COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2669-95

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY COMPLAINANT

VS.

JAMES E. SMITH MECHANICAL, INC. RESPONDENT

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DECISION AND ORDER
OF THIS REVIEW COMMISSION

This case comes to us on the secretary of labor's petition for discretionary review of the hearing officer's recommended order. Section 48 (1) of our rules of procedure (ROP). [1] We granted the petition and received briefs from the parties. According to our rules of procedure, KRS 338.071 and KRS 338.141, this commission bears the ultimate responsibility for deciding a case within our jurisdiction.

The secretary of labor, the enforcer of the Kentucky occupational safety and health act (KRS chapter 338), issued a citation to Smith Mechanical which alleged the respondent did not furnish its employees employment free of recognized hazards likely to cause death or serious physical harm under the general duty clause, KRS 338.031 (1) (a). Specifically, the citation said a heat exchanger Smith installed for Western Kentucky University " ...was not rigged and/or secured in such a manner to prevent it from overturning on the employees." After a trial the parties

[1] Enacted as section 48 (1), 803 KAR 50:010.

submitted briefs to our hearing officer who affirmed the citation and penalty of $2,500.

In his recommended order to this commission, our hearing officer made findings of fact. Larry Moeller, the field supervisor and foreman for Smith Mechanical, was to install the exchanger which weighed 7,670 pounds, with another employee helping. Instead Mr. Moeller made the decision to bring in four additional pipe fitters for the placement. He decided to lift the unit using two chain hoists attached to the low concrete ceiling. Because the ceiling was so low, Mr. Moeller attached the lift slings "...at or near the unit's center of gravity..." instead of attaching one sling at the unit's top. Recommended order (RO) 3. No one in Mr. Moeller's lifting crew had experience with a lift using two slings (due to a low ceiling) attached at the unit's center of gravity or below. Mr. Moeller did not make any attempt to stabilize the heat exchanger to prevent it from turning. On September 19, 1994 Smith Mechanical's crew lowered the unit when it "...began to turn and become unstable." RO 4. The unit spun and fell on Mr. Moeller, killing him. RO 5.

According to Pennwalt Corporation, KOSHRC 1232 (1985) and Empire Detroit Steel Division, Detroit Steel Corp. v. OSHRC and Marshall, Secretary of Labor,[2] 579 F.2d 378 (CA6 1978), CCH OSHD 22,813 (pp. 27,575-27,576), the secretary, in a general duty clause case, must prove:

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[2] As a state OSHA program, this commission is not subject to federal precedent. But we often find the federal cases helpful to our analysis as we do here.

1. the existence of a hazard,

2. the employer's constructive or actual knowledge of the hazard and

3. a feasible method for abating the hazard.

Our hearing officer found the hazard to be the "...serious potential that the equipment [heat exchanger] would become unstable during the installation process and the instability could cause the unit to fall on one or more of the installing employees." RO 7. Hearing office Majors based his finding on the testimony of Dr. Hahn, labor's expert witness, and Randy Gray, the inspecting compliance officer. We agree with the hearing officer and add that Dr. Hahn and Mr. Gray's testimony is supported by Norvin Miller (a pipe fitter helping Mr. Moeller make the lift) who stated at trial that he too recognized the importance of keeping the exchanger stable at all times. Transcript of the evidence (TE) 171.

Restated, the hazard here is lifting an unstable piece of heavy equipment without securing it in such a way as to prevent it from falling on and injuring employees. Through Dr. Hahn, compliance officer Gray and pipe fitter Miller, the secretary proved the hazard was recognized in the pipe fitting industry. While accepting the testimony of Hahn (TE 97), Gray (TE 23-23, 43-44) and Miller about the hazard and the pipe fitting industry recognition of the hazard, we simultaneously reject the testimony of the pipe fitters and Mr. Smith to the contrary. We are impressed by the candor Mr. Miller displayed when he admitted he understood the importance of keeping the unit stable while

performing the lift. TE 171. We are similarly impressed with the testimony of Dr. Hahn, his understanding of the mechanics of the lift and his explanation why the unit twisted (TE 90).

Then our hearing officer found persuasive the testimony of Dr. Hahn (TE 90, 99) and Jerry Prunty (TE 215 & 216-217) to the effect there were feasible methods for stabilizing the unit during the lift.

Several pipe fitters testified it would not be feasible to stabilize the unit with lines which came off the unit horizontally because it would be necessary to attach them to steam pipes. This, they said, would create a greater hazard because of the possibility of rupturing the steam lines. We do not find this testimony credible because, as can be seen from the photographs (secretary's exhibits 12 and 15), the walls of the room where the accident occurred, like the ceiling, are made of concrete. We infer if the bolts attaching the chain hoists to the concrete ceiling held during the lift (secretary's exhibit 22, taken after the accident), then horizontal stabilizer lines attached to bolts in the walls of the room would also hold. Thus, horizontal stabilizer lines leading away from the unit and bolted to the concrete walls of the room where the lift occurred were feasible and we so find.

We find there are three feasible ways to abate the hazard[3]: one, tie a line around the top of the unit to make the two lifting

[3] We find the heat exchanger would have been stable had it been lifted by one line attached at its top. That lifting technique (impossible because of the low ceiling) would have eliminated the hazard in this case.

slings act as one, two, weld outrigger legs to the unit and three, tie horizontal stabilizer lines from the unit to bolts in the concrete wall.

Hearing officer Majors concluded Smith Mechanical violated the general duty clause citing to Pennwalt, supra, for the elements necessary to prove the violation.

We turn, then, to the issues raised by James Smith Mechanical on review.

Smith Mechanical first argues the secretary failed "...to establish precisely what the 'hazard' was..." Smith, in this regard, attempts to lead this commission to a conclusion that the hazard is proving exactly why the heat exchanger fell. We reject respondent's assertion that the recognized hazard must be the answer to the question why the accident happened - that is, why the unit turned. Although Smith Mechanical offers no theories why the accident occurred (and why should it given labor's burden of proof), we infer Smith refers to the two competing theories why the unit twisted and fell: one, because Mr. Moeller himself twisted the unit to line it up with marks on the concrete pad, its destination, and thus initiated the twisting and fall and two, the unit twisted and fell because one sling was not completely lowered and relaxed before the second sling was lowered. We find it unnecessary to resolve this question because the hazard (not stabilizing the unit) is the same for both theories and the three means of assuring stability would have prevented twisting either initiated by foreman Larry Moeller or uneven lowering of the unit.

The focus in a general duty clause case[4] is on recognized hazards, whether recognized by the employer or the industry in which he toils, and how to eliminate the hazard rather than a simple exercise in accident reconstruction. As we stated above, "...the hazard here is lifting an unstable piece of heavy equipment without securing it in such a way as to prevent it from falling on and injuring employees."

Next James Smith Mechanical argues the recommended order affirming the citation ignores the testimony of the pipe fitters "...they had never seen a piece of machinery twist and fall like this in their careers." Smith brief to the commission, p. 2. This commission found the testimony of Mr. Norvin Miller that stability was important very credible. TE 171. Similarly, we found the testimony of Jerry Prunty about the use of stabilizer legs welded to the unit credible. TE 215. But we are not, however, persuaded by the pipe fitters when they testified they never saw a unit twist like this one, for several reasons. One, we find the secretary proved constructive knowledge of the hazard through Dr. Hahn, the compliance officer and Norvin Miller. Recognition of the hazard (that is, the instablity of the unit if not secured) and a feasible means of abatement would have prevented the fall regardless whether the pipe fitters had seen a similar accident or not. Understanding industry specific hazards and abating them is the reason for

[4] "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees." KRS 338.031 (1) (a).

enacting a general duty clause. With the unit stabilized, **an** employee lapse in concentration leading to an unbalanced lowering of the unit or rotating it would make no difference. Stabilized, the unit would not twist and fall.

An employer individually may be ignorant of a hazard and still violate the general duty clause when there is proof, as there is in this case, of industry or constructive knowledge. National Realty and Construction Co. v. OSHRC, 489 F.2d 1257 fn. 32 (CADC 1973), CCH OSHD 17,018.

Two, we assume Smith Mechanical, when it argues the pipe fitters had never seen such an accident, raises the legal issue that the accident was not foreseeable. But the federal review commission in United States Steel Corp., CCH OSHD 26,123, held that the foreseeability of an accident is not an element of a general duty clause violation. We agree with the reasoning of the federal commission. After all the general duty clause, as interpreted, says to an employer he must understand the hazards of his business and take steps to prevent the hazards from threatening his employees. If hazards are eliminated, then there will be no threat to employees. But if the focus in these cases is on a particular accident, that detracts from the broader inquiry of hazard recognition and elimination.

Next the employer argues the citation holds Smith Mechanical to a strict liability standard. When asked how he knew Smith Mechanical "...knew or recognized the existence of the hazard," the compliance officer answered "My determination was based upon the

fact that the accident occurred." TE 45. From this we presume Smith argues it would not have been cited except for the accident.

This commission accepts the argument that the occupational safety and health law does not impose a strict liability standard upon employers. Employers in Kentucky must observe the safety and health regulations and the general duty clause and no more. KRS 338.031 (1).

Hazards to employees exist independent of a potential accident. In the instant case the instability of the unit lifted with two slings presents a potential hazard whether the unit twists or not. The instability hazard is still there and without abatement continues to threaten employee safety. As the ninth circuit court of appeals put it in a general duty clause case "...it is beyond dispute that an accident need not occur for a violation..." to be found. Titanium Metals Corporation of America v. W. J. Usery, Secretary of Labor and OSHRC, 579 F.2d 536, (CA9 1978), CCH OSHD 22,969.

Finally, James Smith Mechanical argues that it had no knowledge of the alleged violation.

Larry Moeller, the victim of the accident in this case, was also the foreman. As company president Robert Smith testified (TE 251), Mr. Moeller was the company expert (TE 260) and field supervisor (TE 261). In its brief to the commission, Smith Mechanical argues that an "...employer is not responsible for actions taken by an experienced foreman," citing Horne Plumbing and Heating Co. v. OSHRC, 528 F.2d 564 (CA5 1976), CCH OSHD 20,504.

In Horne two experienced plumbing foremen were killed when a trench in which they worked collapsed on them. The company in Horne had explicit rules about not working in a deep trench without sloping the sides or erecting shoring and enforced them. These two experienced Horne foremen understood the company rules on safe trenching, violated the enforced work rules and died. Where the employer had explicit safety rules about trenching work and enforced those rules, then the company is not subject to an OSHA citation when the foremen violate them. When an employer has done all that it can do to protect employees by setting out and enforcing work rules, then the foremen's conduct cannot be imputed back to the employer.

In the case at hand, however, there were no work rules on safe lifting practices. Instead the company relied upon the experience of its workers, especially the foreman.

In the Horne case, the foremen's unexpected violation of the explicit and enforced work rules means their conduct cannot be imputed back to the company. Where, however, there are no work rules but the company sends out workers and appoints one of them foreman or field supetvisor, then we hold the foreman or field supervisor's conduct must be imputed to the company. To rule otherwise says to employers they may send out employees without work rules and without corporate officers but incur no liability when OSHA standards[5] or the general duty clause are violated. KRS

[5] We use the terms regulations and standards interchangeably. Kentucky OSHA standards are found at 803 KAR chapter 2.

338.031 (1) very explicitly sets out an employer's obligation to follow the occupational safety and health standards and the general duty clause as well.

There is no proof in the record that James Smith Mechanical had work rules for the foremen or field supervisors to follow - certainly none on stabilizing objects when performing lifts. Therefore Mr. Moeller's conduct is properly imputed back to the company. There is no question that Mr. Moeller, given the wide latitude he was granted as a field supervisor, had the authority to attach stabilizing lines to the unit or weld stabilizing legs or tie the lifting slings together at the top of the unit and we so find. Mercer Well Service, Inc., a federal review commission decision, CCH OSHD 22,210.

We conclude Smith Mechanical violated the general duty clause because it 1) created a hazard when its employees lifted the heat exchanger without taking steps to stabilize it, 2) the company had constructive knowledge of the hazard and 3) there were three feasible methods for eliminating the hazard.

Our hearing officer at the end of the trial asked the parties for proposed findings of fact and conclusions of law. He then asked that these findings and conclusions be put on a computer disk as well. As his recommended order, the hearing officer simply signed those findings and conclusions submitted by the labor cabinet. In Kentucky judges may ask that proposed findings and conclusions be submitted to them (CR 52.01) but then must exercise their judgment in making a decision about the case. It is improper

for a judge in Kentucky (or a hearing officer) simply to sign the findings and conclusions submitted by the winning side unless there is some showing in the record that the hearing officer exercised his judgment in reaching the decision. **Bingham v. Bingham,** Ky., 628 S.W.2d 628 (1982)

By signing labor's proposed findings and conclusions without making any changes in them or discounting James Smith's arguments, our hearing officer leaves the impression he made no independent judgment of his own. When hearing officers solicit proposed findings and conclusions, it must be clear on the record that independent judgment was exercised.

We affirm our hearing officer's recommended order which upheld the citation and penalty of $2,500.

Respondent shall abate the violation, if not already accomplished, upon receipt of this decision.

It is so ordered.

Entered September 10, 1996.

George R. W goner
Chairman

Charles E. Yates,
Member

Donald A. Butler
Member

Copy of the foregoing Order has been served upon the following parties in the manner indicated:

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This 10th day of September, 1996.

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