COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC DOCKET 3047-97

SECRETARY OF LABOR,
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

DONALD PETERS CONSTRUCTION, INC. — RESPONDENT

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DECISION AND ORDER OF
THIS REVIEW COMMISSION

This case comes to us on respondent Donald Peters Construction's petition for discretionary review (PDR).[1] Rather than grant the petition, we called this case for review on our own motion and asked for briefs. Section 47 (3).

The Secretary of Labor, the enforcer of the occupational safety and health act (KRS chapter 338), conducted a complaint inspection of the Donald Peters construction site in Henderson where respondent's employees worked in an excavation. After completing the inspection the secretary issued a citation with six items, each carrying a proposed penalty of $14,000. Our hearing officer dismissed items 1, 2 and 4 along with their penalties. He

[1] Section 48 (1) of our regulations, enacted as 803 KAR 50:010.

affirmed items 3, 5 and 6, setting $14,000 as the penalty for each item. Respondent Donald Peters then sought this review.

Before disposing of this case on its merits, we shall first explain the functioning of the commission in these cases.

When the Kentucky General Assembly created the review commission, it authorized the commission to "...hear and rule on appeals from citations..." KRS 338.071 (4). (emphasis added) The commission, under the statute, reviews the citations themselves and not merely the recommended orders issued by its hearing officers it appoints under KRS 338.081 (1). Thus the review commission by statute is the ultimate fact finder in contested cases and may take the case from the hearing officer and make the final decision. The United States Court of Appeals for the Sixth Circuit, examining a similar statute, held that when the federal review commission reviews a case, it does so "de novo." Brennan, Secretary of Labor v. OSHRC Interstate Glass[2], 487 F.2d 438, 441 (8th Cir. 1973), CCH OSHD 16,799. See also Accu-Namics, Inc. v. OSHRC, 515 F.2d 828, 834 (5th Cir. 1975), CCH OSHD 19,802.

After the Secretary of Labor conducts an inspection and issues

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[2] As a state program we are not obligated to follow federal precedent. We often find federal decisions persuasive as we do here.

a citation, the employer has several choices. He may do nothing and the citation then becomes a final order of the commission by operation of law. KRS 338.141 (1). Or the employer may contest the citation in which case he gets a hearing, a preliminary decision by the hearing officer and a chance for review of the citation by this commission. KRS 338.141 (1) and sections 3, 47 and 48 of our procedural regulations.

At a hearing the secretary bears the burden of proof. Section 43. To prove a case, the secretary must show by a preponderance of the evidence that:

1. the standard[3] applies to the cited condition,

2. the employer violated the standard,

3. an employee had access to the cited condition, and

4. the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition.

Ormet Corp., a federal commission decision, CCH OSHD 29,254 (1991).

This case can be divided into three parts: items 1 and 2, items 3 and 4, and items 5 and 6. For example, items 1 and 2 both

[3] We use the terms standard and regulation interchangeably to denote those safety and health regulations adopted by the secretary in 803 KAR chapter 2.

charge respondent Donald Peters with violating the standard which requires an employer to place a ladder or other means of exit into an excavation where employees work. Items 1 and 2 are identical except that item 1 charged the employer Donald Peters with exposing a single, unnamed employee to the hazard of working in an excavation without a means of exit; item 2 then charges the employer with exposing a second, unnamed employee to the same alleged hazard. The same is true of items 3 and 4 as well as items 5 and 6. The secretary calls these multiple citations, charging the same violation, egregious violations. Each of the six "egregious" items in this case are denominated willful serious.[4]

Items 1 and 2 charged respondent Donald Peters Construction with not providing his employees working in an excavation a stairway, ladder or dirt ramp they could use as an exit. The standard[5] cited reads:

> Means of egress from trench excavations. A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet...or more in depth... (emphasis added)

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[4] A willful violation may carry a penalty of up to $70,000. KRS 338.991 (1). A serious violation may carry a maximum penalty of $7,000. KRS 338.991 (2).

[5] The secretary enforces various safety and health standards. We will use the words standards and regulations interchangeably.

29 CFR 1926.651 (c) (2)[6]

To sustain this citation, the Secretary of Labor had to prove, as a necessary element of its case, the excavation was more than 4 feet deep. Our hearing officer found, and we agree, the compliance officer who conducted the inspection and testified at trial, failed to measure properly the depth of the trench. Recommended order (RO) 5. Because the compliance officer measured the depth along a sloping wall of the excavation rather than a vertical measurement (RO 4), its actual depth could not be determined and we so find. RO 5.

Since the Secretary of Labor failed to prove the depth of the excavation, the hearing officer recommended dismissed items 1 and 2 as not proven. After reviewing the record in this case and the parties' briefs, we dismiss items 1 and 2.

Next, in items 3 and 4, the Secretary of Labor charged respondent Donald Peters Construction with failing to cause a "competent person" to make a daily inspection of the excavation as required by 29 CFR 1926.651 (k) (1) which reads:

> Daily inspections of excavations...shall be made by a competent person for evidence of a situation that could result in possible cave-ins...An inspection shall be

[6] 29 CFR 1926.651 is incorporated by reference by 803 KAR 2:415.

> conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm...These inspections are only required when employee exposure can be reasonably anticipated. (emphasis added)

Once again items 3 and 4 are egregious, according to the secretary, because they involve two employees working in the same excavation. Working in an excavation exposes employees to the hazards of cave-ins, proving access. Our discussion applies to item 3, but in the abstract applies to item 4 as well. Since the citations are denominated as serious violations, the secretary had to prove the employer knew, or could have with reasonable diligence, about the violative conditions, at least for items 3 and 5. KRS 338.991 (11). We find the secretary proved the employer knew of the violative conditions.

For items 3 and 4, the secretary had the burden[7] to prove no competent person inspected the excavation at the beginning of each shift. Mr. Donald Peters, owner of the company, testified he was the competent person and that he inspected the excavation at the beginning of each day. He testified "...I know that I wouldn't start any job unless I'd looked it over before we started..." Transcript of the evidence (TE) 182. Our hearing officer found,

[7] In these cases the Secretary of Labor has the burden of proof. Section 43, 803 KAR 50:010.

without elaboration, "...the mere act of looking at the trench did not constitute an inspection of the excavation..." RO 6.

The standards themselves contain a definition of a competent person, but they are not much help. The definition says: "Competent person means one...capable of identifying existing and predictable hazards...and who has authority to take prompt corrective measures..." 1926.650 (b).

In the R.S. Deering, Inc., BNA 15 OSHC 1349, case, we have a good example of a company president who was not a competent person under the standard. Here are the facts:

> ...Deering's president was unaware of the Type A, B, or C soil classifications used in the... standards or with the new requirements for both visual and manual testing contained in the standards. Therefore, he cannot be found to have been a 'competent person' for purposes of this standard. At p. 1350 (emphasis added)

In Deering, the company president was found not to be a competent person because he did not know and perform the visual and manual tests which the standards permit to be used to determine soil cohesiveness. Appendix A to section 1926 Subpart P-Soil Classification, paragraph (c) (2). These tests, written in understandable language, are simple enough to be understood and utilized by an employer or supervisor who is not a civil engineer. At the very least, the visual and manual tests, once performed,

inform the employer about the cohesiveness of the soil. He can then consult the regulations, if he chooses to slope rather than shore up the sides of the trench, to see to what angle he must slope the sides. In fact the compliance officer admitted the walls were sloped when he discussed his attempts to measure depth.

The visual and manual tests are important in this case because, as the photographs demonstrate, the sides of the excavation were sloped rather than shored.[8] Exhibits 3B and 3D.

Here is what the federal review commission regards as proof an employer is a competent person:

> [the company president] ...testified at length on how he conducted visual and manual tests of the soil on the day of the inspection before work began. R & R Pipeline, Inc., BNA 17 OSHC 1669 (1996) (emphasis added)

In Pipeline, the federal administrative law judge dismissed the competent person citation.

Because employees worked in the excavation, the standard applies. We find Mr. Peters did not qualify as a competent person under the standard because, while he had employees working in an excavation with sloped walls, he did not perform the visual and manual tests found in Appendix A of the excavation standard. We

[8] Shoring is the process of placing boards or a trench box in the trench to prevent the sides from caving-in.

conclude Donald Peters Construction violated the competent person standard. 1926.651 (k) (1).

The issue at this point is whether the violations were serious? Steve Rogers, the inspecting compliance officer, testified a cave-in could kill an employee so the violation was serious. TE 48-49. This, then, takes us to the issue whether items 3 and 4 were willful violations.

A violation is willful if it is committed with intentional, knowing or voluntary disregard for the requirements of the act. E. L. Davis Contracting Co., CCH OSHD 30,580. Empire Detroit Steel Corp. v OSHRC, 579 F.2d 378, 385-386 (6th cir. 1978). Beyond a showing of prior citations, we hold the secretary must come forward with proof of intent to disregard the standard or with proof of voluntary disregard for the standard. We reject our hearing officer's conclusions to the contrary since he determined that only prior citations were necessary to prove willfulness. He did not find intent.

In its brief to us the Secretary of Labor bases the willfulness of items 3 and 4 on two prior citations. When asked if he inspected the trench, Mr. Peters said he looked at it. TE 56. On his own behalf Peters testified "...I am the competent person." TE 182. This, we find, is not evidence of a conscious or

intentional disregard for the act. Instead, Mr. Peters testified he was the competent person, as if to argue 'yes, I understand the requirements of the act, and here I am observing it'

That we have found Mr. Peters was not a competent person under the standards since he did not perform the visual and manual tests, does not take away from the fact he felt he was his company's competent person. This is not proof of willful conduct.

We conclude the secretary failed to prove Donald Peters Construction willfully violated the standard requiring an inspection by a competent person. 1926.651 (k) (1). We are left, then with a serious violation which requires a penalty. KRS 338.991 (2).

To calculate penalties, the secretary first determines a gravity based penalty composed of severity and probability factors. Severity can be either high, medium or low while probability may be greater or lesser. Here the compliance officer found high serious because a cave-in could kill an employee. TE 48-49. Then the compliance officer found greater probability of an injury because, among other factors, the trench was wet and muddy. TE 49. When placed in a matrix, greater probability and high severity produces a gravity based penalty of $5,000. TE 50.

After the gravity based penalty is found, the employer may

qualify for adjustment of the penalty downward based on the size of the employer, the employer's good faith and the history of prior violations within the last three years. For size, the compliance officer awarded 60% because Peters had fewer than 25 employees. TE 50. Peters received no credit for history because of prior violations. TE 51. Similarly, the company received no credit for good faith because of the high serious-greater probability gravity based penalty. TE 51.

When the gravity based penalty is reduced by the 60% credit, we get a total proposed penalty of $2,000.[9] TE 53. We have examined the penalty calculation and found it correctly determined and proper in this case. Accordingly, we set the penalty for item 3 at $2,000. KRS 338.081 (3).

That brings us to the question whether the secretary may cite respondent for multiple violations of the competent person standard, that is whether he may issue egregious citations? We believe this case presenting the question of the secretary's authority to issue egregious citations is one of first impression in this jurisdiction. For this task, the secretary was woefully unprepared. When asked the question why cabinet issued egregious

[9] $5,000 less 60% of that amount (3,000) is $2,000.

citations, the compliance officer said "That was done by the General Counsel and the Secretary of Labor." TE 54. The compliance officer testified the FOM (field operations manual) contained 'provisions' for egregious citations. TE 54. When asked for a definition of egregious, the compliance officer said "I'll be honest with you, I don't know, sir." TE 108. Basically, the compliance officer cited Peters for egregious violations because his supervisors told him to. We do not know of a better definition of arbitrary and capricious conduct by an administrative officer.

In his brief to us the secretary also refers to the field operations manual (FOM) which, apparently, gives some guidance about when to cite for egregious violations. While we know administratively the FOM is neither a regulation nor a statute, we have diligently searched Kentucky law and discovered no mention of a field operations manual. We find the FOM is neither a statute nor a regulation. Because the FOM is neither a statute nor a regulation, we find it is a document containing the Secretary of Labor's internal policy. The question is whether the FOM can be used in any way as a basis for issuing an egregious citation.

KRS 13A.130 (1) says:

> An administrative body shall not by internal policy, memorandum, or other form of action:
> (a) Modify a statute or administrative regulation;

(b) Expand upon or limit a statute or administrative regulation;
(2) Any administrative body memorandum, internal policy or other form of action violative of this section or the spirit thereof is null, void and unenforceable.
(emphasis added)

KRS 13A.130 (1) is reinforced by Kentucky case law. In Kerr v. Kentucky State Board of Registration, Ky. App., 797 S.W.2d 714, 717 (1990), a board concerned with licensing and disciplining surveyors tried to discipline a surveyor under a set of rules it had not adopted as regulations at the time of the discipline. The court said:

> Since such use of an internal policy... would be a violation of appellant's [the surveyor] due process rights, regardless of whether he was informed of such policy... Regulatory agencies are creatures of statute, and have no powers of their own; such internally adopted policies are null and void, and of no effect whatsoever.

The court in Kerr ruled the internal policies of the board were null and void on two counts: 1) KRS 13A.130 and 2) the Kentucky constitution's due process clause.

Applying Kerr to our case, we conclude the field operations manual may not be used to interpret KRS 338.991 (1).

The Secretary of Labor in his brief to us (p. 8) argues the

penalty statutes permit egregious[10] citations. For example, the secretary argues that KRS 338.991 (1) provides for a willful penalty "for each violation." Since KRS 338.991 (1) is not explicitly clear on this point, we must interpret its meaning in light of the secretary's argument it supports an egregious citation. We cannot, however, look to the provisions of the field operations as an interpretation of KRS 338.991 (1) because of KRS 13A.130 (1) which says internal policy shall not be used to modify or expand upon a statute.

So the secretary's analysis of the penalty statute must stand by itself. The statute says a penalty of up to $70,000 may be assessed for "each violation." But does that mean, one, each time an employer violated the standard or, two, each employee exposed to the violation? Our hearing officer dismissed item 4. He would not uphold the egregious citations for items 3 and 4 (no competent person). Since this is a case of first impression, we shall look to federal precedent on the issue.[11]

In Caterpillar, Inc. CCH OSHD 29,962, citations could be

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[10] The American Heritage Dictionary of the American Language, 1970, defines egregious as "Outstandingly bad; blatant; outrageous." p. 417.

[11] As a state OSHA program, we are not bound by federal precedent. We often find it persuasive, however, as we do here.

issued as egregious if the cited regulation permitted multiple units of prosecution. In Caterpillar the regulation in question was the injury and illness log requirement. Individual entries must be made into the log after each injury. For example, there might be an injury on day one which is entered into the log that day. Then there might be a second injury on day 15 and that injury would then be entered into the log. Those are separate violations entered by an employer at separate times. Digging one ditch is one separate act, one separate hazard. Peters did not dig multiple ditches, rather he dug one ditch exposing two employees to the same hazard. The Peters case, then, is quite different from Caterpillar[12].

Next Reich v. Arcadian Corp., 110 F.3d 1192 (5th cir. 1997), said the general duty clause[13] could not be cited as egregious. The court observed that the regulations do not ordinarily permit egregious penalties except where the regulated condition is unique to one employee. Examples of this might be failure to train an employee about safety or, perhaps, failure to remove a worker from

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[12] In Caterpillar the federal commission observed the U.S. Department of Labor's field operations manual is not enacted into law any more than is Kentucky's.

[13] Our Kentucky equivalent is KRS 338.031 (1) (a).

a lead contaminated environment. In Arcadian the court pointed to the testimony of the compliance officer who admitted the employer would only have to fix the violation one time. It is the same in the case at bar. Donald Peters need only slope the trench to the proper angle to receive credit for abating the violation.

In Arcadian the federal commission focused on the fact that both the general duty clause and the regulations speak to the violative condition, not to the number of employees.

In Hoffman Construction, a federal review commission decision, CCH OSHD 22,489, the commission said although the federal compliance manual was not enacted into law, the department of labor had the discretion as the prosecutor to issue separate citations for multiple violations. But Hoffman was applied to several individual scaffolds, each of which was in violation. Peters, as we know, had one trench.

While two employees worked in Peters' excavation at the time of the inspection, the standard requires but one competent inspection. Labor, to put this matter to rest, does not argue there must be one competent person inspecting for each employee exposed. In the case at bar, Peters worked one construction site, digging one trench. Only one competent person's inspection was required for compliance. We conclude the secretary proved one

violation of the competent person standard. We therefore affirm item 3 with a penalty of $2,000 and dismiss item 4.

We leave for another time the situation described in Hoffman where an employer erected several independent scaffolds, each in violation of the safety standards.

Finally, we take up items 5 and 6. Here the secretary charges respondent Peters Construction with "...not protecting [employees] from cave ins by an adequate protective system..." Because the trench was not shored, Peters had to slope the sides of the trench. The cited standard says:

> (a) Protection of employees in excavations.
> (1) Each employee in an excavation shall be protected from cave-ins by an adequate protection system... except when:
> (ii) Excavations are less than 5 feet in depth...and examination of the ground by a competent person provides no indication of a potential cave-in. 1926.652 (a) (1)
> (emphasis added)

As the standard sets out, the employer need not shore or slope where the trench is less than 5 feet deep except when there is no inspection by a competent person. We have already found that no competent person inspected. Therefore, it makes no difference how shallow the trench was. Since no competent person inspected, Peters had to slope or shore the sides of the trench regardless of the depth.

Our hearing officer found the trench had no protective systems (shoring or a trench box). RO 8. Photographs taken at the scene clearly reflect the sides of the trench were sloped but not protected by shoring or a box. Exhibit 3 B.

The compliance officer tested the soil, determining it to be type A, the most stable. TE 64. He testified the sloping of the trench was no more than one half to one (1/2 to 1). TE 122. For type A soil a trench must be sloped at least 3/4 to 1 which is a shallower slope than 1/2 to 1. The regulations, table B-1, require a slope of at least 53 degrees from the horizontal and we find the trench here had sides steeper than that. Respondent, significantly, has not disputed the trench was improperly sloped in either its petition for discretionary review or its briefs to us. Instead respondent focused on depth which is irrelevant under our facts and the standard.

In its brief to us the secretary argues item 5 is willful because Peters Construction was cited previously for the same violation. We have already rejected that argument. In any event, the photographs show clearly the trench was sloped, if inadequately. Further, the compliance officer's attempt to measure the depth of the trench was taken along its slope rather than from the horizontal. TE 119, 128. This sloped trench is not evidence

of an intent to violate the law.

For reasons we have already advanced, we conclude the secretary may not issue an egregious citation (item 6). The standard cited for items 5 and 6 says "Each employee...shall be protected from cave-ins by an adequate protective system." 1926.652 (a) (1). Notice while the standard protects each employee, it does so with only one protective system.

Our hearing officer focused on the phrase "each employee" in the standard as he approved the issuance of an egregious item 6. But while the standard protects each employee, the employer need only slope or shore once to comply, or fail to slope once to be in violation. We reject our hearing officer's reasoning. Here again, our focus instead is on the violative condition. Arcadian, supra.

We affirm item 5 as a serious citation with a penalty we set at $2,000. KRS 338.081 (3). We dismiss item 6.

To sum up, we affirm items 3 and 5, each with a penalty set at $2,000. We dismiss items 1, 2, 4 and 6.

We adopt the hearing officer's findings of fact to the extent they are consistent with this decision.

Entered this April 1, 1999.

It is so ordered.

Robert M. Winstead

Donald A.Butler

Thomas M. Bovitz

CERTIFICATE OF SERVICE

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

HON. JOHN D PARSONS (MESSENGER MAIL)
OFFICE OF GENERAL COUNSEL
LABOR CABINET
1047 U S 127 SOUTH STE 4
FRANKFORT KY 40601

ZACK N WOMACK (CERT MAIL P 059 750 478)
DEEP & WOMACK
PO BOX 50
HENDERSON KY 42420-0050

This 2nd day of April, 1999.

KOSH REVIEW COMMISSION
#4 Millcreek Park
Route #3, Millville Road
Frankfort, KY 40601
PH: (502) 573-6892
FAX: (502) 573-4619

Jacques J. Wiggington
Executive Director