COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4135-04

COMMISSIONER OF DEPARTMENT OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

BUSH AND BURCHETT, INC — RESPONDENT

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DECISION AND ORDER OF THE REVIEW COMMISSION

This case comes to us on respondent Bush and Burchett's (Bush) petition for discretionary review which we granted. 803 KAR 50:010, sections 47 (3) and 48 (1). We received simultaneous briefs from the parties and then a reply from the department of labor.

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[1], 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799 page 21,538, BNA 1 OSHC 1372, 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, 833 (CA5 1975), CCH OSHD 19,802, page 23,611, BNA 3 OSHC 1299.

The commissioner of the department of labor, after conducting an inspection of Bush's work site, issued one serious citation charging the company with not protecting employees "working at the face of...an embankment approximately 25 feet above the ground below..." The citation, a violation of 29 CFR 1926.501 (b) (1)[2], carried a proposed penalty of $875. At the time of the inspection Bush employees stood on top of an earthen embankment rubbing and repairing concrete. Exhibit 2, photographs numbered 24, 25 and 26, and transcript of the evidence, page 67 (TE 67). Bush, the citation alleged, did not protect its employees from falling down the embankment by using guard rails, safety nets or personal fall arrest systems.

After a hearing on the merits, our hearing officer sustained[3] the serious citation and the penalty of $875. Recommended order, page 7 (RO 7). In his recommended order the hearing officer found the work area where the Bush employees stood did not

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[1] 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.

[2] 803 KAR 2:412 incorporates 29 CFR 1926.501 by reference.

[3] The review commission may "sustain, modify or dismiss a citation or penalty." KRS 338.081 (3).

include a wall or guardrail. RO 3. He found the two employees were "four (4) feet from an unprotected side or edge..." RO 2.

In addition to the facts found by our hearing officer in his recommended order, we find these additional facts. Exhibit 3, a scale drawing of the work site introduced by respondent, shows a side view from the top of the berm to the bottom; one inch on the drawing represents ten feet on the ground. Each square on the drawing represents approximately two feet. At the bottom of the drawing it says "DRAWN BY JKW" who we infer is John K. Ward, a professional engineer and employee of Bush. Mr. Ward testified for Bush at the hearing. TE 77.

At the top of the drawing is the four foot wide vertical working surface where the two employees observed by the compliance officer stood to work. See exhibit 2, photographs 24, 25 and 26, exhibit 3 and TE 86. Directly behind the vertical surface where the employees worked is a slope of two feet horizontal for every one foot of vertical drop.[4] At the bottom of the slope is a concrete retaining wall, called an 8 inch curb in the drawing. Mr. Ward testified the slope has an approximately 15 foot vertical drop. TE 87. Below the slope (going from left to right on the drawing) and over the 8 inch curb is a second vertical drop of 8 feet to a six foot wide horizontal ledge. TE 89-90. Below the six foot ledge the drawing depicts a final, vertical fall of approximately 25 feet. Exhibit 3. Mr. Ward said his drawing corresponded with his measurements on site. TE 91. We accept Mr. Ward's testimony about his drawing.

In its petition for discretionary review Bush first argues the cited standard does not apply to the employees finishing concrete at the top of the sloping embankment. For any occupational safety and health case, the first question is always whether the standard

[4] TE 86.

applies. In Ormet Corporation,[5] CCH OSHD 29,254, page 39,199, a federal administrative law judge 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, or with the exercise of reasonable diligence, could have known of the violative conditions.

For the instant matter, we are concerned with whether the standard applies and whether it was violated. Bush employees were photographed while finishing concrete at the top of the rock covered slope. Exhibit 2. These employees worked in plain sight where their employer could readily observe the working conditions.

To determine whether the standard applies and whether its terms were violated, we must examine its elements. Here is what the cited standard says:

> **1926.501 (b) (1)** ***Unprotected sides and edges***. Each employee on a walking/ working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

What is a walking/working surface? Bush argues it is not a stretch of bare earth but offers no authority for that proposition. In the definitions section of the standard, 29 CFR 1926.500 (b) says a "Walking/working surface means any surface, whether horizontal or vertical, on which an employee walks or works..." (emphasis added) To make certain the non-exclusive definition applies to more than floors, roofs and ramps, it includes "formwork and concrete reinforcing steel," neither of which are conventional walking or working surfaces. Formwork and concrete reinforcing steel are terms of art used in the construction of concrete structures. See 29 CFR 1926.700 through .703.

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[5] We cite to federal cases where, as here, we find them persuasive.

A federal administrative law judge, in Davy Songer, Inc, CCH OSHD 30,957, held employees on top of a ten foot high shipping crate for the purpose of dismantling the crate were on a walking/working surface. And so 29 CFR 1926.501 (b) 1) applied. "Because the employees performed their duties on the surface of the crate, their activities came within the standard." At pages 43,143-43,144.

The issue is whether employees are working on a surface; when so engaged, the standard applies if a 6 foot fall hazard is presented. Nothing in the cited standard or the case law carves out an exception for employees engaged in construction work while standing on soil. In Brock v Cardinal Industries, Inc and OSHRC, 828 F2d 373 (CA6 1987), CCH OSHD 28,033, the sixth circuit said construction work occurs when employees take their tools and materials to a work site, make something which did not exist previously and then leave the completed work at the site. Construction work may take place within a pre-existing structure or out of doors. See Cardinal Industries, footnote 10. The cited standard is written for the construction industry. 29 CFR 1910.12.

The term walking/working surface, 29 CFR 1926.501 (b) (1), has been applied to all manner of situations where employees are found to be working. In Baker Dry Wall Co, Inc, CCH OSHD 31,864, page 47,017, an employer was constructing a movie theater, the design of which incorporated "simulated smoke stacks." Here is how the federal administrative law judge, in a recommended order upholding a 29 CFR 501 (b) (1) serious citation, described an area where an employee worked:

> ...one of the employees stood on the 'ring' to which the studs were attached; the employee, who was standing between two studs and holding on to the stud the other employee was screwing into place, could have fallen forward or backward through the

studs[6]...

In the description of the work area in Baker Construction no reference is made to whether the ring was a horizontal or vertical surface. Rather, the ALJ focused on the fact the employee standing on the ring was working and exposed to a fall "forward or backward."

The same situation is presented in the instant case: an employee stood on a working surface, finishing concrete, with a fall hazard directly behind him. We hold 29 CFR 1926.501 (b) (1) applies to walking/working surfaces composed of soil.

Bush in its brief to us makes much of the phrase "horizontal and vertical" found in 1926.501 (b) (1). Bush argues that in order to be cited under the standard the walking/working surface must be both vertical and horizontal which is nonsensical. The definition of walking/working surface, 29 CFR 1926.500 (b), puts that argument to rest when it says "horizontal or vertical." Bush says it was not charged with a violation of the walking/working surface definition which is true. But the department of labor drafted the definitions to inform the regulated community about how to interpret and apply the standards.

N and N Contractors, Inc, CCH OSHD 32,101, reinforces the idea a walking/working surface need not be both vertical and horizontal. In N and N the review commission says:

> The standard provides that 'each employee on a walking/working surface...with an unprotected side or edge shall be protected from falling...'
>
> At page 48,238.

In other words, the federal commission routinely applies 1926.501 (b) (1) to walking/working conditions without reference to the "horizontal and vertical" language.

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[6] The employee stood on a ring with studs to the left and right of him. He could have fallen either forward or backward off the ring.

Within the cited standard, in light of the definition of walking/working surface which informs us about the intent of the standard drafters, the phrase "horizontal and vertical" can be seen as applying to floors which are horizontal surfaces or concrete reinforcing steel and formwork which might be either horizontal or vertical; the standard applies to horizontal surfaces, vertical surfaces and sloping surfaces such as roofs, ramps and embankments. By using the phrase "horizontal and vertical surface," the drafters intended to convey the idea the standard is directed to horizontal surfaces and vertical surfaces but not necessarily in the same instance.

Next Bush argues the embankment was an excavation which would not require guarding unless the excavation was "not readily seen." 29 CFR 1926.501 (b) (7) (i). An excavation presumes a trench, cut, cavity or depression with two sides. In its brief, page 10, Bush shows us a diagram of an excavation with two sloped sides opposite one another. All the diagrams of excavations, including Bush's example, found in appendix B to Subpart P[7] show excavations with two sides. The embankment in our case, Mr. Ward called it a berm in his drawing, slopes downward from left to right with no mirror image embankment opposite it. Exhibit 3. We conclude the excavation standard does not apply to the facts of this case.

Bush says "Neither KOSH nor the highway construction industry recognize the exposed slope as a hazard that requires fall protection." Brief at page 10. Labor did not cite Bush for a recognized hazard under KRS 338.031 (1) (a), otherwise known as the general duty clause. To maintain a general duty clause citation, not our case here, the department of labor must prove either the employer or his industry recognized the hazard. National Realty and Construction Company v Occupational Safety and Health Review

[7] Found at the end of 29 CFR 1926.652.

Commission, 489 F2d 1257 (DC Cir 1973), CCH OSHD 17,018, page 21,686, note 32. Rather, labor cited Bush for a violation of a specific standard. When an employer is cited for a violation of a specific standard, the department of labor must prove each element.

Some general standards do require proof of a hazard. For example, 29 CFR 1926.28 (a) says in part "The employer is responsible for...the wearing of...personal protective equipment...where there is an exposure to hazardous conditions..." For these general standards, the department of labor must prove a hazard. Other standards require the employer to take certain, specified measures when the conditions prescribed by the standards are found. In Vecco Concrete Construction, Inc, CCH OSHD 22,247, the federal commission said:

> By the express terms of section 1926.500 (d) (1), the standard contemplates the existence of a hazard when its terms are not met...
> ...the standard presupposes the obvious, namely, that an open sided platform presents the hazard that an employee may fall from the platform. At page 26,777.

The standard[8] in Vecco reads "[e]very opensided...*platform* 6 feet or more above adjacent floor or ground level *shall be guarded.*"[9] Similarly, the standard in the instant matter says in part "Each employee...[working] with an unprotected side or edge which is 6 feet...above a lower level shall be protected from falling..."

In the case at bar, the standard says the employer shall provide fall protection whenever an employee is working adjacent to an unprotected side which is six feet or more above a lower level. The standard "presupposes" that a fall hazard of at least six feet requires an employer to take corrective action.

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[8] Vecco was decided in 1977. Since then the standard has been rewritten and numbered several times. The principal remains, however.
[9] At page 26,778.

Next, the cited standard says the employee must be on a walking/working surface "...with an unprotected side or edge..." It is clear from exhibit 2, photographs 24, 25 and 26 and the testimony of the compliance officer (TE 17), the Bush employees stood at the top of the rock covered, 2 to 1 slope and that there was no fall protection (guardrails, nets or personal fall protection systems) in place behind the employees where the slope began - and we so find.

Mr. Ward testified the slope had a vertical elevation of around 15 feet with a second vertical drop of 8 feet and a final vertical drop of approximately 25 feet below that. All the standard requires is the use of fall protection when the walking/working surface is "6 feet...or more above a lower level..." We conclude labor has proved the elements of the cited standard.

But Bush says the recommended order is not supported by findings of fact and conclusions of law supported by a preponderance of the evidence. Specifically, Bush in its brief to the review commission says there is "no probative evidence to support the implicit finding [of the hearing officer] that the employee could fall from the ground, down the slope and over the retaining wall to the ground below." Page 14 of respondent's brief. Respondent Bush is under the impression there must be proof an employee would fall the entire length of the slope and over the retaining wall in order to prove a violation of the standard.

At this point it may be helpful to revisit the cited standard; 1926.501 (b) (1) requires fall protection when an employee is working or walking on a surface "with an unprotected side or edge which is 6 feet...or more above a lower level." (emphasis added) Mr. Ward, testifying for Bush, said the slope had an elevation of 15 feet. TE 87.

As the photographs demonstrate, the Bush employees stood at the top of a rock covered slope; the slope itself is a lower level according to the terms of the standard because it drops below the working surface some 15 feet. Exhibit 2, photographs 24 and 25. Given the presence of the Bush employees at the top of the embankment with no fall protection, the presence of the unguarded slope with its vertical elevation of 15 feet proves a violation of the standard and we so conclude.

What the standard requires, and what the facts show, is Bush employees worked at the edge of a working surface six feet or more above a lower level. Bush argues that in order to sustain this citation, labor must prove an employee would fall down the slope, over the curb, down the eight foot drop behind the curb and then down the final elevation to the level where the railroad tracks run, some forty-eight feet according to Bush's exhibit 3. This is not so. Once the elements of the standard are proven, the company is in violation. Because we have concluded the company violated the standard, our analysis shifts to the characterization of the violation.

Labor issued a serious citation and the compliance officer so testified. Bush in its brief says it has no complaint about the penalty. At page 1. Bush does, however, question whether an employee would fall from the unprotected edge all the way to the railroad tracks. So do we. Under our statute the commission may sustain a citation, modify it or dismiss it. KRS 338.081 (3).

Compliance officer Hurst testified the intent of the standard is to prevent falls of six feet or more. TE 27. She said "there is still [a] possibility of him sliding down that loose slate rock and falling to the ground below." TE 29-30. On cross examination Levi Daniels, the Bush employee in exhibit 2 (photograph 24), said "...even [if] you had fell

over it [the unprotected edge], it wasn't steep enough to where you couldn't stop." TE 72. John Ward, Bush's project manager, said "he's [Mr. Daniels] not a subject to a fall, a vertical fall greater than six feet." TE 93. After reviewing the testimony in this case, we are not persuaded Mr. Daniels would slide all the way down the slope to the railroad tracks below as the compliance officer testified. We find more persuasive Mr. Ward's testimony to the effect Mr. Daniels could fall six feet down the embankment. Mr. Daniels testified he was six feet tall. TE 73. If Mr. Daniels were to fall over the edge, he could easily fall six feet and we so find. The cited standard says employers must protect their employees from falls of six feet or more and Bush failed to do as the standard requires.

We are not persuaded by the testimony presented in this case that Mr. Daniels or the second Bush employee would, in a fall, suffer serious injury or death as the statute requires for a serious violation. KRS 338.991 (11). We do not believe, from the facts of this case, a Bush employee could fall over the unprotected edge and fall or slide down the length of the rocky slope from the top, unprotected edge to the concrete curb below. See exhibit 3.

In Commonwealth, Transportation Cabinet Department of Vehicle Regulation v Cornell, Ky App, 796 S.W.2d 591, 594 (1990), the court said:

> ...a reviewing court must determine whether the agency's action is supported by substantial evidence...
> ...the trier of facts in an administrative agency may consider all the evidence and choose the evidence that...[it] believes...

We have found evidence to support the violation of the standard. We have considered the testimony of the compliance officer and the Bush employees and find that while a fall over the unprotected edge is probable, a fall down the rocky slope to the concrete curb is

not. We conclude the department of labor has not proven Bush's violation of the standard is serious. Compliance Officer Hurst said "if an employee fell 25 feet, he could die." TE 25. Later on she said "there is still [a] possibility of him sliding down that loose slate rock and falling to the ground below." TE 29-30. CO Hurst did not say how the Bush employees could fall down the length of the two to one slope covered with crushed rock or more importantly what type of injury would result. We contrast her testimony with that of Mr. Ward, a civil engineer, who said Mr. Daniels would not likely fall more than six feet (TE 93) and Mr. Daniels's statement the slope "wasn't steep enough to where you couldn't stop." TE 72. While the two Bush employees gave specific examples of what might happen in the event of a fall over the unprotected edge, the best CO Hurst could manage was her opinion an employee would die from a fall the entire length of the embankment - an eventuality not supported by the facts of the case. In Crescent Wharf and Warehouse Company, CCH OSHD 15,687, page 20,980, the federal commission said:

> a non-serious[10] violation is one in which there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury...is death or serious physical harm.

Crescent Wharf's definition of a non-serious violation applies to the facts of our case because while a fall off the working surface and onto the rock covered slope would likely result in injuries, we have no compelling evidence in this case of the nature of those injuries. The facts of this case do not persuade us "death or serious physical harm"[11] would result from a fall over the unprotected edge of the embankment.

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[10] Non-serious is another word for an other than serious violation.
[11] From the definition of a serious violation found in KRS 338.991 (11).

There is no testimony in this case about a potential penalty for an other than serious violation.

We sustain the citation in this case as other than serious with no penalty. KRS 338.991 (3).

It is so ordered.

February 6, 2007.

Kevin G. Sell
Chairman

Sandy Jones
Commissioner

William T. Adams, Jr.
Commissioner

Certificate of Service

I certify a copy of the foregoing decision has been served on the following individuals in the manner indicated on February 6, 2007:

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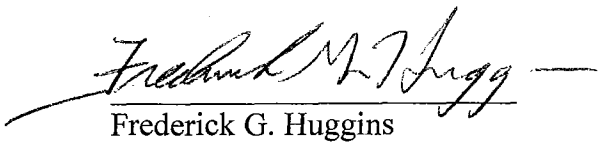

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