COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4550-07

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

BEN HUR CONSTRUCTION COMPANY — RESPONDENT

* * * * * * * * * *

Mark F. Bizzell, Frankfort, for the secretary. Robert A Dimling, Cincinnati, and Joy W. Stransky, Louisville, for Ben Hur.

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes to us on Ben Hur's petition for discretionary review (PDR) of the hearing officer's recommended order. We called the case for review and asked for briefs. Sections 47 (3) and 48 (5), 803 KAR 50:010 (ROP 47 (3) and 48 (5)). Ben Hur says the hearing officer erred when he affirmed a serious citation which alleged a violation of the general duty clause. KRS 338.031 (1) (a).

The secretary had issued a single, serious citation to Ben Hur which was written in the alternative. Item 1 a charged the company with violating 1926.554 (a) (6)[1] while item 1 b said the company violated the general duty clause. This citation as issued carried a proposed penalty of $3,750, although the compliance officer testified the penalty should have been $4,500. Labor, at the close of the

[1] Adopted in Kentucky by 803 KAR 2:413, section 2 (1).

evidence, did not move to amend the penalty. Our hearing officer accepted the CO's testimony and set the penalty at $4,500. KRS 338.081 (3).

KRS 336.015 (1) charges the commissioner of labor with the enforcement of the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the executive director of the office of occupational safety and health compliance issues citations. KRS 338.141 (1). If the cited employer notifies the executive director of his intent to challenge a citation, the Kentucky occupational safety and health review commission "shall afford an opportunity for a hearing." KRS 338.141 (3).

The Kentucky General Assembly created the review commission and authorized it to "hear and rule on appeals from citations." KRS 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the review commission; the review commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the commission takes a case on review, it may make its own findings of fact and conclusions of law. In *Brennan, Secretary of Labor v OSHRC and Interstate Glass*[2], 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799 page 21,538, BNA 1 OSHC 1372, 1374, the eighth circuit said when the commission hears a case it does so "de novo." See also *Accu-Namics, Inc v OSHRC*, 515 F2d 828, 834 (CA5

[2] In *Kentucky Labor Cabinet v Graham*, Ky, 43 SW3d 247, 253 (2000), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act.

1975), CCH OSHD 19,802, page 23,611, BNA 3 OSHC 1299, 1302, where the court said "the Commission is the fact-finder, and the judge is an arm of the commission..."[3]

Our supreme court in *Secretary, Labor Cabinet v Boston Gear, Inc*, Ky, 25 SW3d 130, 133 (2000), CCH OSHD 32,182, page 48,639, said "The review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer." In *Terminix International, Inc v Secretary of Labor*, Ky App, 92 SW3d 743, 750 (2002), the court of appeals said "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another."

With a citation based on an occupational safety and health standard and, alternatively, the general duty clause, our hearing officer had decisions to make, as do we on review. First he had to decide if the cited standard applied to the facts. If he found the cited standard applied, then he had to dismiss the general duty clause citation because the general duty clause cannot be cited where a standard applies. *Usery v Marquette Cement Manufacturing Co*, 568 F2d 902, 905, note 5 (CA2 1977), CCH OSHD 22,099, page 26,618, BNA 5 OSHC 1793, 1794. Second, if the standard applies, the next question is whether labor proved the company violated the standard; if labor cannot prove that, then the hearing officer must dismiss the standards based citation as well. *Ormet Corporation*, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991). Third, if however the cited standard did

[3] See federal commission rule 92 (a), 29 CFR 2200.

not apply, then the hearing officer would have to decide whether labor proved the elements of the general duty clause. This is what our hearing officer did; he affirmed the general duty clause citation and dismissed the one based on a standard.

Facts

This case began as an accident investigation. Ben Hur, a construction company, was engaged by UPS to make improvements to its facility at the Louisville airport. Ben Hur was installing new steel beams in the already existing structure. At the time of the accident Ben Hur used two, two ton hand-operated chain hoists to lift a steel beam over a conveyor belt and metal guard rail.

Ben Hur used a fixed I-beam, part of the original structure, to which it attached the two chain hoists; this fixed beam[4] was horizontal relative to the floor below. One of the chain hoists was attached to a Corso Tractel trolley. This trolley, according to its operating instructions, was "a support device. It is designed for suspending a hoist or winch and moving it along an I or H transversing beam fixed in a horizontal position." The trolley had "four running wheels mounted on ball bearings." These wheels facilitate the trolley's movement along the length of the transversing I beam. Exhibit 3 at page 5, figure 2, is a drawing of a Corso trolley of the type used by Ben Hur at the time of the accident. Exhibit 1, page 2, is a

[4] The hearing officer's recommended order said there was one support beam; Ben Hur's brief to us says there were two support beams, one for the trolley and a second for the fixed chain hoist. Exhibit 2 is the compliance officer's drawing of two chain hoists attached to a single support beam. For our purposes, ruling on the citation, it does not matter whether there were two support beams or one. In either event, the trolley came off the end of the support beam, causing the lifted beam to fall and injure the two employees.

photograph of a Corso trolley. The second chain hoist was fastened directly to the fixed beam.

The two chain hoists were attached at the same point in the middle of the suspended beam. Exhibit 2, a diagram of the lift which the compliance officer drew during his testimony, shows two hoists attached to a single beam overhead. The suspended beam was being raised and also moved laterally by the two chain hoists when the accident occurred, that is when the moveable Corso trolley came off the end of the fixed beam and the suspended beam fell.[5]

To prevent the trolley from coming off the end of the fixed beam, Ben Hur employee Hurst, at the direction of his foreman, placed a bridge clamp on the end of the fixed beam. A bridge clamp resembles a heavy duty C clamp but with a difference. A C clamp is tightened by hand by turning a large wing nut at the end of the threaded pin. A bridge clamp, however, has a nut at the end of the pin; a wrench is used to tighten a bridge clamp. See exhibit 1, page 4. Because a wrench is used to tighten a bridge clamp, it can be closed with much greater force than a hand tightened clamp.

This bridge clamp failed, actually it bent but remained in place on the I beam. Exhibit 1, page 4 is a side view of the bridge clamp while page 5 shows the bent pin to better effect. When the trolley came off the end of the fixed beam, the lifted beam fell. Two employees were injured. One employee, Mr. Hurst, had a broken femur while the other employee has a chipped bone in his hip. Transcript of

[5] The fixed chain hoist did not fall; only the chain hoist attached to the trolley fell.

the evidence, page 30 (TE 30). Both men survived. Mr. Hurst testified at the trial. He said he had recovered and was back at work with Ben Hur at UPS.

Just before the accident, the employee who suffered an injury to his hip was pulling on the fixed chain hoist. When he tired, Mr. Hurst relieved him and began pulling. Shortly thereafter, the trolley came off the support beam and the lifted beam fell.

Whether the cited standard applies

For item 1 a, labor said the company violated the following standard:

> **1926.554 (a) (6)** All overhead hoists in use shall meet the applicable requirements for construction, design, installation, testing, inspection, maintenance, and operation, as prescribed by the manufacturer.

In his recommended order our hearing officer ruled the cited standard did not apply because, he said, the chain hoist could move along the length of a beam on a trolley and the standard does not apply to trolleys; admittedly the standard does not refer to a trolley. Because the cited standard makes no specific mention of a trolley, the hearing officer dismissed item 1 a, the standard based citation. Recommended order, pages 9 and 10 (RO 9 and 10).

The cited standard does not define an overhead hoist. On direct examination, labor's compliance officer (CO) said "An overhead hoist system is meant to be the hoist and components used to lift...including, in this case, a Harrington 2-ton chain hoist and a Corso Tractel beam trolley." TE 75-76. Labor's amended citation says in part:

> Ben Hur Construction Company employees installed and used an overhead hoist system consisting of a Harrington 2-ton hand chain hoist and a Corso Tractel trolley...
>
> TE 10

The secretary may use a citation to interpret a standard. In *Martin v Occupational Safety and Health Review Commission and C F and I Steel*, 499 US 144, 158, 111 SCt 1172, 1179, 113 LEd2d 117 (1991), CCH OSHD 29,257, page 39,225, BNA 14 OSHC 2097, 2101, the US Supreme Court said "[W]hen embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress." In other words, in the amended, standards based citation the secretary said the overhead hoist had two parts: a chain hoist attached to a trolley.

Because our hearing officer found the standard did not apply, he then focused on the general duty clause citation which he affirmed. Our general duty clause says:

> Each employer: (a) Shall furnish to each of his employees employment and a place of employment which are <u>free from recognized hazards</u> that are causing or likely to cause death or serious physical harm to his employees;
>
> KRS 338.031 (1) (a)[6] (emphasis added)

This statute says an employer must protect employees from hazards he or his industry recognizes even though there is no standard. The general duty clause statute has been referred to as the catch-all provision, meaning it is to be used when no standard is found to apply to a situation. Testimony about a recognized

[6] Our statute is identical to the federal version, 29 USC 654 (a) (1), which is known in the trade as section 5 (a) (1) of the act.

hazard can come from the employer or a person familiar with the employer's industry. In the case at bar, proof of industry knowledge came from the Corso trolley manufacture's instructions which accompanies a trolley when it is sent to a buyer. See exhibit 3. TE 178.

While it is true the standard does not use the word trolley, in another section not cited the standard says "The support shall be arranged so as to provide for free movement of the hoist and shall not restrict the hoist from lining itself up with the load." 1926.554 (a) (3). This section says an overhead hoist must be able to move along its support in such a way that the load is directly beneath the hoist – "lined up" according to the standard. A trolley which moves horizontally on the fixed beam is one way to center the load. Perhaps there are other ways to accomplish the task; but for the cases we have cited below, a trolley is used to facilitate the lining up.

Then our hearing officer says "The plain meaning of the words "hoist" and "trolley" distinguish themselves as factually different terms." He says this means "the standard's language does not provide a basis upon which to conclude that it applies to trollies." RO 9. We, however, can point to two cases, one cited and discounted by our hearing officer, which demonstrate hoists attached to trollies are covered by 1926.554.

Labor cited *Paschen Contractors, Inc*, a federal review commission decision, CCH OSHD 29,066, BNA 14 OSHC 1754 (1990), to prove the standard applies to

trollies and hoists. In his recommended order, our hearing officer rejected labor's analysis. He said:

> the federal review commission concludes 29 CFR 1926.554 applies to the hoist and trolley hook to which the hoist is attached, but it did not conclude that the hoist standard applies to the rest of the trolley. The trolley's hook could just as well have been a hook attached to the ceiling.
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> RO 9

This observation by the hearing officer ignores the fact an overhead hoist must be set up in such a way that it can line up with the load below it and a trolley is one method for accomplishing the centering. 1926.554 (a) (3). He also ignores a passage in Paschen quoting from ANSI[7] standard B30.16-1973 which "indicates that the hoist mechanism may be mounted on a trolley that travels on overhead beams." At CCH page 38,825, 14 OSHC 1757. Our hearing officer could have relied solely on Paschen to prove the standard applies to the facts of our case. But there is as we said more law on this subject.

For us the more persuasive case on the applicability of 1926.554 to hoists suspended beneath trollies is *Phillips Getschow Co*, a federal administrative law judge decision, CCH OSHD 32,688, BNA 20 OSHC 1479 (2003). In that case iron workers were using a chain hoist and trolley attached to a beam to remove a very heavy coal crusher from a building. Phillips had set up the trolley in such a way, failing to place an equal number of spacing washers on either side of the hanger shaft, that prevented it from "being centered." At CCH page 51,545, 20 OSHC 1483.

[7] American National Standards Institute.

Federal OSHA said the support beam had a raised area which also prevented the trolley from centering on the load.

As in the case at bar, *Phillips* was cited according to 1926.554 (a) (6) for not following the manufacturer's specifications. In her recommended order Administrative Law Judge Nancy Spies upheld the 1926.554 citation. Here are some passages in *Phillips* which demonstrate the cited standard applies to a hoist attached to a trolley on an I beam:

> The ironworkers rigged the coal crusher to a chain fall hoist and trolley fitted to an ...
>
> at CCH page 51,542, 20 OSHC 1480
>
> The secretary has two bases for this allegation:[8] (1) the I-beam had an indentation or raised area in the lower rail that prevented the free movement of the trolley and hoist, and (2) the number of spacers on the trolley were unequal and prevented the trolley from being centered.
>
> at CCH pages 51,544-51,545, 20 OSHC 1482-1483
>
> The secretary has established a violation of section 1926.554 (a) (6) with respect to the uneven spacing of washers. [on the trolley]
>
> at CCH page 51,546, 20 OSHC 1484

From this, we learn the hoist and trolley are considered by the federal ALJ as one unit when evaluating whether the cited standard was violated. Standard 1926.554 (a) (6) applies to the uneven spacing of washers <u>on the trolley itself</u>. *Phillips* emphatically makes the point the cited standard applies to a situation where a hoist

[8] The secretary charged Phillips with a violation of 1926.554 (a) (6), the same as our case.

is attached to a trolley which is capable of running back and forth on the I beam from which it is hung. We find the trolley is covered by 1926.554.

What we learn from *Phillips, Paschen Contractors* and the facts of our case is a trolley, for a relatively simply device, is where problems will likely arise if the employer does not comply with the standard. In *Lee Way Motor Freight Inc v Secretary of Labor*, 511 F2d 864 (CA10 1975), CCH OSHD 19,320, BNA 2 OSHC 1609, the court said "the standard by its plain terms assumes the existence of a hazard..." At 511 F2d 867 and 869, CCH at pages 23,091 and 23,093, 2 OSHC 1611 and 1612.

Phillips Getschow and *Paschen Contractors* without equivocation say the standard cited in the case before us applies to overhead hoists attached to a trolley.

If the cited standard applies, and we hold it does, then the alternative general duty clause citation cannot stand and is dismissed. *Marquette Cement Manufacturing, supra.*

In the citation labor proposed a penalty of $3,750 but our hearing officer found a penalty of $4,500

In the original citation, the proposed penalty is set at $3,750. Exhibit 5, page 4. Prior to trial labor filed a motion to amend the citation to include an alternative allegation Ben Hur violated the general duty clause. In this amended citation, the penalty remained at $3,750. Ben Hur did not object and the hearing officer granted the motion. RO 1. Then at the trial, counsel for the labor cabinet read the amended citation (instance 1 a which is based on the standard and 1 b the general duty

clause) into the record and Ben Hur did not object. TE 9 – 12. Rather than object to the amended citation, counsel for Ben Hur said "I believe the proposed penalty was $3,750 at least by this motion," to which the hearing officer and labor's counsel agreed. TE 11 – 12. At this point in the proceedings, Ben Hur had taken all steps necessary to confirm the amended citation still carried a $3,750 penalty.[9]

Then during his testimony on direct examination, the compliance officer said the penalty should be calculated in a different manner and came up with a proposed penalty of $4,500.[10] TE 85 – 92. If labor, at the trial and after it had amended the citation with the $3,750 penalty, was then going to offer a different version of the penalty which came to $4,500, it had a duty at the close of its case to move to amend the penalty from $3,750 to $4,500 to conform to the proof offered by the compliance officer. But labor failed to make that motion which is permitted by Kentucky civil rule 15.02. Had labor made that motion, Ben Hur likely would have objected and based its objection on, one, the initial citation it received, two, the motion to amend made prior to the trial, three, the amended citation read into the record at trial and, four, its confirmation at trial the penalty remained at the lower amount.

We have already dismissed the general duty clause citation because the cited standard applies. *Phillips*, *Paschen Contractors* and *Marquette Cement*

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[9] In its brief to the commission Ben Hur argues the penalty should be $3,750 if the citation is affirmed. Pages 19 – 21.

[10] The CO rated the severity as high (high, medium or low being the options) because an employee could have been killed and greater for the probability of an accident (greater or lesser) because at least six employees worked in the vicinity of the cited lift. He said the company got no size adjustment because it employed more than 250 workers and no good faith adjustment because of the high serious/greater probability gravity based penalty. The CO said the company should receive 10 % credit for history because it had not received a serious citation in the past three years. TE 89-90. 803 KAR 2:115, section 1 (2).

Manufacturing Co, supra. As we shall explain, we will also dismiss the standards based citation, item 1 a, because it was inaccurately drafted and failed to give respondent notice of the allegations. Were we, however, to sustain a serious citation, we would impose a penalty of $3,750 for the reasons we have given.

Whether the secretary has proved the elements of the standards based citation

In *Ormet Corporation, supra,* the federal review commission said:

> In order to prove that an employer violated a standard, the Secretary must show that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew,[11] or with the exercise of reasonable diligence, could have known of the violative conditions.

We have already found the standard applies. *Phillips* and *Paschen Contractors.* Skipping for now over the second element brings us to three: whether the cited employer's employees had access to the cited condition. There is no question two Ben Hur employees were injured when the trolley ran off the end of the support beam causing the lifted beam to fall. This proves Ben Hur employees had exposure to the condition; or stated more precisely they had access to the cited condition.

Element 2, *Ormet*

For element 2 according to *Ormet, supra,* here is the cited standard again:

[11] The comma should come after the word "or," not before it. Nevertheless this is how it is punctuated by OSHRC on line as well as CCH and BNA.

> **1926.554 (a) (6)** All overhead hoists in use shall meet the applicable requirements for construction, design, installation, testing, inspection, maintenance, and operation, as prescribed by the manufacturer.
>
> (emphasis added)

We have found the term "overhead hoists" includes a chain hoist attached to a trolley which is itself attached to a supporting I beam. *Phillips* and *Paschen* Contractors. Here is the standard based citation as read into the record at the trial by counsel for the secretary; this citation, as they all are, is labor's understanding of the alleged violation of the cited standard:

> Citation 1, Item 1A. The type of violation is serious. The standard is 29 CFR 1926.554 (a) (6) which states: 'All overhead hoists in use did not meet the applicable requirements for construction design, installation, testing, inspection, maintenance and operation as prescribed by the manufacturer. A) On or about September 12...Ben Hur Construction Company employees installed and used an overhead hoist system consisting of a Harrington 2-ton hand chain hoist and a Corso Tractel trolley to transfer a 30 – foot steel beam from one chain fall system to another. The trolley did not have four formed sheet steel end stops,[12] two at each end of the overhead beam, acting as anti-derailing devices allowing the trolley hoist and beam to slip from the overhead beam and fall causing injury to two employees and thus did not meet the requirements of construction design, installation and operation as prescribed by the manufacturer."[13]
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> TE 9-11 (emphasis added)

As our hearing officer found, Ben Hur used a bridge clamp as an end stop; it was, he said, the failure of the bridge clamp which led to the two injuries when the

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[12] This same language, four formed sheet steel end stops, is found in serious item 1 b, the general duty clause citation.

[13] It was just after labor read this citation into the trial record that Robert Dimling, Ben Hur's lawyer, inquired about the $3,750 penalty and was told it was still the penalty. TE 11-12.

suspended I beam fell; he said use of the bridge clamp was "a recognized hazard." RO 11. On the other hand, the citation says it was the absence of the four formed sheet steel end stops which led to the injuries.

For item 1 a, labor must prove Ben Hur violated the terms of the standard. According to the cited standard, 1926.554 (a) (6), Ben Hur should have complied with the manufacturer's requirements for design and installation of the Corso trolley. As we shall explain, that meant Ben Hur should have installed "proper end stops" on the ends of the I beam and not the four formed sheet steel end stops specified in the citation. See exhibit 3, page 3, the manufacturer's instructions, item 10, where it says "The CORSO trolley must not be put into service before proper end stops are fastened to the I beam at each end to prevent rolling off the end of a beam during use."

Perhaps at this point an example would be of assistance to explain the practical operation of the cited standard. In *Phillips Getschow, supra,* the federal ALJ upheld the 1926.554 (a) (6) citation because the employer had not correctly placed an equal number of spacing washers on either side of the trolley's hanger shaft so the trolley would be able to center itself on the support beam. Failing to follow the manufacturer's specifications which required the use of spacing washers, they must be evenly distributed on either side of the "hanger shaft" to permit centering of the trolley, triggered the operation of the 1926.554 (a) (6) standard. CCH pages 51,545-51,546, 20 OSHC 1483-1484.

The proof in this case established Ben Hur used a bridge clamp as an end stop. TE 28, 121 and RO 4. Ben Hur did not install proper end stops on the ends of the I beam, at least no end stops as contemplated by the instructions. *Phillips Getschow.*

The underlined portion of the standards based citation, quoted just above, is what labor understood to be the four end stops Ben Hur should have installed at each end of the I beam but did not. Labor's mistake when it wrote the citation is it confused the "<u>four formed sheet steel end stops</u>" with what Ben Hur should have welded or bolted onto the I beam as end stops. The four formed sheet steel end stops are part of the actual trolley as it arrives from the manufacturer. Exhibit 1, page 2, is a photograph of a Corso trolley; it is painted blue. Exhibit 3 is a copy of the manufacturer's "operating and maintenance instructions" for the Corso overhead traveling trolley. On page 5 of exhibit 3, figure 2 shows a Corso trolley installed on an I beam; the trolley depicted in figure 2 is of the type Ben Hur was using at the time of the accident. Within figure 2 is the number 5 with a line drawn to what Scott Kollar, Ben Hur's project manager, said was a proper end stop on the I beam. TE 167. Number 5 on figure 2, according to the trolley's operating instructions, refers to "End stops acting as antiderailing devices (provided by others)." Page 5 of exhibit 3.

Then on the bottom of page 5 of exhibit 3, the operating instructions says:

> **4) Safety devices**
> <u>Corso trolleys are fitted with the following</u>
> . Two securing screws to prevent relative motion between the side plates and the threaded

suspension and adjustment bar
. Four formed sheet steel end stops acting as anti-derailing devices...
. Four running wheels mounted on ball bearings

(emphasis added)

We find fitted, just above, is used in the sense of to equip.[14] This means the four formed sheet steel end stops are part of the Corso trolley as it comes from the factory.

Mark Douglas testified for Ben Hur; he is the company's division manager in its Cincinnati office. TE 113. He said the four formed sheet steel end stops are "these little corners that are bent here and here and here? These end stops are to protect the wheel so that when it bumps into the end stop, it keeps it from coming off the beam so it prevents the wheel from getting damaged." TE 134. Here we infer Mr. Douglas was referring to the trolley itself since the wheels are attached to the trolley. See exhibit 1, page 2, and exhibit 3, page 1. Both exhibits depict the trolley which has a steel plate on each side, painted blue in exhibit 1. This plate partially covers the wheels; the "little corners" to which Mr. Douglas refers are found at both ends of the plate. They are bent at right angles to the plate.

Then Mr. Douglas, his attention drawn by the cross examiner to exhibit 3, page 5, figure 2, says the number 5 on figure 2 points to "a plate connected to the beam. Is that correct? Answer: It's an angle connected to the beam." TE 142. This "plate connected to the beam" is not a part of the trolley.

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[14] *Webster's II, New Riverside University Dictionary*, 1984, page 482.

Mr. Stephen Shearer testified for Ben Hur; he said he was a construction manager for the company. TE 169. On cross examination he was directed to page 5 of exhibit 3. Here is the exchange:

> Q. Now, isn't it true that on page 5, if you'll look with me at page 5, they depict as end stops pieces of metal that are attached to the center flange. Isn't that correct?
> A. Yeah. The one that's provided by others...
>
> TE 178 (emphasis added)

We infer "center flange" refers to an I beam upon which a trolley would be placed since the witness was testifying about pieces of metal "provided by others." See exhibit 3, the trolley instructions, page 5, **2) Main subassemblies**, # 5 which points to a flange bolted onto the I beam, figures 1 and 2. We infer the end stops Mr. Shearer referred to were to be attached to the I beam and not to the trolley.

We find the four formed sheet steel end stops are part of the trolley itself. We find the "End stops acting as antiderailing devices (provided by others)" are angled pieces of steel to be mounted on the ends of an I beam by the purchaser, the user, to prevent the trolley from running off the end of the beam. We find Ben Hur had not installed the "End stops acting as antiderailing devices (provided by others)" on the ends of the I beam as the instructions require through the operation of the cited standard. Instead, Ben Hur used a bridge clamp as an end stop on the beam.

We find labor's citation, instances 1 a and 1 b, inaccurately charged Ben Hur with using a trolley which "did not have four formed sheet steel end stops, two at each end of the overhead beam;" our finding reflects the fact the Corso trolley did

have the four formed sheet steel end stops which were an integral part of the trolley. TE 134.

If labor when writing the two citations had simply substituted " End stops acting as antiderailing devices (provided by others)" for four formed sheet steel end stops, then the citations would have accurately reflected the hazard presented to the Ben Hur employees, the lack of end stops on the I beam required by the manufacturer's instructions. Exhibit 3. Labor had the opportunity at the beginning of the trial to correct the problem we have described when it read the amended citation into the record. Then at the end of the trial labor could have moved to amend the citations to conform to the evidence. CR 15.02. But labor did neither.

Elsewhere in the manufacturer's instructions for the Corso trolley, on page 6,[15] it says:

> Never move or remove the end stops[16] <u>fitted at the end</u> of the beam while the trolley is in use.
>
> (emphasis added)

Unfortunately, this sentence on page 6 demonstrates the manufacturer's instructions are poorly, and confusingly, written. Fitted on page 5[17] of the manual refers to the four formed sheet steel end stops which are a part of the trolley itself while on page 6 fitted refers to the owner supplied, angled end stops which are to be attached to the ends of the I beam.[18] Nevertheless, the secretary in our cases has the burden of proof. ROP 43. "Respondent is entitled to fair notice of the conduct

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[15] Page 6 of exhibit 3.
[16] This refers to the proper end stops the owner installs on the supporting beam.
[17] See **4) Safety devices** at the bottom of page 5, exhibit 3.
[18] "Never move or remove the end stops fitted at the end of the beam..."

required by the standard." *Schiavone Construction Company*, a review commission decision, CCH OSHD 21,815, page 26,258, BNA 5 OSHC 1385, 1388 (1977). Professor Mark Rothstein in his *Occupational Safety and Health Law*[19] textbook says "a citation must contain two elements, a description of the alleged violation and a reference to the standard allegedly violated." We have a citation which refers to the standard and *Phillips Getschow* which says the standard applies. What the citation does not have, what we do not have before us, is an accurate description of the alleged violation. What we have instead is a statement in the citation (both the standards based and the general duty clause citation) which says:

> The trolley did not have <u>four formed sheet steel end stops</u>, <u>two at each end of the overhead beam</u>, acting as anti-derailing devices...
>
> (emphasis added)

Ben Hur as we have found did have the four formed sheet steel end stops, they came with the trolley and were actually a part of it.

A citation is a document written to give notice of the charges. KRS 338.141 (1). For us the question is whether the document, the citation, is so defective that it failed to describe a violation.

Our hearing officer in his recommended order recognized labor had incorrectly written the citation; he said:

> ...the citation mistakenly uses language from the [trolley] Instructions that refers to a part of the trolley itself, not to the end stop that Figure 2 [of exhibit 3] shows attached to the I-beam.

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[19] West Publishing, 2010 edition, section 11:4, page 378.

RO 5

Then our hearing officer in several sections of his recommended order said he had to amend the citation *sua sponte*,[20] meaning he had the authority to do it himself without labor filing a motion to amend. Labor never made such an amendment; labor never understood the need to amend the citation because it did not recognize before or during the trial that it had incorrectly written the citation to refer to blue painted, angled sections of metal which were part of the trolley. See exhibit 1, page 2.

Despite the fact the hearing officer amended the citation, he never wrote out what the amended citation would look like. What with labor's amended citation and the hearing officer's *sua sponte* contribution, we are reluctant to add a third amendment. Here is what our hearing officer said about his:

> Despite using the wrong language from the Instruction to the Citation, Labor's proof unambiguously charged Ben Hur with improperly using a bridge clamp as an end stop.

RO 6

> The general duty standard [actually a statute]...requires employers to furnish each employee with a place of employment free from recognized hazards...
> A hazard is recognized under the law if it is recognized by an industry, which can be proven by manufacturer's warnings.

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[20] The case our hearing officer cited which he said gave him the sua sponte authority is not very persuasive. In *John & Ray Carlstrom*, a federal review commission decision, CCH OSHD 23,155, BNA 6 OSHC 2101 (1978), the administrative law judge himself suggested the issue which lead to his amendment of the citation; he did this in the middle of the trial and while labor was still putting on its proof. In Carlstrom the ALJ pointed out the cited standard referred to another standard; the commission said the ALJ's comment gave the parties the opportunity to pursue that line of thinking throughout the remainder of the trial.
In our case our hearing officer gave no such notice during the trial; nevertheless he amended the citation *sua sponte* after the trial had concluded and without labor filing a motion to amend.

RO 10

> The Corso trolley manufacturer's Operating Instructions contain warnings that the trolley should not be used without 'proper end stops' attached to the I-beam on which the trolley travels. Obviously, the bridge clamp used was not a proper end stop because it bent under the load of the I-beam...Nowhere in the Operating Instructions is the use of a bridge clamp for an end stop described...
> For all these reasons, the use of the bridge clamp as a trolley end stop constituted a recognized hazard.[21]

RO 10-11

> Although Item 1b's factual allegation referred to the wrong language in the Corso Tractel trolley Operating Instructions, the proof showed a bridge clamp is not an adequate substitute for an end stop attached to the I-beam...
> Accordingly, the Hearing Officer, *sua sponte*, amends the allegation in Citation 1, Item 1b, to conform to the proof.

RO 12-13

We agree with our hearing officer's finding that nowhere in the trolley manual is there any mention of, or recommendation for, using a bridge clamp as an end stop. Exhibit 3. Even so, respondent's witnesses testified a bridge clamp is regularly used as an end stop in the construction business because of the temporary nature of the work. TE 133, 173 and 189. Having said that, the trolley instruction's general warning is very explicit:

> 10. The CORSO trolley must not be put into service before proper end stops are fastened to the I beam at each end to prevent rolling off the end of a beam during use.

Exhibit 3, page 3

[21] On review we cannot say the use of the bridge clamp as a stop was a recognized hazard because all of Ben Hur witnesses who spoke to the issue said use of a bridge clamp as a stop was common in the construction industry.

This paragraph 10 precisely describes what will happen when proper end stops are not used; it is what happened to the two Ben Hur employees, standing as they were on the "hospital side" of the lift. TE 121 and 211.

If an employer in the construction business decides to use a chain hoist and a trolley attached to an I beam to lift a heavy object, the standard, 1926.554 (a) (6), requires the employer to comply with the manufacturer's instructions and install a proper end stop. If, instead, the construction employer wants to use a bridge clamp as an end stop, he must apply for a variance. KRS 338.153. We note the record before us contains no mention of a variance, either sought or contemplated.

Hearing Officer Head's *sua sponte* amendment fails for several reasons and so we set it aside: one, it was directed to the general duty clause citation which we have dismissed because we found the standard applies. Two, we cannot say with any real confidence what the *sua sponte* amendment looks like since the recommended order did not recast the amended citation with particularity; we would have expected it to be quoted in its entirety and it was not. We cannot review the post trial amendment if we do not have it before us. Three, Mr. Head's amendment does not come to grips with the essential defect we have identified in the two citations: they charge the company with not installing four formed sheet steel end stops when, in fact, the trolley did have those stops as we have found. The manufacturer's instructions say the trolley shall not be operated until the owner installs the angled pieces at each end of the supporting beam; while Ben Hur had not done that, the citations did not require him to do so. Four, all Ben Hur

witnesses who addressed the issue said it was common in the construction business to use a bridge clamp as an end stop, negating a finding of a recognized hazard.

What remains for us to consider is whether the secretary proved the terms of the standard were violated and whether the defective, standards based, citation contained fair notice of the charges.

In his occupational safety and health text, Professor Rothstein says:

> ...the fair notice test will be satisfied if the employer is notified of the nature (including location) of the violation and the standard allegedly violated...A citation will be dismissed only where it fails to contain a description of the alleged violation...It may not be enough for a citation simply to quote the language of the standard allegedly contravened, especially where the standard is vague or general, or where a violation of the general duty clause is alleged.[22]

Insofar as the language of the citation is concerned, Ben Hur had done nothing wrong because the trolley it used did have the four formed sheet steel end stops.

While the cited standard itself is not vague, it is totally dependent on what is found in the instructions accompanying the overhead hoist, or in our case the trolley to which the chain hoist was attached. *Phillips* and *Paschen Contractors, supra.* Thus, for a 1926.554 (a) (6) based citation, the secretary must allege what requirement found in the instructions the employer failed to utilize. This is where the two citations are found wanting. We cannot and will not reinterpret the citations to accomplish what we perceive to be the secretary's intent. This is especially so where the citation so carefully, and in two places, describes as an

[22] Section 11:4, page 379, 2010 edition.

omission the four formed sheet steel stops which we have found are built into, and are an essential part of, the existing trolley in use at the time of the accident.

In *Alden Leeds, Inc v Occupational Safety and Health Review Commission*, 298 F3d 256 (CA3 2002), CCH OSHD 32,600, BNA 19 OSHC 1976, the secretary of labor in 1993 issued a thirteen instance citation which alleged the company had improperly stored swimming pool chemicals; Alden Leeds then entered into a settlement agreement where it agreed to abate the violations. At 298 F3d 257, CCH page 50,972, 19 OSHC 1977. Alden Leeds abated the individual violations described in the 1993 citation: "none of the 13 specific instances of improper storage listed in the 1993 citation was cited in the 1995 notification [of failure to abate]." At 298 F3d 260, CCH page 50,975, 19 OSHC 1980.

Then in 1995 the secretary issued a failure to abate citation to Alden Leeds; in that failure to abate citation the secretary alleged "These instances [of the failure to abate] concerned six of the seven categories of requirements involved in the 1993 citation," but not the earlier violations themselves. At 298 F3d 258-259, CCH page 50,973, 19 OSHC 1978. In its decision the court of appeals, summarizing the arguments of the two parties, said:

> The ALJ observed that it was the Secretary's position that the 1993 citation concerned Alden Leeds's 'storage practices, not specific conditions which violated NFPA 43A (1990)'...By contrast , the ALJ wrote, Alden Leeds's defense 'focused on the fact that the specific conditions in its warehouses' had been changed by the time of the reinspection in 1994.
>
> At 298 F3d 259, CCH page 50,973, 19 OSHC 1978

After a trial, the ALJ affirmed the failure to abate citation as did the commission, with a dissent filed by Commissioner Visscher. In its decision on appeal, however, the third circuit reversed the commission and dismissed the failure to abate citation:

> Consistent with the constitutional mandates of due process, a defendant in an OSHA enforcement action must receive adequate notice. The Act protects this right by requiring that a citation 'describe *with particularity* the nature of the violation' 29 USC 658 (a)[23] (emphasis added)...
> The citation 'must be drafted with sufficient particularity to inform the employer of what he did wrong, *ie*, to appraise reasonably the employer of the issues in controversy.' *Brock v Dow Chemical*, 801 F2d 926, 930 (7th Cir 1986)...
> 'before penalizing a failure to correct a cited violation, the Commission must satisfy itself that the citation defines the uncorrected violation with particularity.' *National Reality & Construction Co v OSHRC*, 489 F2d 1257, 1264 n 31 (DCCir 1973).

At 298 F3d 261, CCH page 50,975, 19 OSHC 1980

In its decision the court of appeals held the 1993 citation which listed specific violations "did not give Alden Leeds adequate notice that its general 'storage practices' were the 'violations' that it was obligated to abate." At 298 F3d 262, CCH pages 50,975-50,976, 19 OSHC 1980-1981. Rejecting the commission's interpretation the 1993 violations were in reality improper storage practices, the court of appeals said:

> Our holding is based on the specific wording of the 1993 citation and the broad reading of that wording that the Commission adopted. That interpretation, we hold, is

[23] In Kentucky 803 KAR 2:120, citations, section 2, content of citations, says "A citation shall describe with particularity the nature of the alleged violation, including a reference to the provision(s) of KRS chapter 338, standard, rule administrative regulation, or order alleged to have been violated."

arbitrary and capricious and cannot be sustained.

At 298 F3d 263, CCH page 50,977, 19 OSHC 1982

After its 1993 inspection Alden Leeds president "wrote to OSHA that the company's storage of oxidizers was in conformance with the NFPA requirements." In its decision the split commission used this letter to show that for the purposes of the 1995 failure to abate citation "Alden Leeds was well aware...that its storage practices were at issue and that Alden Leeds knew how to abate the violation." Dismissing the commission's analysis, the court of appeals said Aldon Leeds's 1993 letter was written two years before it received the failure to abate notice; the third circuit also said Aldon Leeds's 1993 understanding of how to comply with the cited standard was not the same as an implied 1995 recognition that its "storage practices" had earlier been brought into question. At 298 F3d 262-263, CCH page 50,976, 19 OSHC 1981.

Ben Hur, on the same day as the accident, wrote a letter to its general contractor saying it was going to "prevent future accidents" by taking two steps. One, it was going to weld a "trolley stop...to both sides of the flange." Two, it was going to "Keep away from the 'dangerous' side or 'pinch point' of material." Exhibit 4. Here, the labor cabinet would argue that because Ben Hur knew how to abate, to weld stops at the ends of the beam, the citation should be affirmed as written.

That may be so except for several problems we have with affirming Ben Hur's standards based citation. One, the regulation says the citation must "describe with particularity the nature of the alleged violation..." Labor failed to do that; in the

citation labor described as a violation the existence of the <u>four formed sheet steel end stops</u> which were actually a part of the trolley itself. Ben Hur had not failed to provide those sheet steel end stops. Here, labor has failed to prove Ben Hur violated the terms of the cited standard. *Ormet, supra.*

Two, Ben Hur at the trial through a number of witnesses proved the sheet steel end stops were not the "proper end stops" which the Corso trolley manual said had to be "fastened to the I beam at each end to prevent rolling off the end of a beam..." Exhibit 3, page 3, item 10. Despite the convincing testimony of the Ben Hur witnesses, labor had not moved to amend the citation to conform to the evidence.

Three, Ben Hur's September 12 letter to its general contractor was written two and one half months before labor issued the citation, that is before it knew what labor's allegations of a violation would be. Exhibit 5, the citation. Ben Hur's letter told the general how it would "prevent future accidents." It was not, and could not have been, an abatement letter because Ben Hur had not yet been cited.

For us to now to find Ben Hur violated the standard when it used the trolley without the "proper end stops," and thus add our own, third amendment of the citation to this case, would open us to accusations our findings were arbitrary and capricious. *Alden Leeds.*

We will now sift through the testimony of the Ben Hur witnesses who distinguished between the sheet steel end stops and the proper end stops. Then we will discuss Ben Hur's brief to the hearing officer where the company argued, in

reliance on the testimony of their witnesses, it had not been properly charged with a violation.

Mark Douglas is a division manager and vice president at Ben Hur's Cincinnati office. With his attention drawn to exhibit 3, page 5, bullet # 2 at the bottom of the page, Mr. Douglas says:

> ...that bullet [Four formed sheet steel end stops] has nothing to do with the end stops that keep the trolley from coming off of the beam.

TE 134

Scott Kollar, Ben Hur's project manager, was asked:

> Q ...If...under General Warnings # 10 on page 3 [exhibit 3] it states that the 'Corso trolley must not be put into service before proper end stops are fastened to the eye beam at each end to prevent rolling off the end of the beam during use.' And, yet you're saying that on page 5 where it refers to 'four formed sheet steel end stops acting as anti-derailing devices,' is it your testimony that those are part of the blue portions of the trolley and not fastened to the eye beam?
> A Yes.

TE 167

Stephen Shearer, a construction manager for Ben Hur, was referred to exhibit 3, page 5, under heading **2) Main subassemblies**, number 5. He was asked if the "end stops acting as anti-derailing device...provided by others..." came with the trolley when it was purchased. He said "No, they don't come with anything...it doesn't come with the angle end stops if that's what your asking." TE 172. Here Mr. Shearer was making the point the "end stops" did not come with, were not attached to, the trolley.

Gary Terry, a Ben Hur general foreman for construction, agreed with Mr. Shearer that the end stops did not come with the trolley when it came from the factory. TE 188 and 90.

It was the end stops which when welded to the ends of the I beam would prevent the trolley from rolling off the beam. These end stops did not come with the trolley and were not attached to it. On the other hand, the four formed sheet steel end stops were part of the trolley and yet found their way, in error, into the citation.

In its brief to the hearing officer after the trial, Ben Hur argued the secretary failed to prove the requirements of the standard were not met. In support of that argument, Ben Hur wrote:

> The Secretary appears to have confused the I-Beam end stop with the second type of end stop discussed in the trolley manual, the 'trolley end stop'...the manual reads 'Corso trolleys are fitted with the following...four formed sheet steel end stops acting as anti-derailing devices.' According to the clear language of the manual, these are the end stops that are fitted to the trolley, not the end stops that must be attached to the I-beam by the user.
>
> brief, page 8

> Nowhere does the manual require the use of 'four formed sheet steel end stops two at each end of the overhead beam acting as anti-derailing devices.' Rather, the manual requires that 'proper end stops are fastened to the I-beam at each end' and states that these end stops are 'provided by others.'
>
> brief, page 9

Ben Hur and the hearing officer, on this issue, got it right. We find labor cited Ben Hur for not having the four formed sheet steel end stops when it should

have cited the lack of proper end stops. Ben Hur's citation did not describe with particularity the violation, the lack of proper end stops at the end of the beam. *Alden Leeds*, at 298 F3d 261, CCH page 50,975, 19 OSHC 1980.

Labor's citation failed to prove Ben Hur violated the terms of the standard. This is further demonstrated by the question put to the compliance officer by labor's counsel:

> Q. Can you please explain, then, why Ben Hur is in violation of that standard?
> A. The overhead hoist components were not installed per the manufacturer 's guidelines for operation installation, specifically the beam trolley did not have four formed sheet steel end stops acting as anti-derailing devices.
>
> TE 78

From the testimony of the four Ben Hur witnesses and the company's brief to the hearing officer, we understand the company knew it was not charged with a violation[24] and took care to prove it.

Labor failed to prove Ben Hur violated the terms of the standard, that is whether Ben Hur did or did not follow the manufacturer's instructions for operating the overhead hoist which includes the trolley. *Phillips*, *Paschen Contractors* and *Ormet*, *supra*. The instructions said to use the trolley with proper end stops. Labor instead alleged Ben Hur failed to use four formed sheet steel end stops which are part of the trolley itself. Kentucky's regulation says the secretary must describe the

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[24] During our review process, we came to understand the trolley was not at the time of the accident lined up with the load beneath, an apparent violation of 1926.554. (a) (3). See exhibit 2. We also learned Mr. Hurst was not at the time of the accident standing clear of the load, an apparent violation of 1926.554 (a) (4). As we have said elsewhere, however, the secretary enforces the act and we do not.

violation with particularity; this he did not do. 803 KAR 2:120, section 2. What the citation in two places accomplishes is to describe, accurately, the four formed sheet steel end stops found on the trolley in use at the time of the accident. What the citation fails to describe is a violation. We will not construe the citation otherwise. *Alden Leeds.*

Labor failed to give Ben Hur notice of what the charges were. Ben Hur raised this argument to the hearing officer and to the review commission. Ben Hur to the commission said "All the evidence presented by the Secretary pertained to the failure of Ben Hur to use 'four formed sheet steel end stops.'" Brief, page 5.

To the extent they support our decision, we adopt our hearing officer's findings of fact.

We dismiss serious item 1 b, the alternatively plead general duty clause citation, because we determined the standard applies. *Phillips*, *Paschen Contractors* and *Marquette Cement Manufacturing*, *supra.*

We dismiss serious item 1 a, the standards based citation, for two reasons. One, labor failed to prove Ben Hur violated the terms of the standard.[25] *Ormet*, *supra.* Two, labor failed to give Ben Hur notice of its violative conduct. *Alden Leeds*, *supra.*

It is so ordered.

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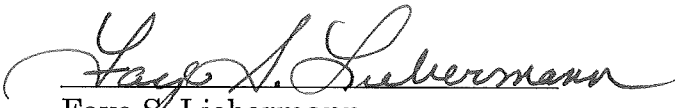
[25] Had we found the secretary proved Ben Hur violated the terms of the standard, and we have not, we would have sustained item 1 a. The secretary proved Ben Hur knew or, with the exercise of reasonable diligence, could have known of the violative conditions. Ben Hur witnesses testified the company used a bridge clamp as the end stop. Ben Hur witnesses also testified the trolley instructions, exhibit 3, came with the trolley when they purchased it. TE 178. This manufacturer's instruction warns the trolley must not be used without proper end stops which must be "fastened to the I beam at each end..." Exhibit 3, page 3, item 10. Element 4, *Ormet*, *supra.*

May 3 2011.



Faye S. Liebermann
Chair

Michael L. Mullins
Commissioner

Paul Cecil Green
Commissioner

Certificate of Service

I certify a copy of this decision and order of the review commission was served on the parties this May 3, 2011 in the manner indicated.

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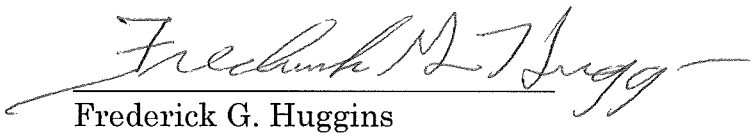

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