exceptions listed in the standard; the occupational safety and health regulations have prohibited many industry practices. When a standard is written, its language presumes a hazard. Austin Bridge Co, CCH OSHD 22,675 at page 29,021, 6 BNA OSHC 1496, 1497. We concur. Use of a crane to lift an employee is therefore presumptively hazardous so the only way for an employer to avoid a citation is to fit within an exception.

Morel first cites us to a federal standards interpretation on the use of cranes to lift personnel in drilled pier operations, 01/28/1992; Morel says the interpretation "permits the use of a crane...when the jobsite conditions make the use of other mechanical means inappropriate." Brief at 7. The January 28 interpretation says "A boatswain chair suspended by reliable hoisting equipment utilizing an A-frame can be used..." Then the letter goes on to say "if jobsite conditions prevent the use of A-frame equipment or the use of such equipment would be more hazardous than the use of a crane, a mobile crane can be used..."

Then the 05/22/1998 standards interpretation letter on hoisting workers on crane load lines (boatswains' chair), also relied upon by Morel, reiterates that a crane could be used to life an employee "if using an A-frame would be more hazardous than using a

[7] We cite federal review commission decisions when we find them persuasive as we do here. Because Kentucky has a state occupational safety and health program (KRS chapter 338), we are not bound by federal precedent.

crane..." The May 22 letter said an employee could be lifted into a drilled foundation pier using an A-frame and a bosun's chair. Both letters say an employer may only use a crane when a A-frame, or tri-pod, would be more hazardous. Neither letter is helpful to Morel or Koker.

Respondent witness Richard Tingle testified he had never seen any other method used for hoisting into a caisson other than a crane. TE 40. While Mr. Tingle may have not been aware of the use of an A-frame, the federal department of labor was better informed.

In the case at bar the only proof the work site prevented the use of an A-frame was Morel's testimony to the effect the site was muddy. That testimony was countered by the compliance officer who said the ground was flat but had mud on top. TE 73. She then said the ground could be cleaned off using a backhoe. TE 94-95. Photographs taken by the compliance officer during her inspection and entered into evidence confirm the ground at the fairgrounds was basically flat Exhibit 2, numbers 16, 17, 18, 19. Although we note mud in the photographs, photograph number 18 shows the crane on level ground with mud right next to it but not underneath it. If a space were clear or made clear for a crane, the same would be true for an A-frame.

We find the conditions on the job site would not have prevented the use of an A-frame or similar device to do the hoisting. Because Morel and Koker did not prove the use of a personal hoist or ladder would be more hazardous, we conclude respondents violated the cited standards and sustain the citations.

Next Morel asks whether it was a controlling employer? Morel in its brief, however, concedes it was a controlling employer, at least in so far as the hearing officer found. Morel brief on discretionary review at page 9.

In Brennan, Secretary of Labor v Occupational Safety and Health Review Commission and Underhill Construction Corp, 513 F2d 1032, 1038 (CA2 1975), CCH OSHD 19,401, the second circuit held an employer in the construction industry could be cited for a violation of the standards even though none of its own employees were exposed to the hazard. In an effort to explain this multi-employer worksite doctrine to its employees, the US department of labor, occupational safety and health administration, issued an OSHA directive, CPL 02-00-124[8], multi employer citation policy. The directive listed four types of employers on a construction worksite where a hazard existed: a creating employer, an exposing employer, a correcting employer and a controlling employer. For our purposes Morel was the controlling employer because it had the "general supervisory authority over the worksite, including the power to correct...violations or require others to correct them[9]." This, as our hearing officer found and Morel conceded, was Morel's position on the jobsite with regard to the instant crane citations. Morel argues it could not be the controlling employer under step 2 of the analysis found in the directive because it acted reasonably in the discharge of its responsibilities on the worksite. But here is what the directive says:

> A controlling employer must exercise reasonable care to prevent and detect violations. The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its employees...Less frequent inspections may be appropriate where the controlling employer sees strong indications

[8] These standards interpretations and directives can be found at www.OSHA.gov.
[9] CPL 02-00-124, X, E, 1.

> that the other employer has implemented effective safety and health efforts. (emphasis added)
> CPL 02-00-124, X, E, 2 and 3e.

Morel in its brief says the hearing officer found the explanation of the use of the crane to perform the hoisting to be reasonable, thereby exonerating Morel. To the extent that our hearing officer did find use the crane to perform the lift reasonable, we reverse. The cited standard prohibits the use of a crane to perform a personnel lift unless the respondent proves other techniques permitted by the standard are more hazardous. As we have already found, neither Morel nor Koker proved the use of an A-frame or similar device was more hazardous than the crane.

Under the directive Morel would have had a 'lesser duty to inspect' it if proved the other employer, here Koker, has "implemented effective safety and health efforts." This Morel could not prove. Mr. Rodriguez testified he had been lifted into a caisson approximately 150 times on this particular jobsite, more than time enough on this wide open, flat construction site for Morel to discover the crane violation and put a stop to it. Koker violated the standard by lifting Mr. Rodriquez; Morel violated the standard under the multi-employer worksite doctrine because as the controlling employer it failed to stop the practice.

Next Morel argues the citations should have been nonserious.

The statute defines a serious violation as existing "...if there is a substantial probability that death or serious physical harm could result from a condition..." KRS 338.991 (11). Compliance officer Nelson rated the violation as high serious (high, medium and low being the three possibilities) because of the atmospheric and physical risks presented to employees hoisted by a crane into the caissons. TE 99-100. She said

"if the crane failed they had no way of removing this man until they could tie it off, bring another piece of equipment over, cut the line and then bring him out." TE 140. She said if the employer had used what she called a "tri-pod" rather than the crane, two lines would be available: one for lifting the employee and a second safety line. TE 140.

Compliance officer Nelson explained the operator of the tri-pod would stand directly over the hole so he could observe the employee during the lifting. TE 144. She said a crane operator, however, could not see the employee in the hole because of the angles involved (see photograph 18, exhibit 2). TE 143-144. Then if for some reason the employee became jammed in the caisson tube, the crane operator would not have time to react before causing injury attributable to the speed and power of a crane. TE 144. These caissons were, in the main, 30 to 36 inches in diameter. TE 35.

Our hearing officer found the "most likely injury from the use of the crane would be bruises or abrasions from hitting against the side of the caisson, thus the severity assessment would be medium." RO 6. While we value the work of our hearing officers, we disagree with our hearing officer's finding of medium severity in this instance and set it aside. Our statutes give the full commission the right under KRS 338.071 (4) to "hear and rule on citations" and to sustain, modify or dismiss a citation and penalty. KRS 338.081 (3). We find the severity of the violation in this case to be high serious as described by the compliance officer.

Given the diameter of the caissons, the length (30 feet) of the caisson Mr. Rodriguez entered on March 18, 2004 when he was overcome by carbon monoxide and the fact Mr. Rodriguez was sitting on a board during the lifts with, we infer, his knees extended in front of him, we find compliance officer Nelson's description of the potential

for the employee being jammed in the caisson and then subject to the very powerful forces exerted on him by the 50 ton crane to be quite compelling. Should the employee sitting on the board become jammed while inside the caisson and then lifted unexpectedly, we find that an injury would be very serious indeed - high serious according to the compliance officer. Ms. Nelson said if an employee became wedged in the caisson space and then wrenched out with the powerful crane, the force could "literally...tear his body apart." TE 144.

Compliance officer Nelson also said an employee in a caisson could encounter an atmosphere with insufficient oxygen or "methane which is a natural gas down under ground. You could have hydrogen sulfide...You can find carbon monoxide." TE 147. Recall that Mr. Rodriguez was overcome with carbon monoxide on March 18, 2004 during one of the lifts[10] and spent two days off of work. TE 110. Mr. Rodriquez's injury from inhaling the carbon monoxide, although not cited, underscores the credibility of Ms. Nelson's testimony about the seriousness of the violation.

Considering the evidence in this case which supports our finding that an accident inside a caisson could have very serious consequences, we find the violation to be serious - and for penalty purposes high serious. We find an employee so hoisted into a 30 to 36 inch diameter caisson by a crane could suffer a broken limb by a sudden, powerful extraction or death from a problem with the air inside the tube[11]. It is difficult for us to imagine a violation involving an employee suspended in a narrow, confined space which would be anything but serious.

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[10] We have used the words lift and hoist interchangeably in this decision.

[11] While respondents were not charged with exposing the employee to the carbon monoxide, the amended citation charged respondents with a confined space violation. Confined spaces, as the definition section sets out, have the potential for accumulation of toxic or explosive gases as well as the presence of air with inadequate oxygen. 803 KAR 2:200 (1).

A serious violation exists "if there is a substantial probability that death or serious physical harm could result..." (emphasis added) KRS 338.991 (11). At this point the issue is how probable must an injury be to find a violation. In California Stevedore and Ballast Co v OSHRC, 517 F2d 986, 988 (CA9 1975), CCH OSHD 19,671, the ninth circuit said:

> Where violation of a regulation renders an accident resulting in death or serious injury possible, however, even if not probable, Congress could not have intended to encourage employers to guess at the probability of an accident in deciding whether to obey a regulation. At 988.

California Stevedore says if an employer sees a hazard, he cannot then say to himself 'yes, but an accident is really not likely to happen so I do not have to do anything.' In reaching its conclusion, the ninth circuit in California Stevedore said "Congress clearly intended to require employers to eliminate all foreseeable and preventable hazards. National Realty and Construction Co v OSHRC[12], 489 F2d 1257, 1265-67 (DC Cir 1973)." Our Kentucky statute, we have a state OSHA program, says the General Assembly intended to prevent "any detriment to the safety and health of all employees." KRS 338.011.

We conclude the citations issued to Morel and Koker and sustained here were properly characterized as serious.

Director of Compliance Steve Sparrow testified for the department of labor. He said he exercised his authority as director to reduce the credit for size from 60% for a small company, both Morel and Koker qualified, to 10% because they were "small" businesses with "one or more serious violations with high gravity...indicating a lack of concern for employee safety and health..." TE 118. Our hearing officer chose to ignore

[12] CCH OSHD 17,018.

labor's award of 10% credit for size and instead used the standard 60% credit for small employers. We agree. We are troubled by unanswered questions. Why, for example, does this 10% credit apply to a small company but not perhaps a large one? If the complainant applied the 10% for size only to small companies, is the division discriminating against small companies? May a small company be cited for a willful violation (KRS 338.991 (1)) and still receive the 60% credit? If so, what is the difference between our willful example and the case at bar? Because of our unanswered questions, we will take 60% for size for both Morel and Koker.

On a larger scale we are frustrated by the lack of detail in this case about the calculation of the penalties. When the compliance officer began her testimony about the penalty calculation, she said a gravity based penalty was derived from two factors: the severity of the violation and the probability of an injury. TE 101. She found a gravity based penalty based on a high serious violation and greater probability of an accident. But she did not say what the amount of the gravity based penalty, the unadjusted penalty, was. We do note on page 103 of the transcript, however, she testified Koker's proposed penalty was $4,000. She said she arrived at that figure using a total credit of 20%. If our math is correct, a proposed penalty of $4,000 derived from total credits of 20% means the gravity based penalty for high serious and greater probability must have been $5,000[13] and we so find.

We agree with the compliance officer's determination the gravity based penalty factors are high seriousness and greater probability of an injury - Mr. Rodriguez did go to the hospital on March 18 and was off of work for two days; this means both companies started out with gravity based penalties of $5,000. We accept our hearing officer's credits

[13] $4,000/.8 = 5,000. Or 5,000 * .2 = 1,000. Then 5,000 - 1,000 = $4,000.

of 60% size, 15% good faith and 10% history for Morel but with a 25% credit for good faith for Koker. Thus the penalties we set, according to our authority found in KRS 338.081 (3), is $750[14] for Morel and $250 for Koker for the serious citations issued to them in this case.

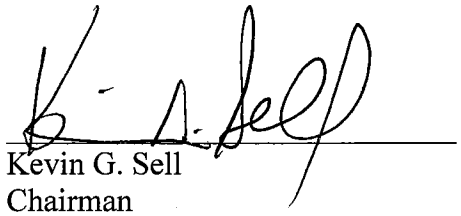
We come finally to labor's motion to strike and Morel's response. We deny labor's motion. We do not find Morel's arguments based on the FOM to be persuasive.

We affirm our hearing officer's recommended order to the extent it agrees with our decision in this case.

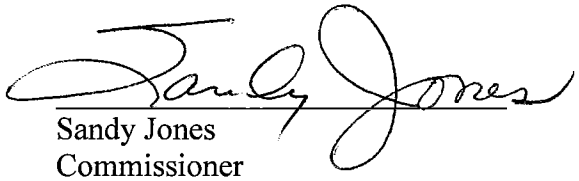
It is so ordered.

Entered this October 3, 2006.

KENTUCKY OCCUPATIONAL
SAFETY AND HEALTH
REVIEW COMMISSION:



Kevin G. Sell
Chairman



Sandy Jones
Commissioner

[14] $5,000 * .85 = 4,250. Then 5,000 - 4,250 = $750.

Certificate of Service

I certify a copy of the foregoing decision of this commission on October 3, 2006 has been served on the following in the manner indicated:

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