COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2977-97

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

JOHN CLEARY AND SON — RESPONDENT

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DECISION AND ORDER
OF THIS REVIEW COMMISSION

We called this case for review under our authority contained in section 47 (3) of our rules of procedure.[1] The parties, in their briefs to us, responded to several questions posed in our call for review.

After a fatality investigation, the secretary of labor, the enforcer of the Kentucky occupational safety and health act (KRS chapter 338), issued citations to John Cleary and Son, respondent. The secretary charged Cleary with not maintaining hand signals or audible contact between loggers, permitting employees to be within two tree lengths during felling (tree cutting) or yarding operations (dragging trees to a site where they can be loaded on a truck) and not providing safety and first aid training. Following a trial on the merits, our hearing officer dismissed the citations, taking the position that because John Cleary and Son was not an employer the secretary of labor had no jurisdiction under the act. KRS 338.015 (1) and 338.031.

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

We took this case on review because of our concern about two issues: first, whether the entity John Cleary and Son (including the deceased Randall Pitcock) was an employer and, two, whether a partner in an enterprise may also be an employee? In order to understand these issues, it is first necessary to appreciate the working relationship between John Cleary, his son Jimmy and Randall Pitcock.

We find the following facts[2]: In early 1996 John Cleary, under contract with Johnny Rich Lumber, began logging in Burkesville, Kentucky. Transcript of the evidence (TE) 18 and exhibit 1. Rich Lumber owned the land and timber. TE 19. For every 100 board feet of lumber cut, the Clearys received $6.50. TE 20 and 108. To accomplish the logging for Rich Lumber, John Cleary and his son Jimmy, both experienced loggers, worked as partners. TE 107. Later in 1996 Randall Pitcock, also a veteran logger, joined the logging enterprise as a partner. TE 110 and 113. Because the more difficult logging had already been done (TE 111), Mr. Pitcock received $1.25 per 100 board feet cut and the Clearys the remaining $5.25. TE 112. Because Mr. Pitcock was also a tobacco farmer, he could not work as a logger every day; nevertheless he received his $1.25 share regardless whether he worked each day or not. TE 112-113. The Cleary-Pitcock arrangement was not in writing. TE 115. The work consisted primarily of cutting trees and then pulling the logs with a skitter

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[2] The commission must make findings of fact and conclusions of law. KRS 338.071 (4) and 803 KAR 50:010, section 47 (1).

(a four wheeled tractor with three winches) to a point where they could be loaded on a truck. TE 108-109, 115 and exhibit 3. While the three men worked on the Rich Lumber job, also known as the Alpine tract (TE 110), no one attempted to control the work of the others. TE 112 and 115. Randall Pitcock died when a cable from the skitter picked up a seasoned pole (not a tree just cut but an old log lying on the ground) and caused it to hit him. TE 118-119.

John Cleary and son Jimmy had an ongoing relationship as partners. TE 107. But when Randall Pitcock joined the Clearys to complete the logging of the Alpine tract, they formed (as respondent admitted in its brief to this commission) a joint adventure. In Whitsell v Porter, Ky., 217 S.W.2d 311, 313, 314 (1949), the high court said:

> A joint adventure is an informal partnership differing from the traditional partnership principally in that it is usually, but not necessarily, formed for and limited to a single transaction.
>
> Each member of a joint adventure has the dual status as principal for himself and agent of the others...

This takes us to a resolution of the first issue: whether the joint adventure formed by John Cleary, his son and Randall Pitcock is an employer under the Kentucky occupational safety and health act? In the federal system when two or more corporations combine together to form a joint venture, it is considered an employer. Bloomfield Mechanical Contacting, Inc. a corporation and Bloomfield-Blumin, a joint venture v. Occupational Safety and

Review Commission and Peter J. Brennan, Secretary of Labor[3], 519 F.2d 1257 (CA3 1975), CCH OSHD 19,917. The joint venture in Bloomfield came together to undertake a plumbing contract while in the instant case, John Cleary, Jimmy Cleary and Randall Pitcock formed a joint adventure to complete the logging of the Alpine tract; in effect, the Clearys took in a third partner for the single transaction. In both instances the principal is the same: a business entity was created to carry out a productive task with potential economic benefit. We reverse our hearing officer and hold a joint adventure in Kentucky, created by individuals who are partners in the undertaking, is an employer for the purposes of Kentucky's occupational safety and health (OSH) act. KRS 338.015 (1) and 338.031.

But to invoke the jurisdiction of the OSH act there must be an employer with employees (KRS 338.031) and that takes us to the second issue: whether John Cleary, Jimmy Cleary and Randall Pitcock were employees of John Cleary and Son, the joint adventure under Kentucky's occupational safety and health act? Our hearing officer found the three men to be partners. We agree. But the quest does not end here. The next question is whether the partners of a joint adventure can also be employees of that joint adventure?

To answer that question, we turn first to an examination of Mangus Firearms, a federal administrative law judge (ALJ) decision, CCH OSHD 19,381. Mangus was owned by a person who also acted as

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[3] As a state review commission we are not bound by federal precedent but we often find the decisions persuasive as we do here.

the manager. The owner had a "silent investor" who occasionally filled in as a clerk when the manager was away. The ALJ ruled the silent investor was an employee while performing her clerical function. In other words, the woman was an employee only when she worked as a clerk at the shop.

Then in Miller Construction Company, a federal decision, BNA 2 OSHC 3282, the commission held:

> each principal in a partnership or working joint venture, if a working partner or working joint venturer, is an employee of the partnership or joint venture... (emphasis added)

In Miller the business consisted of either a three person partnership or a joint venture composed of a partnership and a sole proprietor, the situation in the instant case.

For both Mangus and Miller Construction, the principal is the same; if the partner, joint adventurer or silent investor works, he is an employee for purposes of the act. This makes sense. Occupational safety and health law applies to employers with employees who work in situations where hazards may be present. It is the professed goal of the act to eliminate hazards in the workplace. KRS 338.011. For us to rule that a whole class of employees, working partners in joint adventures, is without the protection of the OSH act would frustrate its purposes. The OSH act is expressly designed to protect those who work. When Mr. Cleary or Mr. Pitcock began to work for the logging joint adventure, they came under the protection of the act. For the purposes of KRS chapter 338, we find John Cleary and Son, the joint adventure, is an employer and the working partners are employees of

that joint adventure.

Cleary, in its brief to the hearing officer, argued it could have not been an employer because any partner could exercise control.[4] From our reading of the facts of the case, no one exercised control - or perhaps too many did.[5] But that does not provide a trap door out of the occupational safety and health law, for if it did many would take it. As the federal commission put it in V.I.P. Structures, Inc., CCH OSHD 30,485:

> Responsibility under the Act for ensuring that employees do not put themselves into any unsafe position rests ultimately upon each employer, not the employees, and employers may not shift their responsibility onto their employees.

Once an entity comes into existence to perform a task, be it a corporation, proprietorship, partnership or joint adventure, it becomes an employer; then it must look around to see if anyone is working for the entity to accomplish some task. If there is such a worker, he is an employee of the entity and entitled to protection under the occupational safety and health act. V.I.P Structures and KRS 338.031. The employer, then, who does not observe the requirements of the OSH statute and standards will be subject to the jurisdiction of the secretary whether the working

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[4] Cleary cited Ratliff v Redmon, Ky., 396 S.W.2d 320, 327 (1965). But in Ratliff the issue is whether a claimant is an employee or independent contractor for the purpose of determining eligibility for workers' compensation benefits. Ratliff was written with workers' compensation in mind, not occupational safety and health.

[5] According to the inspecting compliance officer, Jimmy Cleary said his father gave the signal to him to start the skitter (the yarding) while Mr. Cleary told the officer that Randall Pitcock gave the signal instead. TE 42.

partners could have exercised control or not.

Having concluded John Cleary and Son (including Mr. Pitcock) is a joint adventure with working partners as employees of the joint adventure, we now consider the citations themselves.[6] Citation 1, item 1, charged respondent with not maintaining hand signal or audible contact between the three working partners. The cited standard, 29 CFR 1910.266.(d) (7) (i)[7] says in part:

> Hand signals or audible contact...shall be utilized whenever noise, distance, restricted visibility...prevent clear understanding of normal voice communications...

But instead of proof the partners had trouble hearing one another, the compliance offered "There was some discrepancy on who had told who to start the skitter." TE 42. As we interpret the standard, it requires "hand signals or audible contact" when voice communications cannot be heard or understood. Unfortunately for the labor cabinet, the proof disclosed that Jimmy Cleary heard his father give the signal while Mr. Cleary heard Randall Pitcock. Because the partners could hear one another, we must dismiss citation 1, item 1.

Next citation 1, item 2a, charges that respondent had employees within two tree lengths of a mechanical felling operation. Then, in item 2b, grouped with 2a, labor charges respondent with yarding logs (moving logs with a cable pulled by

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[6] Our hearing officer dismissed the citations for lack of jurisdiction without providing an analysis of the citations. We will deal with the citations ourselves as the case is now before us.

[7] Incorporated by reference in Kentucky by 803 KAR 2:317.

the skitter) when employees were not in the clear. Items 2a and 2b, grouped as we said, carried a combined penalty of $1,500. Because the joint adventure was either cutting logs or moving them, we assume that the labor cabinet intended to cite in the alternative. According to 1910.266 (c), "fell" means to cut down trees. The compliance officer testified the tree in question was cut but "hadn't fully hit the ground." TE 50. The compliance officer assumed the tree was still being felled because it "...was not already down on the ground." TE 49. But his conclusion overlooks the definition of felling. Because the tree had been cut, we dismiss citation 1, item 2a, leading us to consider 2b.

Item 2b, alleges a violation of 1910.266 (h) (5) (i) which says "No log shall be moved until each employee is in the clear." Labor issued this citation "...because John Cleary and Randall Pitcock were in an area that the trees were being yarded." TE 52-53. We find that is so. Randall Pitcock died when struck by a log pulled by the skitter. TE 118-119. This citation carried a proposed penalty of $1,500. The compliance officer figured the penalty by first determining the gravity based penalty. He awarded high severity because a yarding operation could cause a tree or log to strike an employee, causing death. TE 55. Then he awarded greater probability because the likelihood of injury was great given the absence of required training. That produced a gravity based penalty of $5,000. TE 55-56. Respondent joint adventure received a total of 70 percent adjustment of the gravity based penalty. First John Cleary and Son received 60 percent credit for

size (the number of employees). Then it received 10 percent credit for history (no prior citations). Finally, the employer received no credit for good faith because they had no written safety and health programs. TE 45-47. The 70 percent credit resulted in the $1,500 proposed penalty. We affirm citation 1, item 2b but not the proposed penalty.

Next the secretary of labor issued citation 1, item 3a, for not providing training in accordance with 1910.266 (i) (1) and item 3b, for not having monthly safety meetings as required by 1910.266 (i) (11). This grouped citation carried a proposed penalty of $1,500. We find John Cleary and Son provided no training. TE 57. We infer, because there was no training provided, the joint adventure held no monthly safety meetings. We affirm citation 3, items 3a and 3b.

Finally, the secretary issued citation 1, item 4, to the employer for not training its employees in the techniques of first aid and CPR, a violation of 1910.266 (i) (7) (i). Citation 4 also carried a proposed penalty of $1,500 Here we find none of the partners had first aid or CPR training. TE 62. We affirm citation 1, item 4.

Logging is dangerous work. We find the citations serious because of the likelihood of serious physical injury or death, attributable, in part, to respondent's failure to observe the logging standards set out in 1910.266. KRS 338.991 (11).

We affirmed three citations each with a proposed penalty of $1,500 for a total of $4,500. But it is the duty of this

commission in contested cases to set penalties. KRS 338.081 (3) and 338.991 (5). When it filed its answer to the administrative complaint, John Cleary and Son plead financial hardship. We must therefore first compare the proposed penalty with income figures for the year the violation occurred. Although respondent failed to submit hard financial data to support its claim of financial hardship, its witnesses did testify generally to the income of the enterprise.

Rich Lumber issued around 10 checks to John Cleary for the work he, his son and Randall Pitcock did on the Alpine tract. TE 147-148. The checks ranged from $900 to $1,200. TE 148. Because respondent did not elect to introduce the checks themselves into evidence, we will take the $1,200 figure; then ten times that amount is $12,000[8] and we so find. Cleary and his partners paid their own expenses. But Rich Lumber loaned them the skitter (TE 108) and picked up the logs. TE 153. So the joint adventure had no skitter or trucks of its own to haul the logs. We infer, with nothing in the record to the contrary, the joint adventure had few expenses.

If we infer, then, because there is no proof otherwise, that the $12,000 is the profit or income from the job for Rich Lumber, we can then compare it with the $4,500 proposed figure for the three citations we have upheld. $4,500 divided by $12,000 equals 38%.

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[8] We take the gross amount paid as our figure since this was a joint adventure among the three men.

We have held in Fleming County Industries[9], KOSHRC 2439-93, that 7% is a reasonable ratio of penalty to income. Applying that figure to this case, 12,000 times .07 equals $840. Exercising our authority to set penalties in contested cases (KRS 338.081 (3)), we set the total penalty at $840, adjusted for financial hardship, for all three citations because logging is a hazardous occupation and the joint adventure had no safety programs or training.

Respondent shall pay the $840 in twelve equal, monthly installments of $70 each to the secretary of labor commencing thirty days from receipt of this decision. Fleming Co. Industries, Inc., KOSHRC 2439-93.

We affirm citation 1, items 2b, 3 (a and b) and 4 with a combined serious penalty of $840. We dismiss items 1 and 2a.

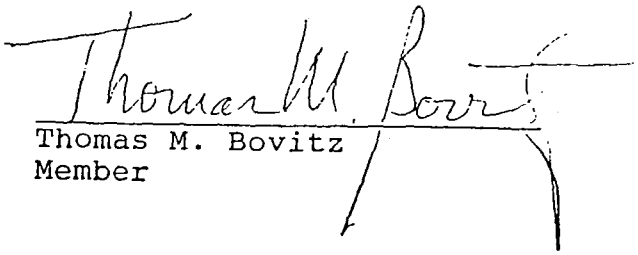
If abatement has not already been accomplished by respondent, we order it to do so within 30 days.

It is so ordered.

Entered November 4, 1997.

Robert M. Winstead
Chairman

[9] Attached as appendix A.



Thomas M. Bovitz
Member