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FEB 06 1997

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

LABOR CABINET
OFFICE OF GENERAL COUNSEL

KOSHRC NO. 2608 - 94

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

C & S ERECTORS, INC.

RESPONDENT

* * * * *

DECISION AND ORDER
OF THIS REVIEW COMMISSION

We called this case for review of the hearing officer's recommended order according to section 47 (3) of our rules of procedure (ROP).¹ Both parties responded to our request for briefs.

Complainant, the secretary of labor, enforces the occupational safety and health act (KRS chapter 338) in Kentucky. It conducts inspections of work sites and issues a citation when it finds an apparent violation. When an employer elects to contest a citation (KRS 338:141 (1)), it files its notice of contest with the secretary. A hearing officer, appointed by this commission, conducts a hearing and issues a recommended order. KRS 338.071 (4) charges this commission, not our hearing officers, with the responsibility for ruling on contested citations in the final analysis.

Respondent C & S Erectors, Inc. is a steel erection contractor; a considerable portion of its business comes from the

¹ Enacted as section 47 (3), 803 KAR 50:010.

construction of large, single story structures. In this particular case, C & S worked on the construction of a WalMart store in Danville. Transcript of the evidence (TE) 19.

This case began as an accident investigation triggered by a "media referral." TE 19. Erick Herron, a new employee of respondent C & S Erectors, fell from a height of approximately 20 feet (TE 35); he wore a safety belt with lanyard but the lanyard was not tied off to prevent a fall. TE 71. As a result of his fall Erick Herron suffered bruises, a head injury, a broken bone, a laceration and a sprain. TE 34.

As the result of the compliance officer's investigation, the secretary issued three willful citations, one serious citation and one nonserious citation to C & S Erectors.

Citation 1, item 1, charged the company with willfully not instructing employees to recognize and avoid "unsafe conditions" and proposed a penalty of \$17,500. 29 CFR (Code of Federal Regulations) 1926.21 (b) (2).² Our hearing officer affirmed this citation as written. Compliance officer (CO) Charles Stribling testified he interviewed Erick Herron who said he received no safety training before undertaking the work which led to his fall. Mr. Herron did not appear at the trial but the hearing officer admitted compliance officer (CO) Stribling's testimony about his conversation with Mr. Herron as an exception to the rule against hearsay. KRE (Kentucky Rules of Evidence) 801A (b) (4) says a "statement is not excluded by the hearsay rule" if it is made by a

² Adopted in Kentucky by 803 KAR 2:402.

"servant concerning a matter within the scope of...employment" and is made "during the existence of the relationship." (emphasis added). Respondent argues the secretary did not prove Mr. Herron was an employee when he gave his statement to the investigator, an essential element to establishing this exception to the hearsay rule under 801A (b) (4). As respondent points out in its brief to the commission, the secretary did not ask a direct question whether Mr. Herron was employed by the company on June 21, 1994 (TE 236) when he talked with CO Stribling. Neither did C&S.

But Martin Leffler, C & S's field superintendent for whom employee Herron worked, testified he took no corrective action after the fall. When asked why he took no action (he might have disciplined workers, changed work rules or issued new ones), Leffler said "I don't see this man [Herron] coming back to work. I mean, I really never would expect this man to be back on the job site." TE 127. We infer from Mr. Leffler's testimony that Erick Herron, upon recovering from his injuries, could have returned to work with C & S Erectors if he wanted and so find. Therefore the hearsay statement is admissible under KRE 801A (b) (4).

Mr. Leffler testified he instructed Erick Herron to screw down steel decking for the flat roof as part of the decking gang. "[Herron's] job was to stay out there in the middle of that building and screw that deck." TE 142. Our hearing officer found Leffler's testimony that he instructed Herron on working safely "not credible." Recommended order (RO) page 4. We agree with our hearing officer's finding. C&S was obligated by its contract to

hold weekly safety meetings and document those meetings. Exhibit 5. This was not done. TE 136. When Erick Herron fell, he was not screwing down decking in the middle of the roof but was, instead, straddling (standing or sitting) on an I beam (exhibits 11 and 12).

On the other hand, the hearing officer found compliance officer Stribling's testimony on Herron's out of court statement about not receiving any safety training credible. RO 3. We agree and affirm our hearing officer's conclusion that C&S violated the standard which requires employers to instruct their employees on hazards encountered on the job. The question remains, however, whether this was a willful violation.

The sixth circuit court of appeals in Cincinnati set out in Empire-Detroit Steel Division, Detroit Steel Corp. v. OSHRC and F. Ray Marshall, Secretary of Labor³, 579 F.2d 378, 384 (CA6 1978), CCH OSHD 22,813, a good definition of willful:

Willful means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision is described as willful, regardless of venal motive. (emphasis added)

To paraphrase, if the company when it disregards the standard takes action knowledgeably or if the action is conscious, intentional, deliberate or voluntary, then the conduct is willful. In short there must be some proof of intent, much like in a criminal case, to establish a willful violation. Here the secretary of labor

³ As a state with its own occupational safety and health program (KRS chapter 338), we are not bound to follow federal precedent. From time to time, however, we find the analysis in federal cases helpful as we do here.

offered, as proof of willfulness, a citation the company received in Indiana for a violation of the same standard. Complainant's exhibit 4. But this citation is directed to Mr. Gene Stoops, not to Martin Leffler the superintendent for C&S in the instant case. We cannot presume that Mr. Leffler, the supervisor for C&S at the worksite, was aware of the prior, Indiana citation. Without proof which tends to shed light on Mr. Leffler's intent, we must reduce this citation from willful to serious.⁴ KRS 338.991 (2).

The seriousness of the violation was tried, without objection⁵, when the compliance officer testified he **set the willful penalty after first fixing a serious penalty to which he then applied a multiplier. TE 62-68. KRS 338.991 (11) says there is a serious violation "...if there is a substantial probability that death or serious physical harm could result from a condition..."** that is from a violation of the standards. Here the employer failed to instruct a new employee to avoid the hazard of falling, and a fall from 20 feet will result in serious physical injury at the very least, as the facts of this case disclose.

Because we have reduced citation 1, item 1, to serious, we

⁴ The federal commission reached the opposite conclusion in D.A & L. Caruso, Inc., CCH OSHD 26,985, p. 34,694, where company engineer McCabe was present when the company was cited previously for a trenching **violation and was also the engineer when the company was inspected at a later date and cited for willful conduct. Further, the proof showed the superintendent knew the trenching standards. In the instant case, however, Mr. Leffler thought he did not have to enforce safety belt and lanyard standards until his employees reached 25 feet. TE 118.**

⁵ In Toler Excavating Co., CCH OSHD 19,875, the federal commission held it could reduce a willful violation to serious where the seriousness issue was tried by consent.

must reconsider the penalty. Compliance officer Stribling testified what the serious penalty would be in this situation. He first set a gravity based penalty. He determined that the likely result from a fall of 20 feet would be death or serious physical harm; this, he testified, was a high severity injury. Then, because Mr. Herron was at the point of danger when he fell, the CO determined there to be a greater probability of an injury. Using a chart from his compliance manual which ranges from low severity-lesser probability to high severity-greater probability, he found the gravity based penalty to be \$5,000. CO Stribling's manual permits adjustments to penalties for size of the employer (number of employees), the history of prior violations and the employer's good faith. Because C&S had sixty employees, it qualified for a 40% adjustment for size. Because the company had received no serious citations within the last three years in Kentucky, it received a 10% adjustment for history. TE 62-68. In some circumstances employers are also permitted an adjustment for good faith. Mr. Herron when he fell was not tied off. TE 71. Neither was he working in the center of the roof but was at a position where he was immediately subject to a 20 foot fall. TE 30. Although the company was to hold weekly safety meetings and file a report, it did not do so. We find this sufficient cause to award no C&S no credit for good faith. Therefore we conclude the penalty in this case to be \$2,500⁶ for citation 1, item 1, according to our authority contained in KRS 338.991 (6).

⁶ \$5,000 reduced by a 50% credit results in a \$2,500 penalty.

Next the secretary of labor charged respondent C&S in citation 1, item 2, with not requiring their employees to wear appropriate personal protective equipment, specifically a safety belt and lanyard, a violation of 1926.28 (a). This citation, written as a willful violation with a proposed penalty of \$17,500, was affirmed by our hearing officer. The standard reads:

The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part [1926] indicates the need for using such equipment to reduce the hazards to the employees.
(emphasis added)

Generally, C&S employees did not wear safety **belts and lanyards attached to prevent falls while working on the WalMart building and specifically Erick Herron did not have his lanyard attached when he fell. TE 71.**

In its brief to us on review, C&S raises several issues which we will now discuss. The company argues it did not violate 1926.28 (a) because Mr. Herron was ordered to screw down decking. That job required him to stand on metal sheets which were already spot welded into place. Because he fell while straddling an I beam and not while screwing down decking, the company says Herron was guilty of employee misconduct, a defense to an occupational safety and health citation. Brock v. L.E. Myers Co., High Voltage Division and OSHRC, 818 F.2d 1270, 1276-1277 (CA6 1987), CCH OSHD 27,919. But to establish the affirmative defense of employee misconduct, the employer must show it had a safety rule which it communicated to its employees and that the rule was enforced through progressive

discipline; this C&S failed to prove so the defense fails.

C&S argues the secretary must prove the company, through supervisor Leffler, knew or could have known with the exercise of reasonable diligence that Erick Herron was exposed to the fall of 20 feet. KRS 338.991 (11). That, the secretary did prove. Mr. Herron, and other C&S employees as well, worked on a flat open roof 20 feet off the ground. To see where his employees were, Mr. Leffler had only to look around.

C&S argues the hearing officer improperly relied on a Kentucky standards interpretative directive, 404-105(a), which counsels compliance officers to enforce a 10 foot tie off rule in Kentucky, to support her ruling that the company violated the standard. We agree with respondent's position that standards interpretation directives issued by the secretary of labor to its employees do not have the force and effect of law. Kerr v. Kentucky State Board for Registration for Professional Engineers and Land Surveyors, Ky. App., 797 S.W.2d 714, 717 (1990) and Kenton County Jail, KOSHRC 2700-95. But the issue before us is whether the company violated 1926.28 (a), not a standards directive. Before the hearing officer, C&S Erectors advanced the argument that .28 (a) must be read in the conjunctive: that is, the secretary must prove 1) exposure to a hazard and 2) that part 29 CFR 1926 "...indicates the need for using such equipment..."

C&S, in its brief to us, says that 1926.28 (a) is preempted by Subpart R of 1926. That is not true since R, which deals with

Attached as appendix A to this decision.

steel erection, does not require fall protection below 25 feet and then only specifies that nets be hung. The only section in Subpart R which speaks to safety belts and lanyards attached to a "catenary" line concerns employees "...gathering and stacking temporary floor planks..." not at issue in this case. 1926.750 (b) (2) (iii).

To deal with the question whether in Kentucky 1926.28 (a) reads and or or, we must first recount the strange history of 1926.28 (a) in the federal system. When .28 (a) was first promulgated by the U.S. Department of Labor, it read and meaning federal OSHA, to establish a violation, must prove 1) exposure to a hazard and 2) that some part of 1926 indicates the need for such equipment. That, to the federal government, seemed to difficult, so it reissued the standard to read or. But the federal government failed to follow the requirements of notice and comment rule making so the federal occupational safety and health review commission held that 1926.28 (a), changed to read or, actually read and as it did originally. So federal OSHA must still prove a hazard and a requirement for the equipment in 1926. The L.E. Myers Co., High Voltage Systems Division⁸, a federal review commission decision, CCH OSHD 27,476, p. 35,604.

But as our hearing officer observes in her order, Kentucky followed "proper procedure" when it adopted 1926.28 (a) and when it

⁸ In Myers the federal commission wrote "The facts plainly demonstrate that the three Myers' employees were exposed to the hazard of a fall warranting the use of safety belts." This, the secretary in the instant case proved as well.

did so the standard read or. We agree and hold that Kentucky's version of 1926.28 (a) is written in the disjunctive and reads or. That means when Kentucky's occupational safety and health program seeks to prove a violation of 1926.28 (a), it need prove either 1) a hazard or 2) an indication in some Part of 1926 which requires the use of personal protective equipment. In the case at bar, the secretary of labor proved that when Erick Herron fell without being tied off, he was seriously injured. The hazard proved here is the threat of a fall from 20 feet without personal protective equipment (a safety belt with lanyard tied off to prevent a fall).

In the case at bar, 1926.28 (a) says C&S is "responsible for requiring the wearing of appropriate personal protective equipment...where there is an exposure to hazardous conditions..." We hold according to the facts of this case that a potential fall from 20 feet is such a hazardous condition. We decline, however, to rule whether falls from less than 20 feet present "hazardous conditions" as such facts are not now before us. The language of 1926.28 (a) requires that we deal with it on a case by case basis.

Having concluded the respondent violated 1926.28 (a), we turn our attention to the issue whether the violation was willful or serious. Our hearing officer found that C&S had adequate notice to the "...Commonwealth's standard so that its disregard of that standard was properly termed "Willful." RO 11. To reach that conclusion, the hearing officer cited to a Kentucky standards interpretation directive. We reject the hearing officer's finding. We discussed the rule that a Kentucky standards interpretation

directive does not have the force and effect of law in Kentucky. Kerr and Kenton County, supra. Standard 1926.28 (a) is itself silent on what type of protection is needed and in what circumstances. But the standard does require the secretary to prove either a requirement within 1926 for personal protective equipment or, in the alternative, a hazardous condition which the secretary did prove. We do not know if the secretary can prove whether a fall below 20 feet is hazardous but we agree with him that a fall from 20 feet is. To some extent, the company recognized it too. New employees, like Mr. Herron, according to superintendent Leffler's testimony (TE 104-105), were assigned to screw steel decking in place which would, for large parts of their working day, remove them from the danger of a fall.

Superintendent Leffler testified he understood employees shall be tied off above 25 feet. TE 118. That is the federal rule. The L.E. Myers Co., High Voltage Systems Division, supra. But of course in the federal system the secretary of labor must prove 1) a hazardous condition (a fall) and 2) some part of 1926 which requires protection such as Subpart R on nets above 25 feet. 29 CFR 1926.750 (b) (2) (iii). In Kentucky in the instant case, by contrast, the secretary must prove a hazardous condition (here a fall from 20 feet) to establish the need for safety belts and lanyards tied off to prevent falls. The fact that C&S employees wore safety belts which could have been tied off to prevent falls proves their suitability as a fall protection system.

Because Mr. Leffler understood the tie off rule to be the

federal 25 foot standard, because Kentucky standards directives may not be enforced and because 1926.28 (a) is silent on the circumstances when personal protective equipment must be used, we find, without more, that C&S did not understand that their employees (who wore belts at all times in any event) must tie off in Kentucky when encountering "hazardous conditions" - in this case the prospect of a 20 foot fall. 1926.28 (a). We therefore reduce citation 1, item 2, from willful to serious. As before, we take this action because the secretary of labor tried the seriousness of the violation, without objection, when calculating the penalty. For the reasons stated we set the penalty for item 2 at \$2,500 as well.

Finally, we affirm our hearing officer's order dismissing citation 1, item 3, but sustaining citation 2, item 1, and citation 3, item 1.

While C&S apparently does the large majority of its work out of state, under either federal law or the law of other state occupational safety and health programs, we expect the company when working here will observe Kentucky law.

We affirm the recommended order to the extent it is consistent with this decision.

We affirm citation 1, items 1 and 2, each with a penalty of \$2,500.

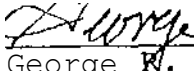
We affirm citation 2, item 1, with a penalty of \$1,000 and citation 3, item 1, with no penalty.

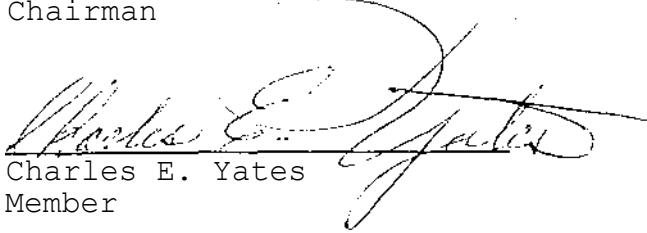
If abatement has not already been accomplished by respondent,

we order it to do so immediately.

It is so ordered.

Entered February 4, 1997.


George B. Wagon
Chairman


Charles E. Yates
Member


Donald A. Butler
Member