COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC DOCKET
4147-04, 4151-04, 4149-04

COMMISSIONER OF DEPARTMENT OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

MOREL CONSTRUCTION CO, INC
EAST IOWA DECK SUPPORT, INC
MIDWEST STEEL, INC — RESPONDENTS

* * * * * * * * * *

James R. Grider, Jr., for the commissioner. Anne Guillory and Glenn J. Fuerth for Midwest Steel and East Iowa Deck Support. Robert J. Schumacher for Morel.

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes to us on petitions for discretionary review filed by all parties. We called the case for review and asked for briefs. Sections 47 (3) and 48 (5), 803 KAR 50:010. Midwest Steel asserted, without discussion, it could not be cited as a controlling employer because of Summit Contractors,[1] CCH OSHD 32,888, BNA 21 OSHC 2020, a federal review commission decision; we asked for supplemental briefs on the issue. Although the Summit Contractors issue was not tried before the hearing officer, the department of labor did not move to strike that portion of Midwest's brief citing to Summit, and so the issue is before us now.

An inspecting compliance officer on August 17, 2004 visited the work site at the state fairgrounds in Louisville. Exhibit 4. CO Seth Bendorf said he observed four East

[1] Go to oshrc.gov. Select decisions and click on final commission decisions for 2007.

Iowa employees on a flat roof on the South Wing C building, some 42 feet in the air, installing metal decking. He said the four employees did not wear fall protection equipment as required by the Kentucky occupational safety and health standards. During his walk around inspection of the construction work site, Mr. Bendorf said he observed the East Iowa employees were not immediately securing the large rectangular sheets of metal decking after they laid them into place, a violation of the standards. He also determined the East Iowa employees did not receive required training on the Kentucky standards for fall protection. The department of labor issued three serious citations for failing to require the use of fall protection, for not immediately securing the metal decking and for not training the employees. Labor issued the citations to East Iowa Deck Supports, the company that hired the four employees to do the work, as well as Morel Construction, the general contractor, and Midwest Steel which subcontracted the deck installation to East Iowa. Neither Morel nor Midwest Steel had employees exposed to the alleged hazards.

All three employers filed notices of contest. KRS 338.141 (1). Because the cases shared common facts, the hearing officer consolidated them for a trial on the merits. Section 10, 803 KAR 50:010.

In his recommended order our hearing officer dismissed item 1 for all three parties. He said the companies proved the affirmative defense of employee misconduct, citing to Danis-Shook Joint Venture XXV v Secretary of Labor,[2] 319 F3d 805, 812 (CA6 2003), CCH OSHD 32,645, BNA 19 OSHC 2166. The hearing officer, for all three employers, also dismissed item 2, failure to immediately secure the metal decking as it

[2] In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2000), the supreme court said the Kentucky occupational safety and health act "should be interpreted consistently with federal law."

was laid down, because he found no hazard. Mr. Head sustained item 3 against the three employers because the East Iowa employees had not been trained to the Kentucky standards on fall protection.

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 and discovers violations, the executive director of the office of occupational safety and health compliance issues citations to the employer. 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 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, 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799 page 21,538, BNA 1 OSHC 1372, 1374, the eighth circuit said when the commission hears a case it does so "de novo." See also Accu-Namics,[3] Inc v OSHRC, 515 F2d 828, 834 (CA5 1975), CCH OSHD 19,802, page 23,611, BNA 3 OSHC 1299, 1302, where the court said "the Commission is the fact-finder, and the judge is an arm of the commission..."

[3] See federal commission rule 92 (a), 29 CFR 2200.

Our supreme court in Secretary, Labor Cabinet v Boston Gear, Inc, Ky, 25 SW3d 130, 133 (2000), CCH OSHD 32,182, page 48,639, said "The review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer." In Terminix International, Inc v Secretary of Labor, Ky App, 92 SW3d 743, 750 (2002), the court of appeals said "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another."

I

Midwest's Summit Contractors argument

Our hearing officer in his recommended order found Morel Construction, the general contractor for steel erection, hired Qualico to perform the roof decking work. Qualico subcontracted the work to Midwest Steel which then subcontracted to East Iowa. Recommended order, page 4 (RO 4). CO Bendorf said East Iowa Decks worked under the direction of Midwest Steel. He said Morel as the general had the authority "to take prompt and corrective measures to prevent a violation of the standard..." . Volume I, transcript of the evidence, page 91 (I TE 91). We find Morel and Midwest Steel to be controlling employers.

In their briefs to us, neither Midwest Steel nor Morel Construction took issue with labor's assertion they were controlling employers[4] and thus liable for the citations as well as East Iowa. At the same time, however, Midwest said Summit Contractors, supra, requires the citations issued to it and Morel be dismissed.

[4] Midwest brief page 2, Morel page 3.

After the federal commission issued its decision for Summit Contractors, supra, the department of labor appealed to the United States Court of Appeals for the Eighth Circuit; although the case has been briefed, the court has not issued its decision. Chao v Summit Contractors, Inc and Occupational Safety and Health Review Commission, 07-2191. As we write, the third circuit in Secretary of Labor v Trinity Industries, Inc and OSHRC,[5] 504 F3d 397, 402 (CA3 2007), CCH OSHD 32,915, BNA 21 OSHC 2161, 2163, is the first court to cite the commission's Summit Contractors decision. In the Trinity case, the company purchased a foundry and then hired Pli-Brico to remove a brick wall and an inner insulation blanket, both of which were part of the furnace. When Trinity noticed the blanket contained asbestos, OSHA investigated and issued a citation to Trinity for failing to determine if asbestos were present. On appeal to the third circuit, Trinity argued that because the employees worked for Pli-Brico, it could not be cited; Trinity cited Summit Contractors. In its decision, referring to Nationwide Mutual Insurance Co v Darden, 503 US 318 (1992), and Summit, the court without analysis said "We find neither case controlling or particularly persuasive" and upheld the citation.

According to our law in Kentucky an employer "Shall comply with occupational safety and health standards..." KRS 338.031 (1) (b). In Brennan v Occupational Safety and Health Review Commission and Underhill Construction Corporation,[6] 513 F2d 1032, 1038 (CA2 1975), CCH OSHD 19,401, BNA 2 OSHC 1641, an administrative law judge vacated a citation[7] charging Underhill with improperly storing construction materials at

[5] Although this case is marked by the third circuit as not to be published, the full text is found in BNA and CCH. We find the Trinity opinion to be well reasoned.
[6] Indexed as Dic-Underhill in BNA.
[7] In the Underhill case the ALJ issued his decision on July 12, 1973 which means as far back as 1973 the secretary of labor was issuing citations to construction employers whose employees were not exposed to the cited hazard. Underhill Construction Corp, CCH OSHD 16,276, BNA 1 OSHC 1577.

the outer edge of a building in such a way as to jeopardize employees working on floors below; the citation said Underhill violated the safety standards. The ALJ found no evidence Underhill employees were exposed to the hazard. The commission affirmed the ALJ's decision for the same reason: the employer had no employees exposed to the hazard.

On appeal, the second circuit said an employer's responsibilities under the occupational safety and health act are divided into two parts. Under 29 USC 654 (a) (1) an employer "shall furnish...his employees employment...free from recognized hazards..." Section (a) (1) has become known as the general duty clause. Then 29 USC 654 (a) (2) says "Each employer...shall comply with occupational safety and health standards..." The standards, the court observed, "are intended to be the primary method of achieving the policies of the Act." Unlike the general duty clause, "This specific duty to comply with the Secretary's standards is in no way limited to situations where a violation of a standard is linked to exposure of *his* employees to the hazard." 513 F2d at 1038, CCH pages 23,164-165, 2 OSHC 1645. In support of its decision to hold an employer responsible for a violation of the act to which his employees are not exposed, the second circuit said the act was "revolutionary" and "was 'an important piece of remedial legislation,'" citing to Brennan v OSHRC and Gerosa, Inc, 491 F2d 1340, 1343, CCH OSHD 17,336, page 21,872, BNA OSHC 1 OSHC 1523, 1525. The second circuit said:

> We believe the Commission's narrow interpretation of the construction regulations unreasonable. We have in mind the broad purpose of the Act 'so far as possible' to assure 'every working man and woman in the Nation safe and healthful working conditions.' 29 USC 651 (b).
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> 513 F2d at 1038, CCH page 23,165, 2 OSHC 1645

Then the court in Underhill said:

> In a situation where, as here, an employer is in control of an area, and responsible for its maintenance, we hold that to prove a violation of OSHA the Secretary of Labor need only show that a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking.
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> 513 F2d at 1038,
> CCH page 23,165,
> 2 OSHC 1645 (emphasis added)

In other words the second circuit said while an employer had a general duty to protect his own employees from recognized hazards at a construction site, he had a specific, statutory duty to comply with the safety and health standards for the benefit of all employees engaged in a "common undertaking" at a construction site.

After the second circuit issued its Underhill decision, the federal review commission brought itself into line with the court. In Grossman Steel and Aluminum Corporation,[8] CCH OSHD 20,691, 4 OSHC 1185, the commission said:

> We...conclude that, on a construction site, the safety of all employees can best be achieved if each employer is responsible for assuring that its own conduct does not create hazards to any employees on the site, and that imposing liability on this basis would not place an unreasonable or unachievable duty on contractors. We will therefore follow the holding of the Second Circuit to this effect in Brennan v OSHRC (Underhill Construction Corp.)...we will hold the general contractor responsible for violations it could reasonable have been expected to prevent or abate by reason of its supervisory capacity.
>
> CCH page 24,791,
> 4 OSHC 1188

Although the review commission in its Grossman Steel decision put general contractors on notice they would henceforth be liable for safety and health violations

[8] And a companion case known as Anning-Johnson Company, CCH OSHD 20,690, 4 OSHC 1193.

because of their control of the work site, even though they did not have exposed employees, the commission said its holding was dicta because Grossman Steel was not a general contractor. CCH page 24,791, footnote 6, 4 OSHC 1188-1189. Whether dicta or not, the federal review commission followed the rule first laid down by the Underhill court in 1975 and continued to do so until the commission reversed itself in its Summit Contractors decision, supra, in 2007.

Since the late 1970s in Kentucky we have consistently applied what has become known as the multi employer work site doctrine to cases such as this one before us now. A general contractor on a construction site who is a controlling employer may be cited for a violation of the standards even though his own employees are not exposed to a hazard. See Morel Construction Co, Inc, and Koker Drilling Company,[9] KOSHRC 4133-04 and 4131-04, where this review commission, citing to Underhill, supra, upheld the multi employer doctrine.

In the federal system a majority of the circuits that have issued decisions on the multi employer work site doctrine have adopted the doctrine as set out first in Underhill and then in Anning-Johnson and Grossman Steel, supra. Most recently the tenth circuit court of appeals in Universal Construction Company, Inc v Occupational Safety and Health Review Commission, 182 F3d 726 (CA10) 1999), CCH OSHD 31,861, BNA 18 OSHC 1769, said "We now join the majority of circuits and adopt the multi-employer doctrine." At F3d 728, CCH page 46,985, 18 OSHC 1770. As the court observed "The Secretary's interpretation [of the act] has been accepted in one form or another in at least

[9] Go to koshrc.ky.gov.

five circuits and rejected outright in only one."[10] At F3d 728, CCH page 46,985, 18 OSHC 1770. As the Universal Construction court reasoned, the secretary has "imposed liability under the doctrine since the 1970's and has steadfastly maintained the doctrine is supported by the language and spirit of the Act." 182 F3d at 728, CCH page 46,985, 18 OSHC 1770. Although the court said section 654 (a) (2) is ambiguous "and does not clearly compel the conclusion that Congress did or did not intend to permit the Secretary to impose liability for hazards that an employer controlled but did not create and which did not threaten the employer's employees," the tenth circuit resolved the ambiguity by drawing attention to the distinct difference between the general duty and specific duty clauses found in 29 USC 654, sections (a) (1) and (2). While the general duty clause[11] limits an employer's responsibilities to "his employees," the specific duty clause[12] does not. Then the Universal court said "Where language appears in one section of a statute but not in another section, we assume the omission was intentional." From this, the court reasoned: "'a broader class was meant to be protected by the latter [the specific duty clause, section (a) (2)].'" 182 F3d at 729-30, CCH page 46,986, 18 OSHC 1771.

This makes sense. On the one hand, the general duty clause, 29 USC 654 (a) (1) and KRS 338.031 (1) (a) in Kentucky, limits an employer's liability to violations of the act where only his own employees are exposed; this is because an employer with experience acquired knowledge of hazards found in his own business will be in a position to train his employees to avoid those hazards. It would be unreasonable, where no

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[10] "See United States V Pitt-Des Moines, Inc, 168 F3d 976 (7th Cir. 1999); R.P. Carbone Constr. Co v Occupational Safety & Health Review Comm'n, 166 F3d 815 (6th Cir. 1998); Beatty Equip. Leasing, Inc v Secretary of Labor, 577 F2d 534 (9th Cir. 1978); Marshall v Knutson Constr. Co, 566 F2d 596 (8th Cir. 1977); Brennan v Occupational Safety & Health Review Comm'n, 513 F2d 1032 (2d Cir. 1975); but see Southeast Contractors, Inc v Dunlop, 512 F2d 675 (5th Cir 1975);" as cited in 182 F3d at 728.

[11] 29 USC 654 (a) (1).

[12] 29 USC 654 (a) (2) which in Kentucky is KRS 338.031 (1) (b).

standard applies, to expect an employer to train employees who do not work for him and then be subject to a citation for not doing so if he is found in violation.

On the other hand, the specific safety and health standards for construction, 29 CFR 1926, are published and accessible.[13] Employers know what is expected of them. Unlike the general duty clause, the specific duty clause, 29 USC 654 (a) (2) and KRS 338.031 (1) (b), says employers shall comply with the standards; but the statute is not, by its terms, limited to an employer whose own employees are exposed to the hazard.

In the Universal decision, the tenth circuit said construction contractors work in close contact with one another. Craft jurisdiction may prevent one subcontractor from abating hazards created by another. 182 F3d at 730, CCH page 46,986, 18 OSHC 1771.

> To alleviate these hazards...the general rule regarding multi-employer construction worksites is that employers will be liable under [section] 654 (a) (2) for hazards the employer either created *or* controlled, regardless of whose employees are threatened by the hazard.
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> 182 F3d at 730, CCH page 46,986, 18 OSHC 1771.

From Underhill and Universal, supra,[14] we learn the secretary's authority to issue multi employer citations to construction contractors is solely derived from 29 USC 654 (a) (2), known as KRS 338.031 (1) (b) in Kentucky; neither the US secretary of labor nor Kentucky's secretary has placed any regulatory limitation on that statutory authority as we shall demonstrate.

II a

Should the courts defer to the secretary's interpretation of a regulation or to the

[13] These general industry and construction industry are adopted in Kentucky by various sections of 803 KAR chapter 2.

[14] And the cases cited in footnote 10 of this decision.

review commission's?

On April 27, 2007, the federal review commission issued Summit Contractors, supra. The three commissioners issued separate opinions. Two commissioners overruled Anning-Johnson and Grossman Steel, supra, while the third dissented. Chairman Railton and Commissioner, now Chairman, Thompson cited an "obscure"[15] federal regulation which they say prohibits the federal secretary of labor from issuing citations to construction contractors with no exposed employees. This regulation, 29 CFR 1910.12 (a), was promulgated on April 28, 1971 to take advantage of section 6 (a) of the occupational safety and health act, 29 USC 655 (a), which in turn gave the US secretary of labor a two year window to promulgate, without notice and comment rulemaking, "any national consensus standard, and any established Federal standard..." 29 USC 655 (a). The drafters of the act realized it would take the department of labor many years to enact original standards which could only be promulgated with notice and comment rulemaking. See 5 USC 553. The majority of the safety and health standards came into being under section 6 (a) of the occupational safety and health act. 29 USC 651 et seq.

Here is the regulation cited by Chairman Railton and Commissioner Thompson as the basis of their decision in Summit:

> **Section 1910.12 Construction work.** 1910.12(a) **Standards.** The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.

[15] In his 2008 edition of Occupational Safety and Health Law, Thomson, West, page 274, Professor Mark Rothstein said "Interestingly, the Commission based its decision on an obscure regulatory section purporting to limit the scope of the construction standards."

(emphasis added)

Summit was the prime contractor; it employed a job superintendent and three assistant superintendents at the job site. Summit contracted with All Phase for brick work. The secretary of labor issued citations to both companies because All Phase employees were working at height on a scaffold without fall protection and because Summit was the prime contractor; no Summit employees were exposed to the hazard. Summit, to the commission, argued 1910.12 (a), specifically the last sentence, prohibits the secretary from issuing citations to employers with no employees exposed to a hazard.

Chairman Railton read the first sentence of 1910.12 (a) to mean the construction standards applied to every employee and employer at a construction site. Then the second sentence, according to the chairman, said a construction employer was only responsible for "his employees." Commissioner Thompson read the two sentences in reverse; he said: "Read together, the two sentences of the regulation require an employer to 'protect the employment and places of employment of each of his employees[16]...by complying with [Part 1926 standards]' applicable to 'every employment and place of employment of every employee engaged in construction work.'" Dissenting Commissioner Rogers said the first sentence of 1910.12 (a) restates the statute which says each employer shall comply with the standards. 29 USC 654 (a) (2). She said the second sentence, in the context of a construction site with multiple responsibilities, was simply an emphasis on the employer's primary responsibility to his own employees and not a

[16] Commissioner Thompson read the second sentence of 1910.12 (a) in light of the general duty clause. 29 USC 654 (a) (1). This is illogical because the various circuit courts which have found authority for the secretary's multi employer citation policy have found that authority in 29 USC 654 (a) (2), the specific duty clause.

limitation on the secretary's ability to cite controlling employers with no exposed employees.

It is apparent to us the first independent clause of the first sentence of 1910.12 (a) makes the construction industry subject to the 1926 standards in existence at the time of the adoption of 1910.12 (a). However, the three different interpretations of the remainder of the first sentence and the second, complete sentence of the regulation make it difficult to come to grips with the Summit decision, regardless of the fact each commissioner has his own, individually and plausibly expressed understanding.

In Martin v Occupational Safety and Health Review Commission and CF &I Steel Corp, 499 US 144, 111 SCt 1171, 113 LEd2d 117, CCH OSHD 29,257, BNA 14 OSHC 2097, the US Supreme Court said when the question arises whether to look to the review commission or the secretary of labor for an interpretation of a safety and health standard, the supreme court said courts must defer to the secretary's interpretation. "[A]though we hold that a reviewing court may not prefer the reasonable interpretations of the Commission to the reasonable interpretations of the Secretary, we emphasize that the reviewing court should defer to the Secretary only if the Secretary's interpretation *is* reasonable." At 499 US 158, CCH page 39,225, 14 OSHC 2102. In CF&I, the court had to resolve a split among the circuits. Several circuits had said the courts should defer to the commission's interpretation of standards while others had been deferring to the secretary's interpretations.

In the case at bar Midwest Steel, in effect, has asked this commission to hold 1910.12 (a) prevents the Kentucky secretary of labor from issuing a citation to an employer at a construction site where none of his employees were exposed to the hazard.

Before doing so, we must first examine the majority's decision in Summit Contractors to see if we are persuaded by the reasoning put forth by the two commissioners. We must decide whether to accept the interpretation of 1910.12 (a) found in the two concurring opinions in Summit Contractors or the US secretary of labor's interpretation. To guide us, we turn to the US Supreme Court's decision in CF&I, supra, where the court, faced with the same issue, resolved the matter in favor of the secretary who enforces the act. See KRS chapter 338 and 29 USC 651, et seq.

In the Summit decision, the three commissioners have their own interpretations of 1910.12 (a). In the Summit case, the secretary issued a citation, charging a violation of the standards, to a general contractor at a construction site whose own employees were not exposed to the hazard. Summit, page 3. Chairman Railton and Commissioner Thompson in their opinions place great emphasis on interpretive rules and published guidelines issued by the US secretary of labor from 1971 to 1994. These department of labor guidelines and interpretations, according to the majority opinions, have over the years taken inconsistent positions on the application of what is now known as the multi employer work site doctrine; this doctrine says the secretary may issue citations to controlling employers, on construction sites, who have no employees exposed to the hazard. Chairman Railton said the secretary's field inspection reference manual, a published guideline first issued in 1971, finally in 1994 contained an explicit section which authorized issuing citations to general contractors with no exposed employees. Both Chairman Railton and Commissioner Thompson found these published guidelines indicative of the secretary of labor's intent not to issue citations to contractors with no employees exposed to a hazard. The two commissioners took this position despite the

fact the US secretary of labor has never said 1910.12 (a) prohibited her from issuing multi employer citations; and in fact the secretary's conduct over the years reinforces the conclusion she has not seen the regulation as a prohibition to issuing multi employer citations.

What is missing from the Summit majority's analysis is an appreciation of the importance the supreme court places on the secretary's issuance of citations as the primary instrument for demonstrating her interpretation of safety standards, regulations and, presumably, 1910.12 (a). In its decision in CF&I, the supreme court said an agency's "'litigating positions' are not entitled to deference when they are announced in "appellate counsel's *'post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court." At 499 US 156, CCH page 39,225, 14 OSHC 2101. What the supreme court found to be its preferred method for determining the secretary's interpretation of her standards is her citations based on those standards:

> The Secretary's interpretation of OSH Act regulations in an administrative adjudication, however, *is* agency action, not a *post hoc* rationalization of it. Moreover, when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress. See 29 USC 658.
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> 499 US 157, CCH page 39,225, 14 OSHC 2101 (emphasis added)

When the supreme court cited to 29 USC 658, it was referring to the secretary's statutory authority to issue citations[17] which the court said was just as much an exercise of the secretary's delegated law making powers as her promulgation of standards. Then in CF&I, the supreme court spelled out a hierarchy of its preferred methods for the secretary to demonstrate her interpretations of her regulations - in descending order. First in importance, according to the court, was the issuance of a citation. Then the court set

[17] In Kentucky, KRS 338.141 (1) authorizes the secretary to issue citations.

out two of what it called "less formal means of interpreting regulations prior to issuing a citation." These included the promulgation of interpretative rules, the second method, and published guidelines, the third. According to the US Supreme Court, the interpretations and guidelines exclusively relied upon by the majority in their Summit opinions are an inferior method for determining the secretary's interpretation of her regulations when compared to citations issued.

In Summit the secretary issued a citation to a general contractor at a construction site; this contractor had no employees exposed to the hazard. As spelled out by the court in CF&I, the secretary's citation in the Summit case became upon issuance a statutorily authorized interpretation to the effect that 1910.12 (a) does not prohibit multi employer citations at construction sites; if this were not so, then the secretary would not have issued the citation. The same is true for the citation issued in Underhill, supra, sometime between the inspection in November of 1972 and the ALJ's recommended order issued on July 12, 1973. In other words, the secretary beginning in 1973, and very likely before then, has been issuing citations to employers, at construction sites, who had no employees exposed to the hazard. To reiterate, as the supreme court put it, "when embodied in a citation, the Secretary's interpretation [of her regulation] assumes a form expressly provided for by Congress." CF&I, supra, 499 US at 157, CCH page 39,225, 14 OSHC 2101. The secretary writes and enforces regulations and because of that experience is in a better position to say what they mean than the commission which neither writes nor enforces the regulations.

The same logic applies to the case at bar. When the Kentucky secretary of labor issued citations to the two controlling employers with no exposed employees, Morel and Midwest, he was simultaneously interpreting 1910.12 (a) as permitting him to do so.

When Summit is analyzed according to the court's CF&I decision, a different result obtains. Had the two, majority commissioners followed the direction of the court, that is by looking first at the secretary's citations as the primary method for discerning her interpretation of 1910.12 (a), they would have seen the secretary's unambiguous acknowledgment of her statutorily authorized right to issue multi employer citations. Section 29 CFR 1910.12 (a) does not prohibit her from issuing multi employer citations to controlling contractors with no exposed employees; otherwise she would not over the years have issued all those multi employer citations. Then according to CF&I,[18] the next question is whether the secretary's interpretation of 1910.12 (a) is reasonable. First of all, the US secretary of labor has never said 1910.12 (a) could be read as prohibiting her from issuing multi employer citations. Second, we must look to the existence of the citations themselves; the two concurring commissioners ignored the secretary's citations and the US supreme court's opinion in CF&I because they could not explain away the lengthy history of the multi employer citations. Third, the federal courts of appeals from Underhill to Universal Construction, supra, have found statutory support for multi employer citations within the specific duty clause, 29 USC 654 (a) (2), and have not seen 1910.12 (a), promulgated in 1971, as an impediment to their decisions. Fourth, the two majority commissioners could not agree on an interpretation of 1910.12 (a). Dissenting

[18] Commissioner Thompson cites to Power Reactor Development Company v International Union of Electrical Workers, 367 US 396, 408, 81 SCt 1529, 6 LEd2d 924 (1961), for the proposition that an agency's first construction of an act, or regulation, is "entitled to more than usual deference..." That point, according to the US supreme court in CF&I, would be the secretary's first multi employer citation, issued sometime prior to the one she issued to Underhill, supra. Summit opinion, page 14.

Commissioner Rogers found 1910.12 (a) ambiguous. She said "The first sentence makes clear that the construction standards apply to the 'place of employment of every' construction employee and is similar in breadth to section 5 (a) (2) of the Act." Then she said "the second sentence merely emphasizes the primary responsibility of the direct employer to comply with the appropriate standards, but it is not drafted as a limitation..." Commissioner Rogers said she would defer to the secretary's "reasonable and longstanding interpretation of section 1910.12 (a) as permitting her to cite controlling contractors under the multi-employer doctrine," referring to the US supreme court's decision in CF&I, supra. Summit opinion, pages 28-29, CCH page 53,272, 21 OSHC 2034.

In his concurring opinion in Summit, Chairman Railton cited to Anthony Crane Rental, Inc, v Reich, 70 F3d 1298, 1306 (DC Cir 1995), CCH OSHD 30,953, BNA 17 OSHC 1447. Summit, page 7, CCH page 53,263, 21 OSHC 2024. In its decision the DC circuit said it found a "marked tension" between 1910.12 (a) and the US secretary of labor's multi employer work site doctrine. From the chairman's reference to Anthony Crane in his Summit decision, we are left with the incorrect impression that no circuit court since Anthony Crane was issued has considered 1910.12 (a) and what affect the regulation might or might not have on the secretary's ability to issue multi employer citations. Three and one half years after the DC circuit issued its Anthony Crane decision, the tenth circuit in Universal Construction thought about the secretary's multi employer doctrine and the relevance of 1910.12 (a). Here is what the tenth circuit, citing to Anthony Crane, said:

> While we concede the multi-employer doctrine and the language of the Act are not perfectly harmonious, the

> broad language and remedial purpose of the Act in combination persuade us that the Secretary's interpretation of section 654 (a) (2) is consistent with and does not frustrate the policy of the Act.
>
> 182 F3d 731, CCH page 46,987, 18 OSHC 1772

We find, for the purposes of our enforcement duties in Kentucky, the US secretary of labor's interpretation of 1910.12 (a) to be reasonable, given the secretary's long history of issuing multi employer citations to contractors with no exposed employees. See Underhill, Universal Construction and CF&I, supra. While Chairman Railton and Commissioner Thompson offer reasonable and yet differing interpretations of 1910.12 (a), they are no more reasonable than is Commissioner Rogers'. Taking into consideration the secretary's reasonable interpretation of 1910.12 (a), contained within the exercise of her statutory authority to issue citations, we conclude 1910.12 (a) does not prohibit either the US secretary of labor or the Kentucky secretary from issuing a citation to a controlling employer on a construction site who has no employees exposed to the hazard. See KRS 338.031 (1) (b).

II, b

Had the secretary intended 1910.12 (a) as prohibiting her from issuing multi employer citations, she would not have promulgated it under the authority of section 6 (a) of the act which does not require notice and comment rule-making.

In their concurring opinions, Chairman Railton and Commissioner Thompson have held 1910.12 (a) prohibits the secretary from issuing citations to construction contractors with no employees exposed to the hazards; in other words, the Summit majority decision says 1910.12 (a) prescribes and proscribes an employer's duty to

employees working at a construction site. The secretary of labor, however, has never found the regulation to be an interference with her statutory authority to issue citations to employers at construction sites when she finds violations of the standards. Neither has the secretary, to our knowledge, ever relied upon 1910.12 (a) as authority when she issued a citation. The secretary's authority to issue citations for violations of the general and specific duty clauses rests on the statute; no regulation is required. 29 USC 654 (a) (1) and (2).

This dichotomy, the difference between the secretary's interpretation of her authority to issue citations and those found in the concurring opinions in Summit, raises an important question: is 29 CFR 1010.12 (a) a regulation promulgated with the intent and ability to allocate employer responsibilities for employees at construction sites?

Section 6 (a) of the act, 29 USC 655 (a), gave the US secretary of labor two years to adopt "any national consensus standard, and any established Federal standard." The occupational safety and health act became effective on April 28, 1971. Section 34 of the act. Within 1910.12 (a) itself, the regulation says "The standards prescribed in part 1926 of this chapter are adopted under section 6 of the Act..." (emphasis added) In the third paragraph of the preamble to the regulation it says "The new Part 1910 contains occupational safety and health standards which are either national consensus standards or established Federal standards." 36 FR 10466.

Section 6 (a) says these national consensus standards and established federal standards shall be promulgated "Without regard to chapter 5 of title 5, United States Code..." This means these existing standards were to be promulgated without notice and comment rulemaking.

In Underhill Construction Corporation v Secretary of Labor and Occupational Safety and Health Review Commission, 526 F2d 53 (CA2 1975), CCH OSHD 20,216, BNA 3 OSHC 1722, Underhill II, the second circuit, in a decision about the effective date of existing construction standards, confirmed 29 CFR 1910.12 (a) was promulgated under section 6 (a) without notice and comment rulemaking. See the court's reference to 37 FR 10466-69 and footnote 7 found at 526 F2d 56, CCH page, 24,075, 3 OSHC 1724. The secretary's preamble to 1910.12 (a) begins at 36 FR 10466. In Underhill II the court said:

> Generally, the Secretary adopted under OSHA[19] only '*established Federal standards*'...More specifically, with respect to the construction industry, he adopted... '*standards* prescribed by Part (1926) of this title...' Since 29 CFR 1926.1050, the section containing the CSA effective date, is not a 'standard' or an 'established Federal standard,' it is clear that that section was not adopted by the Secretary under OSHA.
>
> 526 F2d at 57, CCH 24,076, 3 OSHC 1725-1726 (emphasis added)

Part 1926, the construction standards, was adopted by 1910.12 (a). In Underhill II the court said 1910.12 (a) only adopted established standards and nothing else, not even effective dates.

We asked the parties to include comments about Underhill II in their supplementary briefs to us. Midwest Steel said Underhill II was outdated and should be disregarded. We disagree. For our purposes, Underhill II is directly on point: by the authority of section 6 (a), the secretary of labor promulgated 1910.12 (a) as a vehicle for making use of established standards and did so without notice and comment rulemaking. According to Underhill II, section 6 (a) could not even be used to adopt an effective date since it was not an established federal standard. The court's decision in Underhill II

[19] The occupational safety and health act. 29 USC 651 et seq.

reinforces the secretary's interpretation of 1910.12 (a) as not preventing her from issuing multi employer citations. Unlike the secretary, the two majority commissioners in Summit concluded 1910.12 (a) contains the existing federal 1926 standards and a provision denying the secretary her statutory right to issue multi employer citations. Underhill II suggests dissenting Commissioner's interpretation of 1910.12 (a) was closer to the mark when she said the first sentence makes the construction standards applicable to the "'place of employment of every' construction employee" while the second emphasizes the contractor's duty to comply with the appropriate standards applicable to his work, a proposition we believe the secretary of labor would subscribe to.

Even though Underhill II was decided in 1975, cases raising section 6 (a) issues are still today brought to the commission. In Manganas Painting Co, Inc, CCH OSHD 32,908, pages 53,387-53,389, BNA 21 OSHC 1964, 1969-1971, Commissioners Railton, Thompson and Rogers explored the congressionally mandated creation of the lead standard which came into being without notice and comment rulemaking. That decision said "we conclude that the Secretary was not required to follow the procedural requirements of either section 6 of the OSH Act or section 553 of the APA when she promulgated the lead in construction standard. Accordingly, we reject Manganas' claim that the promulgation process was procedurally deficient." At CCH pages 53,388-53,389, BNA 21 OSHC 1970-1971. Manganas, issued on March 23, 2007, some 34 days before Summit, demonstrates the commission's familiarity with the requirement for notice and comment rulemaking when promulgating standards as well as the exceptions to the notice and comment rules found in section 6 (a) of the occupational safety and health act. 29 USC 655. Commissioners Railton and Thompson in Summit, however,

chose not to employ their understanding of notice and comment rulemaking when they interpreted 1910.12 (a) to prohibit the citing of controlling employers with no exposed employees.

If 1910.12 (a) was promulgated simply to take advantage of section 6 (a) of the act by adopting existing 1926 standards for construction work, as we think it was, then it is a valid exercise of the secretary's statutory authority. Had the secretary, however, intended 1910.12 (a) as prohibiting her from issuing multi employer citations, then she would not have relied upon section 6 (a) of the act but would have used section 6 (b) instead which says "The Secretary may by rule promulgate, modify, or revoke any...standard.." through notice and comment rulemaking. 29 USC 655 (b). The same is true in Kentucky; KRS 13A.170, et seq, says promulgated regulations are subject to notice and comment rulemaking.

Section 6 (a) does not grant the secretary the authority, without notice and comment rulemaking, to promulgate regulations specifying a construction employer's responsibility for employees on a construction site; to do that the secretary must promulgate under section 6 (b) of the act. 29 USC 655 (b). This perhaps explains why the secretary has never claimed any authority for 1910.12 (a) beyond the adoption of existing standards.

The secretary's promulgation of 1910.12 (a) under section 6 (a) of the act is indicative of the secretary's intent to promulgate only existing standards. In CF&I, supra, the court said citations, when compared with promulgated and published guidelines, were a more reliable indication of the secretary's intent because congress authorized the secretary to issue citations. The same reasoning applies to the promulgation of existing

standards which congress authorized in section 6 (a) of the act. The secretary's use of her statutory ability to issue citations and promulgate standards without notice and comment rulemaking are better indications of her intent than published guidelines. CF&I, supra.

We are persuaded the US secretary of labor intended to and did promulgate 1910.12 (a), under the authority of 6 (a) of the act, for the sole purpose of making 1926 standards applicable to the construction industry. We therefore conclude Kentucky's adoption of 1910.12 (a) by 803 KAR 2:301, section 2 (a), was limited to existing 1926 standards for construction work. Section 2 (a), 803 KAR 2:301, supports our conclusion because that regulation, adopted in Kentucky under the authority of KRS 338.061 (2), is titled "Adoption and extension of established federal standards." Further, the "necessity, function and conformity" section of 803 KAR 2:301 says "KRS 338.061 (2) provides that the board may incorporate by reference established federal standards..." Kentucky's adoption of 1910.12 (a) by 803 KAR 2:301, section 2 (a), is expressly limited to existing standards.

Based on our analysis of the US Supreme Court's opinion in CF&I, supra, as it relates to the Summit Contractors, supra, decision, as well as the federal circuit court opinions finding support for multi employer citations within an employer's statutory duty to comply with the safety and health standards, 29 USC 654 (a) (2), we conclude the Kentucky secretary of labor has statutory authority to issue multi employer citations to contractors, at construction sites, whose own employees are not exposed to the hazard. KRS 338.031 (1) (b). See Underhill, Underhill II, and Universal Contractors, supra.[20] While we reject the reasoning of the concurring commissioners in their Summit Contractors, decision, we are persuaded by the reasoning of the US Supreme Court in

[20] See as well the cases we cited in page 9, footnote 10 of this decision.

CF&I as well as the circuit court opinions which have found support for the multi employer doctrine in 29 USC 654 (a) (2).

We turn to our review of the citations.

III

Item 1, fall protection

In its citation 1, item 1, issued to all three employers[21] the department of labor charged a violation of 803 KAR 2:417, section 1 (1) (b);[22] the standard says:

> Each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge ten (10) feet or greater above a lower level shall be protected from fall hazards by guard rail systems, positioning device systems, or fall restraining systems.

Serious citation 1 said "Four employees were installing metal decking for a roof of the South Wing C expansion, approximately 42 feet from the ground with no fall protection." Exhibit 4. The four employees worked for East Iowa.

East Iowa began the roofing work on August 2, 2004. IV TE 27. CO Bendorf determined the employees worked 42 feet above the ground on the roof under construction. RO 3. Hearing Officer Head found the compliance officer on August 17, 2004, the date of the inspection, observed East Iowa's Foreman Dale McAtee working on the roof without a fall protection harness. RO 5. The CO's observation was confirmed by testimony from East Iowa employees. For this case, fall protection is a full body harness with a retractable lanyard which can be attached to the structure to prevent falls from height. V TE 148.

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[21] Employers must comply with the occupational safety and health standards. KRS 338.031 (1) (b). In this decision we use the words employer and company interchangeably.

[22] This regulation has been renumbered to 803 KAR 2:417, section 3 (1) (b). The language has not changed.

Aaron Jordan, an East Iowa roofing employee, admitted he worked without fall protection on August 17. He said "I will admit that, yes." VI TE 54. He said a fifty foot retractable steel cable, used to prevent falls when attached to the harness, was approximately l/4 inch in diameter. VI TE 51-52. When tied off, Mr. Jordan used the 1/4 inch cable. VI TE 49. During his examination Mr. Jordan was shown fifteen photographs taken by the compliance officer; Jordan said he could not tell from the photographs if he was connected to the cable. VI TE 54-56.

Foreman McAtee, when examined by the hearing officer said, "No, I didn't have my harness on." VI TE 31. He said Mr. Wakeland, another East Iowa employee, did not have his harness on either. VI TE 31.

We find the three East Iowa employees who worked on the roof, on the day of the inspection, were not wearing fall protection as the standard requires. They are Foreman McAtee, Jordan and Wakeland.

In these cases the secretary of labor carries the burden of proof. Section 43 (1), 803 KAR 50:010. For the secretary to establish a violation he must prove the standard applies to the cited condition, the employer violated the standard, an employee had access to the cited condition and the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition. Astra Pharmaceutical Products, Inc, CCH OSHD 25,578, pages 31,899-31,900, BNA 9 OSHC 2126, 2129. Here East Iowa performed steel erection at a height of 42 feet. East Iowa's foreman Dale McAtee and at least two of his employees, with his knowledge, worked on the 42 foot roof without fall protection even though the standard requires protection at 10 feet. 803 KAR 2:417, section 3 (1) (b). The steel erection standard applies because the East Iowa

employees were installing the sheet metal roofing on a steel structure. Thus, the only remaining issue is whether the employers knew of the violation or could have known with the exercise of reasonable diligence. Employer knowledge can be proven by actual or constructive knowledge. Because East Iowa employed the four roofers while Morel and Midwest Steel had no employees with access to the hazard of falling but were instead controlling employers, their situations are somewhat dissimilar. We will take up East Iowa's citation first.

McAtee said on the day of the inspection he was the highest ranking East Iowa employee. VI TE 5. He answered the following question: "Q. Were you in charge of the safety of yourself and the other workers? A. Yes." VI TE 5. Greg Naso manages and owns East Iowa. IV TE 6. He said Dale McAtee was his foreman. IV TE 12. Mr. Naso said he made one trip back to the work site between August 2, the day the job began, and August 17 which was the day of the inspection. We find Mr. Naso was not on the job site on August 17. IV TE 31. We find Foreman Dale McAtee was the East Iowa employee in charge of himself and the other East Iowa employees on August 17. In Atlas Electric Construction, Inc, CCH OSHD 22,621, page BNA 6 OSHC 1479, 1480, the administrative law judge declined to impute a union steward's knowledge of safety conditions to the company. In Atlas the judge said there was no evidence the employer delegated any safety authority to the steward. In the case at bar, however, Mr. Naso was absent from the Louisville work site most of the time. He left Foreman McAtee in charge of, we infer, both production and safety for East Iowa. Foreman McAtee had authority and exercised it. Mr. McAtee said he knew Mr. Wakeland worked on August 17 without his harness "and we just got by with it, so I let him get by with it." VI TE 31. Foreman

McAtee admitted he and East Iowa employee Wakeland did not, on August 17, have on their fall protection gear while working on the roof.

In National Realty Construction v Occupational Safety and Health Review Commission, 489 F2d 1257, 1267 at footnote 38, CCH OSHD 17,018, pages 21,687-21,688, 1 OSHC 1422, 1428, the federal court of appeals said when a job superintendent feels free to breach the company rules, this is "strong evidence that implementation of the policy was lax." Here Mr. McAtee was in charge because he was the senior East Iowa employee on the job from day to day; he had the authority to let another employee "get away with it." Mr. Naso, the owner, was not there on August 17 or most days for that matter.

In Daniel Construction Company, a federal review commission decision, CCH OSHD 26,027, BNA 10 OSHC 1549, the company received a citation for a fall protection violation at a construction site where Daniel was building a warehouse. Labor's compliance officer observed employees working at the edge of a roof without fall protection. Daniel raised the employee misconduct defense. In its decision the commission said Daniel had a fall protection rule and had communicated the rule to its employees but had not effectively implemented the rule. Daniel's supervisor was observed engaging in the violative conduct, no fall protection, and permitting his employees to do likewise in his presence. Here the commission said the supervisor's knowledge of the violations, both actual and constructive, would be imputed to Daniel Construction unless the company proved it took all necessary precautions to prevent the violations. At CCH page 32,672, 10 OSHC 1552.

Daniel Construction is a case where the secretary's burden to prove employer knowledge and the company's affirmative defense of employee misconduct share common facts. Professor Mark Rothstein, in his 2007 edition of Occupational Safety and Health Law, Thomson, West, said:

> The third element of the [employee misconduct] defense [whether the employer took steps to discover violations] is the most concisely worded but the most complicated. In essence, the employer is presenting evidence that it lacked even constructive knowledge of the noncomplying conditions. Thus, the success of the defense will depend on whether the employer exercised reasonable diligence in detecting workplace hazards.
>
> At page 209 (emphasis added)

In other words, it is labor's burden to prove employee knowledge of the violation or that he could have known of the violation if he exercised reasonable diligence. Correspondingly, an employer, to prove the third element of the employee misconduct defense, must show he exercised reasonable diligence in his efforts to discover violations of the safety rules.

In Daniel the commission said "A supervisor was involved in the misconduct. This is strong evidence that Daniel's safety program was lax...The commission has stated that where a supervisory employee is involved in the violation the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." At CCH page 32,672, 10 OSHC 1552. Then the commission said Daniel had not proved the supervisor was trained or adequately supervised; the commission said the employer had not proven the defense.

In our case, the proof is the East Iowa employees had been trained about fall protection. But we find there is no proof the East Iowa employees, including their foreman, were adequately supervised and set aside our hearing officer's finding to the contrary. East Iowa owner Greg Naso was not on site the day of the inspection; he was regularly absent from the construction site during the term of his contract with Midwest Steel.

At the hearing Doug Carden, Morel's vice president, said he periodically walked up a stairwell to see the East Iowa sheet metal workers (VII TE 86). This, among other things, led our hearing officer to find the East Iowa employees were supervised while engaged in the roofing job. However, Dale McAtee, East Iowa's foreman, said Morel and Midwest supervisors did not come up to the roof to observe because, if they had, they would have had to tie off. VI TE 34. Mr. McAtee's off-hand remark is compelling evidence, and is certainly not self serving as was Mr. Carden's. This is what Foreman McAtee said:

> Q. Did anyone from Morel or Midwest check on you folks to make sure you were tied off while you were on the roof?
> A. Just what they can see from the ground basically. They didn't ever make no scheduled trips. They're not—they've got to be 100 percent tied off too, if they come. So, they don't--
>
> VI TE 34 (emphasis added)

While Mr. McAtee's testimony by itself might not carry the day, it is reinforced by Fred Shelton, a Midwest manager who gave the following, detailed testimony:

> Q...while you were on the job as the project manager, with what frequency, if any, did you conduct inspections of the East Iowa workers on the roof?
> A. I would periodically walk around the site and observe them from the ground. And, when they come down off the

> roof, I would occasionally run into them on the site and I'd just talk to them...remind them, always 100 percent tie off.. V TE 40

Observations of the East Iowa employees from the ground served no purpose when the cable used to tie the employees to the structure was only 1/4 inch in diameter. VI TE 51-52. Aaron Jordan, the East Iowa employee who worked without fall protection equipment on August 17, said he could not tell from numerous photographs shown to him during his examination whether depicted employees used fall protection. VI TE 54-56. We do not find Mr. Shelton's testimony about his "from the ground" testimony persuasive because of what he also said about what he could actually see from the ground.

When asked about periodic inspections of the East Iowa employees on the roof, Mr. Shelton was asked the following:

> Q. How often do you go up on the roof yourself to check to see that the fall protection--
> A. I don't go up on the roof, sir.
> (emphasis added) V TE 105

The question then was what could Mr. Shelton see from the ground. He said he could tell if an East Iowa employee on the roof wore a harness. V TE 47. He said he could not, while standing in a stairwell some 350 feet from the employees, see the 1/4 inch cable. V TE 51. He said he could not see the roof area from his office trailer which was below the roof. V TE 55. He said Morel's trailer was in the same area. V TE 73. He said he would have to walk some 100 to 150 feet outside the perimeter of the work site to see the East Iowa workers on the roof. V TE 58. From a distance of 100 to 200 feet, on the ground, Mr. Shelton said he could see if the East Iowa employees wore their harnesses but could not see if they were tied off to a cable. V TE 59 and 62. Mr. Shelton said he could look at the video, exhibit 7, and tell whether employees wore harnesses. V TE 103.

Mr. Shelton said he saw some employees on the roof were not tied off: "From the video, I seen some employees not have harnesses on, not tied off." V TE 103. Here Shelton equates the harness with being tied off which is confirmed when he says he determined Foreman McAtee was not tied off because he was not wearing a harness. V TE 109.

We reverse our hearing officer who found the East Iowa employees received periodic inspections by Morel and Midwest supervisors. In his recommended order our hearing office has not drawn our attention to any testimony which by the conduct of a witness on the stand would require a credibility determination. We base our findings on a comparison of what the witnesses said as found in the record.

We find the Morel and Midwest supervisors did not go up to the roof to inspect the East Iowa employees because, as Mr. McAtee put it, they would have had to tie off and so did not climb up to the roof.

We find it was possible to tell from the ground and looking up to the roof whether East Iowa employees wore harnesses. Mr. Shelton said he could see the harnesses. We find the supervisors looking up from the ground could not tell whether those East Iowa employees who wore harnesses were connected to the 1/4 inch cable. Mr. Shelton could see the harnesses from the ground and equated the harnesses worn with fall protection, ignoring whether the employees wore just the harnesses or used the harnesses to tie off to the 1/4 inch cable.

We find the East Iowa employees, on the day of the inspection, worked by themselves on the roof without supervision. Foreman McAtee said no supervisors came up to the roof deck because if they had, they would have had to put on fall protection

harnesses and hook up to cables. Then Fred Shelton, a Midwest supervisor said he never got on the roof. As we have found, Mr. Shelton could not see the 1/4 inch cable from the ground and neither, we infer, could anyone else.

In Daniel, the commission said:

> ...Daniel's area superintendent engaged in violative conduct and was present on the roof while other violations occurred in plain sight. Accordingly, the supervisor's knowledge of the violations, both actual and constructive, is imputable to Daniel for the purpose of proving employer knowledge of the violations unless Daniel establishes that it took all necessary precautions to prevent the violations, including adequate training and supervision of its supervisor.
>
> At CCH page 32,672,
> 10 OSHC 1552

We agree with the commission in Daniel. In the case at bar Greg Naso, the company owner, was largely absent from the work site. The four East Iowa employees worked on the roof without supervision other than that of Foreman McAtee who was also found to be in violation of the fall protection standard.

Because Foreman McAtee was himself working without fall protection on August 17 and permitted his employees to do likewise while he observed them, we find East Iowa had actual and constructive knowledge of the fall protection violation. We impute Mr. McAtee's knowledge to the company. Daniel Construction at CCH page 32,672, 10 OSHC 1552 and Atlas Electric, supra.

Actual or constructive knowledge for Morel and Midwest is also dependent on the facts.

KRS 338.991 (11) says in part:

> ...a serious violation shall be deemed to exist...unless employer did not, and could not with the exercise of reasonable diligence, know of the presence of the

violation. (emphasis added)

Had the Morel and Midwest supervisors gone to the roof to inspect, they would have been able to prove they inspected to discover violations of the fall protection standard. In other words, had the Morel and Midwest supervisors been reasonably diligent in inspecting the roof from time to time, donning fall protection as they did, then the violations by the East Iowa workers would have been apparent.

In Kokosing Construction Company, CCH OSHD 31,207, BNA 17 OSHC 1869, the federal commission found constructive knowledge where the violation was in plain sight; Kokosing employees worked in proximity to unguarded rebar, a violation. A compliance officer testified the unguarded rebar was in plain sight; he said the employees could have seen it because they traveled through the area. CCH page 43,723, 17 OSHC at 1871. Had the Morel and Midwest supervisors gone to the roof, they would have seen, on August 17, the three East Iowa employees working without fall protection, that is without being tied off to the 1/4 inch cables.

Based on Morel and Midwest's failure to exercise reasonable diligence to discover the violations which were in plain sight had they taken the time and effort to look, we find the department of labor proved the two employers had constructive knowledge of the fall protection violation. Kokosing.

In J. H. MacKay Electric Company and U. S. Engineering Company, CCH OSHD 23,026, BNA 6 OSHC 1947, the federal commission, finding employer knowledge of the violation, upheld citations where the employers argued they could not have known of the violations. MacKay and U. S. Engineering employees worked on the fifth floor of a building without adequate fall protection. In its decision the commission said "the lack of

adequate perimeter protection on the fifth floor would have been readily apparent had the Respondents simply inspected that area before permitting their employees work there." At CCH page 27,824, 6 OSHC 1950. The commission's decision in MacKay applies to the Morel and Midwest Steel supervisors who, as we have found, did their inspecting from the ground where they could see if the workers wore harnesses but not whether they were tied off to the fall protection cables.

In Automatic Sprinkler Corporation of America,[23] a federal review commission decision, CCH OSHD 24,495, BNA 8 OSHC 1384, the company's employees worked on an unguarded scaffold. Automatic Sprinkler said it was not responsible for the violation because it instructed its employees not to use equipment which belonged to other employers. Rejecting this defense, the federal commission said "an employer must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work." CCH page 29,926, 8 OSHC 1387. Implicit in the commission's reasoning is an understanding the employer must comply with the act and may not avoid his responsibility by relying on another employer's safety and health efforts.

> While we have held that employers are not responsible for unpreventable instances of employee misconduct, the formulation and communication of a general work rule is not enough. The employer is required to exercise reasonable diligence in anticipating the hazards to which his employees will be exposed. (emphasis added)
>
> CCH page 29,927, 8 OSHC 1388,

In the case at bar the East Iowa employees received fall protection training. Morel and Midwest, however, failed to exercise reasonable diligence to determine if the employees

[23] Go to oshrc.gov. Click on the year 1980 for final commission decisions.

on the roof wore the fall protection harnesses and then connected them to a 1/4 inch steel cable and we so find. The department of labor proved Morel and Midwest had constructive knowledge of the fall protection violation because they failed to be reasonably diligent in discovering violations and thus ignored their responsibilities under the act. Instead of being reasonably diligent as the act requires, Morel and Midwest Steel relied on East Iowa to police itself. Automatic Sprinkler. See also KRS 338.031 (1) (b) and KRS 338.991 (11).

For the reasons stated, we conclude all three companies, East Iowa, Morel and Midwest Steel, violated the fall protection standard, 803 KAR 2:417, section 3 (1) (b), as set out in the citations. We reverse our hearing officer's recommended order and sustain serious item 1 for all three companies. KRS 338.081 (3). Because the parties did not make penalty calculation an issue, we reinstate the proposed serious penalties[24] as follows: $2,500 for East Iowa, $4,500 for Midwest Steel and $3,000 for Morel Construction.

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[24] When determining a gravity based penalty the CO first assesses the seriousness of the hazard and then the probability of an injury; these factors are derived from the statutory definition of a serious violation. A "serious violation shall be deemed to exist...if there is a substantial probability that death or serious physical harm could result..." KRS 338.991 (11). Then the CO applies the penalty reduction credits found in 803 KAR 2:115, section 1 (2): good faith, size as measured by the number of employees and the history of prior violations.

This was a serious violation because of the 42 foot elevation. For East Iowa, the CO assessed high severity (high, medium, low being the options) because of the 42 foot fall. I TE 94. The CO assessed greater probability (greater or lesser probability of an accident) because he observed unprotected employees at the edge of the roof. I TE 95. Morel and Midwest received the same high serious/greater probability rating. I TE 95. All three companies received the same unadjusted, gravity based penalty of $5,000 for each item. I TE 96. East Iowa received 40 % for size (60% being the maximum). I TE 97. East Iowa received 10 % for history (the maximum permitted by the compliance manual). Fifty percent credit yielded a proposed penalty of $2,500 for items 1 and 2 for East Iowa. No good faith is given for high serious/greater probability ratings. I TE 98.

Midwest got no credit for size (400 employees nationwide). I TE 99. Midwest got 10 % for history for a proposed penalty of $4,500. I TE 99.

Morel got 40 % for size but no credit for history; its proposed penalty was $3,000 for items 1 and 2. I TE 100.

Although the secretary of labor proved a serious violation of the fall protection standard for all three employers, item 1, and we have so found, the hearing officer dismissed the item 1 citations because he said the employers proved the affirmative defense of employee misconduct. Our hearing officer cited to a test for the employee misconduct defense he found in Danis-Shook, supra, 319 F3d at 812, CCH page 51,216, BNA 19 OSHC 2170. That case says the four elements of the defense are:

1. the company has a thorough safety program,

2. the company communicated the safety program and fully enforced the program,

3. the conduct of the employee was unforeseeable and

4. the safety program was effective in theory and practice.

This commission does not find the Danis-Shook test to be useful; it is awkward and difficult to understand and apply. Danis-Shook does not unambiguously state the employer's responsibility to take reasonable steps to discover violations and then enforce the rules. Instead we use the employee misconduct test found in Jensen Construction Co, CCH OSHD 23,664, page 28,695, BNA 7 OSHC 1477, 1479. Jensen sets out four elements which are easy for employers to understand and use in their work. To prove the defense, an employer must show that it:

1. has established work rules designed to prevent the violation,

2. has adequately communicated these rules to its employees,

3. has taken steps to discover violations,

4. and has effectively enforced the rules when violations have been discovered.

The Jensen test, unlike Danis, starts, and properly so, with employee training and concludes with the logically connected elements - discovering violations and then consistently punishing those violations. There is no way for us to justify dismissing an otherwise proven violation unless the employer trained his employees, looked for violations and then punished those who violated the rules. While the court in Danis-Shook said "The Superintendent walked the work site every day, watching for violations," this critical factor did not find its way into the Danis-Shook test and in any event did not play a part in the court's analysis of the employee misconduct defense. Ultimately the issue in Danis-Shook was whether the company had a rule which required its employees to wear lifelines, harnesses and vests when there was a danger of engulfment by water. East Iowa, Morel and Midwest Steel had trained their employees about the safety rules but then did not enforce them.

As we said, in its Danis decision the sixth circuit used its uninformative employee misconduct defense cited by our hearing officer in his recommended order. Contrasting the sixth circuit's approach, the federal commission in Danis relied on the four elements of the defense set out in Jensen Construction, although the commission cited to Gem Industrial, another review commission decision. See Danis-Shook, a review commission decision at CCH OSHD 32,397, page 49,866, BNA 19 OSHC 1497, 1502. Similarly, the administrative law judge in Danis used the Jensen approach as well but cited to Nooter Construction Co. See Danis-Shook, an ALJ decision, at CCH OSHD 31,991, page 47,700. In other words the sixth circuit ignored the Jensen rules but came up instead with its own restatement of the requirements. Although we are not beholden to any particular published case on the employee misconduct issue, we will continue to rely on the

elements of the defense as set out by the federal commission in Jensen, Gem Industrial and Nooter.

We hold our hearing officer erred when he applied the Danis-Shook test. When an employer raises the employee misconduct defense, this commission will continue to analyze the employer's actions according to the Jensen, supra, test.

When we apply the Jensen test to the facts of the instant case, the employee misconduct defense fails. East Iowa, Morel and Midwest had rules and communicated those rules to their employees. Morel and Midwest, however, took no steps to discover fall protection violations; these two employers did not exercise the reasonable diligence required by the act. KRS 338.991 (11). As Professor Rothstein observed, an employer's failure to exercise reasonable diligence to discover violations proves constructive knowledge of the violation but at the same time may prevent the employer from proving the employee misconduct defense. The department of labor carries the burden to prove knowledge of the violation, either actual or constructive. Then, when the defense of employee misconduct is raised, the burden of persuasion shifts to the employer to prove, if he can, the elements of the defense. See Lawson, The Kentucky Evidence Law Handbook, fourth edition, section 9.00 (2) (f), pages 746-747.

East Iowa's foreman violated the rules himself and permitted others in his sight to do likewise. When Foreman McAtee discovered his employees working without fall protection, he took no steps to enforce the rules. East Iowa owner Greg Naso, absent from the site as he was, took no steps to discover violations and neither did Morel or Midwest.

As our hearing officer ably points out in his recommended order, "The OSHA Act does not require employers to be an absolute guarantor that employees will always follow promulgated safety standards." RO 19. We agree. An employer must comply with the occupational safety and health standards. KRS 338.031 (1) (b). But where the employer proves he has safety and health rules, has communicated those rules to his employees, has taken steps to discover violations and has punished employees for violating the rules, then this commission will dismiss the citation. Jensen, supra.

Midwest draws our attention to Horne Plumbing and Heating Co v OSHRC, 528 F2d 564 (CA 5 1976), CCH 20,504, BNA 3 OSHC 2060, where the court of appeals set aside the commission's decision to affirm a trenching violation. The employer had raised the affirmative defense of employee misconduct. Two foremen entered an unshored trench and were killed. The day before the accident the owner, Mr. Horne, had visited the site to make sure his men had the plywood and jacks needed to properly protect against cave ins and told his men to shore: he "instructed and cautioned his men to shore the trench." According to the court, Horne Plumbing had an excellent safety program. The ALJ said Mr. Horne took steps to make sure his workers followed his rules. The next day Mr. Horne was not present when two of his foremen entered the unshored portion of the trench and were killed. Just before the two men died in the trench, two of Horne's hourly employees warned about entering the unprotected portion of the trench. In its decision the federal appeals court in Horne said the owner, with his personal emphasis on training and shoring, had done all he could to prevent the accident.

In the case at bar, part owner Greg Naso of East Iowa was only on the job site two times between August 2 and 17. IV TE 31 and 98. East Iowa had two full time

employees on the job and two hired locally. IV TE 11. Despite the company's safety rules and the training about those rules, it was Foreman McAtee and Aaron Jordan, the two permanent East Iowa employees, who were not tied off on August 17. Mr. Naso said there was little communication between Midwest Steel and East Iowa about the job because Foreman McAtee gave the daily orders and knew how to look at the plans and then do the roofing work. IV TE 98-99 and 109. Mr. Naso said he concentrated on his "relationship with the customer." He would "go over the safety requirements...do a quick review of the drawings and if there's any specific details that I know of as it relates to me selling the job...." IV TE 109.

Based on the testimony of Mr. Naso and Foreman McAtee, we find the foreman day to day directed East Iowa's roofing work at the fairgrounds; he did so without the supervision of his own boss or the managers for Midwest or Morel who avoided having to don fall protection gear.

Mr. Naso's testimony about the ability of Foreman Mr. McAtee to tend to East Iowa's work without supervision confirms what the foreman said about the Midwest and Morel managers not coming up to the roof to observe.

Mr. Horne was personally involved in the safety of his men. His employees understood the importance of the rules and urged their foremen to stay out of the unprotected trench. Mr. Naso, however, left the day to day operations in the hands of Foreman McAtee who then elected to work without fall protection and permitted the other full time employee to do the same.

We conclude Horne Plumbing is of no precedential value to our case. Mr. Horne was personally dedicated to the safety of his men while Mr. Naso in the case at bar left

the day to day operations at the fairgrounds to his foreman who worked without supervision. The facts in the Horne case show the owner's commitment to safety which he communicated to his workers who urged their foremen to stay out of the unprotected trench. Foreman McAtee knew he was on his own and took advantage of it as did his fellow worker, Aaron Jordan. No one with East Iowa urged McAtee and Jordan to put on their fall protection harnesses and tie off, and neither for that matter did anyone with Morel or Midwest.

We reverse our hearing officer who dismissed item 1 because, he said, the employers proved the employee misconduct defense. We find the three employers failed to prove the third element of the defense: whether the employer has taken steps to discover violations. Jensen, supra.

IV

Item 2

Midwest Steel hired East Iowa to install the metal decking on the flat roof under construction some 42 feet above the ground below. East Iowa then assigned four employees, including Foreman McAtee, to do the work which consisted of laying down long, rectangular pieces of corrugated sheet metal and then securing the metal to the steel structure, first with nails and then with screws.

Labor in serious item 2 charged the three companies with not "immediately securing" the metal decking as it was laid down. The citation said:

> 29 CFR 1926.754 (e) (5) (i):[25] Metal decking was not tightly and immediately secured upon placement to prevent accidental movement or displacement:
> a. Employees had installed approximately 3,600 square feet of metal decking prior to shooting nails to secure the

[25] Adopted in Kentucky by 803 KAR 2:417, Section 2 (1).

decking on the South Wing C Roof Area.

For item 2 East Iowa received a proposed penalty of $2,500 while Morel's was $3,000 and Midwest's $4,500; each company received the same proposed penalty for all three citations. Each company had an unadjusted penalty of $5,000 but then received varying amounts of penalty credits. See footnote 24.

Then the standard says:

> Except as provided in [section] 1926.760 (c),[26] metal decking shall be laid tightly and immediately secured upon placement to prevent accidental movement or displacement. (emphasis added) 1926.754 (e) (5) (i)

Our hearing officer dismissed item 2 for the three companies. He said East Iowa would nail down the sheets after 300 square feet of decking was put in place rather than the 3,600 alleged in the citation. He said this method of nailing posed no hazard "due to the weight and interlocking construction of the decking." RO 22. The hearing officer found the individual sheets weighed between 160 and 180 pounds which is supported by the testimony of Greg Naso, East Iowa's owner. RO 13 and IV TE 41. Then the hearing officer said the sheets could not be dislodged by the wind. RO 13. Despite the hearing officer's finding the wind could not move the sheets, Mr. Naso said, while watching the compliance officer's video of the roofing operation taken at the start of the inspection, his workers would do the final nailing "to secure it against blowing away in a wind storm, that's why they call it wind tacking." IV TE 55. We reverse our hearing officer on this point; we find the sheeting can be dislodged by the wind. It is one of the reasons the drafters of the standard specified the sheets be immediately secured.

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[26] 1926.760 (c) refers to a controlled decking zone which an employer may utilize at heights just above 15 feet to 30 feet. Since the employees in this case were working at a height of 42 feet, the controlled decking zone does not apply; no party argued it did.

Our hearing officer said the "sheets had lips and grooves that interlocked when each new sheet was laid." RO 13. He cited to owner Greg Naso's testimony. IV TE 42. Later in his examination, however, Mr. Naso said the sheets were corrugated which is confirmed by a diagram introduced as exhibit 26. IV TE 54. Exhibit 26 shows the corrugated surface of the metal.

Owner Greg Naso was asked how soon the sheets were nailed down after their placement:

> Q. Now, can you tell us from this viewpoint [the video]... at what point after a sheet is laid does the wind tacking occur and how many sheets of decking is put down before the earliest sheet is wind tacked?
> A. It's difficult to pick a number, but it's somewhere between five and ten sheets...You've got to lay out enough that you can get it positioned, but you don't lay out so much that you've got more out than you can deal with...if unforeseen conditions come up with wind or what have you. If the wind's blowing twenty mile an hour when you go to start work, you may be tacking down every sheet.
>
> IV TE 69-70 (emphasis added)

Mr. Naso said the individual sheets measured 36 inches by 30 feet; his employees moved the sheets about the roof with a "deck buggy." IV TE 40-41. Three feet times 30 feet is 90 square feet for each sheet. Mr. Naso said anywhere between five to ten sheets would be laid before nailing. Five times 90 is 450 square feet while 10 times 90 is 900 square feet. We find East Iowa would ordinarily commence nailing after it had laid down 450 to 900 square feet of decking. Of course Mr. Naso said each sheet would be tacked down, one at a time, when the wind was blowing 20 miles per hour. Mr. Naso admits his company, when laying down the sheet metal, does not comply with the standard because the sheets are not immediately secured unless there is a strong wind. Compliance Officer

Bendorf said he was told the company did not secure the decking until it had placed some 3,600 square feet. I TE 101. While this turned out to be an inaccurate figure, securing did not take place until after five or 10 sheets were laid, a violation of the standard which requires the sheets be immediately secured; the standard makes no allowances when the wind is not blowing.

In its brief to the commission, Midwest said the hearing officer's dismissal of item 2 should be upheld; the company said the decking was secured by its weight and because of the corrugated surface of the sheets, which some witnesses described as an interlock that occurred when one panel was put down next to another with some overlap of the sheets and their corrugated surfaces. We disagree. The standard says the metal decking "shall be laid tightly and immediately secured." That is two requirements. We find the decking in this case was laid tightly because the workers placed the sheets so the corrugated sheets would overlap. But laid tightly is one requirement and immediately secured a second requirement.

Neither the corrugated surface nor the overlap of the sheets nor their weight is securing as required by the standard, despite Midwest's argument to the contrary, because East Iowa's foreman said the metal sheets had to be periodically wind tacked, that is nailed. In other words, the company knew it could not rely on either the weight of the sheets or their corrugated surface to keep them in place. We find, according to the facts in this case, securing as used in the standard means nailing sufficient to prevent the sheets from being moved, whether by wind or other means. Nailing was the only method used to secure the sheets once they were placed; the sheets were neither bolted nor welded into place. Mr. Naso did, however, say that sometime after the sheets were secured by

nailing, a worker installed screws which connected the metal sheets to the steel rafters underneath in such a way as to cause the metal roof to become "integral to the structural design of that roof system, the metal decking is [sic] and number of fasteners that go into the metal decking." IV TE 54. East Iowa used nails to secure the metal sheets, that is keep them from moving, and then later used screws which made the roof a part of the building's structural integrity.

Section 1926.754 (e) (5) (i), the cited standard, is found in subpart R, the steel erection standard. This means the drafters of the standard understood metal decking would be installed as roofing as a part of the steel erection process and that these roofs would be located a sufficient distance above the ground below to present the hazard of falling as well as the substantial probability of death or serious physical harm. Compliance Officer Seth Bendorf's testimony confirms this. He said a fall from a height of 42 feet would cause the death of the employee. I TE 103. With the working conditions and hazards for steel erection in mind, the drafters said "metal decking shall be laid tightly and immediately secured upon placement to prevent accidental movement or displacement."

Immediately is not defined in the standard. The on-line Oxford English Dictionary says "immediately" means "With no person, thing, or distance, intervening in time, space, order, or succession...closely, proximately, directly."[27] There is no room in the cited standard for an employer to decide he need not immediately secure the decking; were that so, then an employer could decide when to secure - when it is convenient for him – which is what East Iowa decided to do in this case.

[27] Go to oed.com.

East Iowa said it had to lay down a number of sheets before nailing because of alignment problems but Mr. Naso also said his workers would nail down sheets immediately in a strong wind.

In Northwest Erectors, Inc,[28] CCH OSHD 31,104, BNA 17 OSHC 1853, the secretary of labor cited the company under the former steel erection standard for not securing metal decking after it was laid down. Northwest's foreman said "one 30-foot sheet is laid with one end tack welded; then it is realigned and usually tack welded in the middle; and then the other end is tack welded." (Emphasis added) With the company's explanation how it secured the decking, the federal ALJ vacated the citation because the company, by tack welding each sheet as it was placed, had complied with the terms of the standard. Applying the facts in Northwest to the case at bar, we infer East Iowa could place a sheet, nail it at one end to secure it and then align it.

When Northwest Erectors placed the one metal sheet and then proceeded to tack weld it, the employees knew they had before them one metal sheet which had not yet been secured and then began welding; the same cannot be said for the East Iowa workers who would place from five to 10 sheets before securing them into place. We infer the four East Iowa employees would not necessarily know how many of the five to 10 sheets had been secured, and how many had not, as they placed one unsecured sheet next to another.

Northwest proved it immediately secured the roofing sheets by welding at one end and so its citation was dismissed. In the case before us, however, East Iowa admitted it did not immediately secure the sheets and so the citation stands as written.

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[28] Go to oshrc.gov. Click on decisions and select administrative law decisions for 1996.

In Austin Bridge Company, CCH OSHD 23,935, page 29,021, BNA 7 OSHC 1761, 1765, the federal commission said:

> It is well-settled that the Commission lacks authority to question the wisdom of the standards promulgated by the Secretary...For this reason, we lack authority to question the Secretary's determination that the requirements or prohibitions of a standard are 'reasonably necessary or appropriate' means of eliminating or reducing work-place hazards.

When a case comes to the commission, the secretary of labor has already issued a citation based on a safety or health standard. KRS 338.141 (1) and (3). Our job is to find facts about the case and then enter conclusions of law; we determine whether the secretary has proven the elements of the alleged violation and if not dismiss the citation. It is not for us to question the wisdom of a safety standard. Austin Bridge.

This brings us to the next issue for item 2. The hearing officer dismissed the citation because he said the secretary did not prove a hazard. The secretary did prove the standard applies, the employer violated the terms of the standard, the employees had access to the cited condition at the 42 foot height and, because East Iowa's on site foreman knew his men were not immediately securing the sheets after placement, the employer had actual knowledge of the violation; the secretary proved the elements of the violation. Astra Pharmaceuticals, supra. While the East Iowa employees had access to the cited condition, the sheet metal placed but not secured, that is not necessarily the same thing as proof of a hazard.

In Austin Bridge, the federal commission said some standards require proof of a hazard, citing to 1926.28 (a) on personal protective equipment as one example. But the commission said the greater majority of the standards "are predicated on the existence of

a hazard when their terms are not met. Therefore, the Secretary is not required to prove that noncompliance with these standards creates a hazard in order to establish a violation." See Austin Bridge, CCH page 29,021, 7 OSHC 1766, citing to the fall protection standard as an example, numbered at the time as 1926.500 (d) (1). Austin Bridge was about trenching violations. Trenching and steel erection are both dangerous undertakings. The federal drafters of the decking standard deliberately put it in the steel erection subpart aware, as was the compliance officer in our case, that falls from height were deadly whether the employee connected steel beams or set sheet metal roofing in place.

In Vecco Concrete Construction, Inc, CCH OSHD 22,247, page 26,777, BNA 5 OSHC 1960, 1961, the commission said, about a standard requiring fall protection for an open sided platform:

> the standard presupposes the obvious, namely, that an employee may fall from the platform.

The same is true for our case. The cited standard requiring the sheet metal to be immediately secured was written into the steel erection standard with the understanding the work takes place at height and the metal sheets can be displaced, by wind or other means, in such a way as to allow an employee to fall.

We conclude the hazard of falling is implicit in the steel erection subpart and the cited standard which is a part of it. Our hearing officer erred when he dismissed item 2 because he found a hazard was not proven. We conclude the hazard of falling is contained in the steel erection subpart and the cited steel erection standard as well.

We reverse our hearing officer and affirm item 2 for East Iowa, Midwest Steel and Morel Construction. We find the proposed penalties of $2,500 for East Iowa, $3,000 for Morel and $4,500 for Midwest are appropriate. See footnote 24.

None of the cited companies in the case at bar applied for a variance from the decking standard to protect themselves from the operation of the standard, given their expressed concerns about aligning the sheets before securing them. KRS 338.153 (1). Under the statute an employer may apply for an exception to a standard which may be granted if the employer can prove its work practices would result in an environment "as safe and healthful as those which would prevail if he complied with the standard." Although the companies raised the affirmative defense of employee misconduct, they did not raise or argue the affirmative defense of infeasibility which is permitted under our law. See Seibel Modern Manufacturing and Welding Corporation, CCH OSHD 29,442, pages 39,681-39,684, BNA 15 OSHC 1218, 1225-1228, a federal review commission decision which upheld the defense and placed the burden of proving it on the employer.

V

Item 3

For item 3 the secretary's citation says the companies did not train the East Iowa roofers to the Kentucky fall protection standard which is somewhat different than the federal. Item 3 says:

> 29 CFR 1926.761 (b) (5):[29] The employer did not provide a training program for all employees exposed to fall hazards. The program shall include training and instruction in the following areas: the fall requirements of this subpart:
> a. Employees were not familiar with the fall protection requirements of 29 CFR 1926 Sub part R or the KAR specific requirements for fall protection in steel erection.

[29] Adopted in Kentucky by section 2 (1), 803 KAR 2:417.

This citation, issued to all three respondents, carried the same proposed penalties as items[30] 1 and 2. See footnote 24.

Here is the cited standard:

> **1926.761 (b)** ***Fall hazard training***. The employer shall provide a training program for all employees exposed to fall hazards. The program shall include training and instruction in the following areas:
>
> **1926.761 (b) (5)** The fall protection requirements of this subpart.

Our hearing officer affirmed item 3 for all three employers as a serious violation. As we shall explain, we sustain item 3 for Morel, Midwest and East Iowa as nonserious citations with no penalty.

From the testimony and the hearing officer's recommended order we learn the secretary issued the citations because the training materials did not tell the employees Kentucky's fall protection standard takes effect at 10 feet of elevation. Midwest Steel's safety program said the standard was 15 feet while East Iowa's said it was 25 feet. The federal regulation says fall protection must be put into effect at an elevation of 15 feet. 1926.760 (a). Although it plays no part in our decision for item 3, and indeed was not litigated, we are troubled none of this information was conveyed to the employers in the citation. Item 3 does not refer to 1926.760 (a). Neither does item 3 cite to 803 KAR 2:417 where Kentucky's 10 feet fall protection requirement is found.

Midwest Steel cross examined the compliance officer about what steps it should have taken to instruct about Kentucky fall protection requirements:

> Q. ...they should have inquired into what?

[30] KRS 338.141 (1) authorizes the secretary to issue citations which are often in the business referred to as items.

A. If East Iowa Decks was familiar with the more stringent requirements for steel erection fall protection in Kentucky.
Q. And, that's the difference between, I think, the ten and fifteen foot--
A. That is one of the differences.

III TE 39

Then the CO read into the record a number of items from Kentucky's steel erection regulation, 803 KAR 2:417, which triggered the next exchange:

Q. ...And, so your criticism of Midwest is that it did not insure that East Iowa was aware of the ten foot Kentucky requirement.
A. Correct.

III TE 41

Greg Naso, East Iowa's vice president and co-owner, confirmed his company had not trained its employees to the Kentucky ten foot fall protection standard. IV TE 103.

We find the cited standard applies to steel erection and is indeed located in that section, subpart R. We find the three employers violated the standard when they did not teach the employees about the 10 foot requirement in Kentucky. Training is required under the occupational safety and health act so employees will understand the hazards facing them and know what steps they may take to avoid them. Working at 42 feet, the employees had access to the cited condition: not being trained to the more stringent Kentucky standard. With reasonable diligence the three employers could have found out about Kentucky's more strict requirement which is contained in chapter 2, occupational safety and health, 803 KAR 2:417. We conclude the secretary proved Morel, Midwest and East Iowa violated the cited standard. Astra Pharmaceutical Products, supra, and KRS 338.031 (1) (b).

Basically, Kentucky's fall protection standard takes effect at 10 feet while the federal does at 15. Our difficulty with item 3 is there is no proof in this case East Iowa

employees worked at heights less than 42 feet. Given the level at which the four East Iowa employees worked, there is no practical difference between understanding fall protection is required at 10 feet versus 15. Either way, the East Iowa employees knew they were required to wear fall protection, the harnesses and lanyards, at 42 feet and for whatever reason three of them did not on August 17.

The statutory definition of a serious violation says in part:

> ...a serious violation [exists] if there is a substantial probability that death or serious physical harm could result from a condition... KRS 338.991 (11)

According to the facts, the condition referred to in the statute is working at height without the Kentucky training.

Morel and Midwest argue the training violation should be nonserious. We agree. East Iowa came to the job site for one reason, to install the roofing sheets at a height of 42 feet. When East Iowa was done, it left the job site.

A lack of training about the 10 foot rule, with the employees working at 42 feet, would not contribute to a serious physical injury. There is no testimony to the effect the employees did not know how to use fall protection.

We sustain item 3 as a nonserious citation with no penalty for Morel, Midwest Steel and East Iowa. KRS 338.081 (3). As set out in this decision, we sustain serious items 1 and 2 as well, with the appropriate penalties, for all three respondents.

It is so ordered.

October 7, 2008.

Kevin G. Sell
Chairman

Sandy Jones
Commissioner

William T. Adams, Jr.
Commissioner

Certificate of Service

I certify a copy of this decision and order of the review commission, KOSHRC 4147-04, 4151-04, 4949-04, has been served this October 7, 2008 on the following in the manner indicated:

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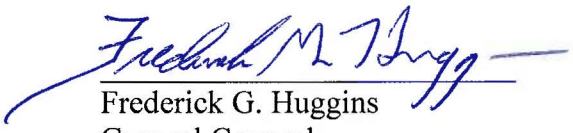

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