COMMONWEALTH
KENTUCKY OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION

KOSHRC 4251-05, 4248-05, 4253-05

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

RIVER CITY DEVELOPMENT CORP.
HAYES DRILLING, INC
D. W. WILBURN — RESPONDENTS

* * * * * * * * * *

John D. Parsons for the secretary. Thomas M. Moore and Tammy Meade for Hayes Drilling.

DECISION AND ORDER OF THE REVIEW COMMISSION

This case comes to us on petitions for discretionary review filed by the secretary and Hayes Drilling. Because neither River City Development nor D. W. Wilburn filed petitions for review, and this commission elected not to call their cases for review on its own motion, their cases became final and not subject to appeal forty days after the hearing officer issued his recommended order. Sections 3 (2) and 48, 803 KAR 50:010.

KRS 336.015 (1) charges the commissioner of labor with the enforcement of the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the executive director of the office of occupational safety and health compliance issues citations. KRS 338.141 (1). If the cited employer notifies the executive director of his intent to challenge a citation, the Kentucky

occupational safety and health review commission "shall afford an opportunity for a hearing." KRS 338.141 (3).

The Kentucky General Assembly created the review commission and authorized it to "hear and rule on appeals from citations." KRS 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the review commission; the review commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the commission takes a case on review, it may make its own findings of fact and conclusions of law. In Brennan, Secretary of Labor v OSHRC and Interstate Glass[1], 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799 page 21,538, BNA 1 OSHC 1372, 1374, the eighth circuit said when the commission hears a case it does so "de novo." See also Accu-Namics, Inc v OSHRC, 515 F2d 828, 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..."[2]

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."

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[1] In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2000), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act.

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

This case began as an accident investigation on a construction site at Bryant Station High School in Lexington. Volume I, transcript of the evidence, page 25 (I TE 25). On April 19, 2005 Billy Evans, an employee of masonry subcontractor River City,[3] lifted up a piece of plywood from where it lay on the ground and fell into a circular hole dug by Hayes Drilling. I TE 26. Mr. Evans broke both his ankles. I TE 31.

Just before Mr. Evans's fall, the Hayes drill operator had directed a Hayes laborer to place the plywood over the hole and we so find. IV TE 73 and 85. Mr. Evans had been driving a sky track fork lift truck he used to haul mortar for River City. I TE 27. He got off his truck to move the plywood so he would not run over it. I TE 26-27. The hole was 18 feet deep and 36 inches in diameter. I TE 33. Mr. Evans said he did not know there was a hole beneath the plywood. I TE 40.

General contractor D. W. Wilburn had hired Hayes to do the drilling. IV TE 9-10. Hayes drilled approximately 800 holes which became part of the foundation for the building under construction at the high school. V TE 10. Once Hayes drilled the holes, Wilburn filled them with concrete and reinforcing steel. III TE 94.

Compliance officer Shannon Dowdell began her inspection at Bryant Station High School on July 6, 2005. II TE 62. Hayes Drilling had finished its work and departed the job site around the first of May. IV TE 66. Hayes did not participate in the CO's opening conference or walk around inspection. IV TE 18 Hayes did attend the CO's closing conference where it learned about possible citations. IV TE 17 As a result of her inspection, the CO issued three serious citations to D. W. Wilburn, the general contractor, to Hayes Drilling, the drilling subcontractor, and to River City, a masonry subcontractor. KRS 338.991 (2). Item 1 charged

[3] I TE 25, 37 and III TE 66.

the three companies with violating 29 CFR 1926.502 (i) (1);[4] the citation said a piece of plywood over the hole into which Mr. Evans fell was not capable of supporting "twice the maximum axle load of the largest vehicle expected to cross over the cover..." Exhibit 3. Item 2 said the plywood cover was "not secured when installed so as to prevent accidental displacement by the wind, equipment or employees," a violation of 1926.502 (i) (3). Then item 3 said the plywood cover was "not color coded or marked with the work[5] [sic] "HOLE" or "COVER," a violation of 1926.502 (i) (4).

Although the commissioner of labor issued separate sets of citations to each company, the hearing officer consolidated the three cases for a trial on the merits. At trial the secretary of labor bears the burden of proving each citation. Section 43, 803 KAR 50:010. To prove a citation the secretary "must show that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence, could have known of the violative conditions." Ormet Corp, a federal review commission decision, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135. In his recommended order, our hearing officer dismissed all citations issued to River City. He found that while River City knew Hayes Drilling was not placing barriers around some of the holes, the supervisor did not know "some of the unbarricaded holes were being covered with plywood." Recommended order, page 4 (RO 4) and III TE 48 and 56. Our hearing officer then reasoned River City could not have known Hayes had begun using unmarked and unsecured plywood to cover the drilled holes since such methods violated the cited standards: "Nothing alerted River City's employees that they should...inspect under unmarked plywood to determine if it covered a caisson hole."

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[4] Adopted in Kentucky by 803 KAR 2:412 section 2 (1) (b).

[5] From the context of the citation, we believe "work" should have been typed as word. The apparent typographical error was not raised as an issue to this commission.

He concluded River City could not "have discovered the hazard with reasonable diligence." RO 15. Complainant secretary of labor did not appeal the hearing officer's decision to dismiss all three citations issued to River City.

The Citations

Item 1

Our hearing officer dismissed serious item 1 for Hayes Drilling and D. W. Wilburn as well. RO 20. To establish a violation, the secretary would have to prove the strength of the plywood and the axle weight of "the largest vehicle expected to cross over the cover." 1926.502 (i) (1). Compliance officer Dowdell said she had no personal knowledge of the weight of vehicles. I TE 105. She said her information about vehicles used and their weights came from Tommy Driver, site superintendent for River City. I TE 106-107. In his recommended order the hearing officer said the CO could testify about the vehicle information she learned from Mr. Driver because his words spoken to her could come into evidence as an exception to the rule against hearsay. RO 10.

KRE 801A (b) (4), the rule cited by our hearing officer, says:

> Admissions of parties. A statement is not excluded by the hearsay rule...if the statement is offered against a party and is:
> (4) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. (emphasis added)

Our hearing officer is correct. A hearsay statement, admitted under 801A (b) (4), is an admission against the party who utilized the declarant as either an agent or employee. Although the above quoted rule is contained in one sentence, it is actually two rules: one for a party's agent and another for a party's employee. An agent need not be the party's employee and an

employee need not be the party's agent for the rule to operate.[6] As Professor Lawson instructs us, the rule "has three requirements: (1) the declarant must qualify as an 'agent or servant' of the party against whom the hearsay is offered; (2) the hearsay must concern a matter 'within the scope of the agency or employment' of the declarant; and (3) the statement must have been made during 'the existence of the relationship' between the declarant and the party." (emphasis added) In order for a party, here the secretary of labor, to succeed in getting the hearsay admitted, the party must prove the three elements of the rule as explained by Professor Lawson. It is not enough merely to cite a rule or a case referring to the rule; the party seeking to have the hearsay admitted must prove each element of the rule, just as each element of a standard must be proven.

> The objective of the third of these requirement[s] is to protect the opposing party against *false utterances* (by excluding statements by persons having no relationship with the party at the time of the statement) while the objective of the second requirement is to protect the opposing party against *unreliable utterances* (by excluding statements by employees about matters beyond the scope of their employment). The primary focus of the exception is not upon authority of the agent to speak for the party but rather on the relationship between the content of the statement and the duties and responsibilities of the declarant as an agent or employee.

We affirm our hearing officer's decision to dismiss serious item 1 issued to Hayes. A hearsay statement obtained from a River City employee cannot be used, over the objection of Hayes, as proof against respondent.

Complainant secretary of labor issued all citations, and properly so, under the authority of the fall protection subpart of the construction standards. Subpart M, 29 CFR 1926.500 through 503 and appendices. We find D. W. Wilburn, the general contractor, was erecting a building at the school; Hayes drilled caisson holes for the foundation while River City did masonry work.

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[6] Lawson, Robert G, *The Kentucky Evidence law Handbook*, 4th edition, LexisNexis, section 8.25[4], page 604.

Section 1926.501 (b) (4) *Holes.* **(i)** says "Each employee on walking/working surfaces shall be protected from falling through holes...more than 6 feet...above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes." (emphasis added) When Hayes drilled a caisson hole more than 6 feet deep, it created a falling hazard and thus invoked the applicable fall protection standards.

The land upon which Wilburn and its subs worked to construct the school building, otherwise known as earth, soil or ground, is a walking and working surface within the terms of the above standard. Employees stood on the ground and walked on it while engaged in their construction work. Hayes's drilling machines[7] and Mr. Evans's fork lift truck moved about on the ground at the construction site. In Davy Songer, Inc, a federal administrative law judge decision, CCH OSHD 30,957, BNA 17 OSHC 1643, 1644, construction workers stood on top of a ten foot tall shipping crate, dismantling it. Although the company argued the top of a crate could not be a walking/working surface, the ALJ rejected the argument. She said "a working surface is defined not by why it was built, but rather how it was actually used by workers." We agree with the ALJ and would add that a working surface is defined as a place where employees do their work. We find the ground where Hayes's drill stood and where the Hayes laborer placed the unmarked and unsecured plywood was a walking and working surface.

Item 2

Our hearing officer found the plywood which Mr. Evans picked up before falling into the hole was neither secured against accidental displacement nor marked with the word "hole" or "cover" as required by the standards. RO 7, I TE 75 and IV TE 138. We agree and adopt his findings.

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[7] Hayes had two rigs on site. III TE 98.

Hayes Drilling's serious item 2 said the plywood cover placed over the hole was "not secured so as to prevent accidental displacement by the wind, equipment or employees..." The cited standard says:

> All covers shall be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees. 1926.502 (i) (3)

For item 2, Hayes received a proposed penalty of $2,500.[8]

We find the plywood was used as a cover. Kevin Dorris, Hayes's drill operator, testified he told his laborer to place a piece of plywood over the hole as a "temporary cover." IV TE 72-73, 85. As we have found, the plywood cover was not secured. Hayes makes the interesting argument item 2 should be dismissed because Mr. Evans deliberately picked the plywood cover up to move it out of the way of his fork lift truck. Hayes is mistaken on two accounts. One, the plywood cover was not secured to prevent accidental displacement by wind or equipment as well as by employees. With the plywood cover not secured, it could have been moved, displaced, by either wind or equipment and thus create the same falling hazard as did Mr. Evans when he picked the plywood up and fell into the hole beneath it. Even if Mr. Evans had never picked up the plywood, Hayes would still have violated the standard because the plywood cover was not secured.

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[8] KRS 338.991 (2) sets the maximum penalty for a serious citation at $7,000. The CO first determines the gravity based penalty which is itself composed of two factors: seriousness of an injury should one occur and the probability of an injury. A serious violation is one where there is a "substantial probability that death or serious physical harm could result from a condition which exists..." KRS 338.991 (11). Hayes started with a gravity based penalty of $5,000 because the CO decided the severity was high (high, medium and low severity being the three choices) because an employee falling into the hole could have been killed. II TE 5 and 10. She could assess the probability of an injury as being greater or lesser. She found greater probability because an employee was injured. I TE 125. Then the CO applied the three penalty adjustment factors to the gravity based penalty. 803 KAR 2:115, section 1 (2). Hayes received 40% credit for size of the company because of the number of employees and 10% for history of prior violations (the maximum permitted) because there were none within three years. II TE 10-11. Hayes received no good faith credit because of the high serious/greater probability gravity based penalty. The fifty percent penalty credit reduced the gravity based penalty of $5,000 to a proposed penalty of $2,500.

In Lee Way Motor Freight, Inc v Secretary of Labor, 511 F2d 864, 870 (CA10 1975), CCH OSHD 19,320, page 23,093, BNA 2 OSHC 1609, 1613, the court said "One purpose of the Act is to prevent the first accident." Since the act is designed to prevent accidents by requiring employers to comply with the safety and health standards, it is not necessary for the secretary to prove an accident. Once Hayes placed the unsecured plywood on the ground it was subject to accidental displacement by wind or equipment. So Hayes violated the terms of the standard independent of Mr. Evans's accidental fall.

Two, the standard is written to prevent the hazard of accidental falls, situated as it is in the fall protection subpart, which is exactly what happened to Mr. Evans. In any event, Mr. Evans picked up the plywood to move it out of the way of his fork lift truck, not to facilitate his falling into the hole – those are the facts. I TE 26. We conclude because Mr. Evans's fall was accidental, the standard applies.

We find support for our conclusion in B&N&K Restoration Company,[9] CCH OSHD 32,951, where an employee working on a roof picked up two, overlapping metal sheets he believed were being stored. Like Mr. Evans, the employee fell through a hole beneath the unmarked and unsecured pieces of sheet metal. The ALJ said while the employee intentionally lifted the sheets, he did not know about the hole. In his recommended order the ALJ rejected BNK's contention the lifting was not a hazard contemplated by the standards. He cited to Atlas Roofing Company, Inc v OSHRC, 518 F2d 990, 1013 (CA5 1975), CCH OSHD 20,002, page 23,797, BNA 3 OSHC 1490,1501, where an employee lifted a bundle of insulation of the same type being laid on the roof at the time; this employee fell to his death through a hole beneath the insulation. Affirming a violation, the fifth circuit found "the 'accidental displacement' standard applied whether there was an 'advertent dislodging' or any 'inadvertent removal' of a cover..."

[9] Go to oshrc.gov and click on decisions; then select final administrative law judge decisions for 2008.

Then the court, referring to the insulation which the employee thought to be "one of the many bundles...scattered over the solid roof deck," said "It was a jury-rigged system which failed with the price of a human life."

Grounding his order on the Atlas Roofing decision by the fifth circuit, the ALJ rejected BNK's argument "the intentional displacement of the cover...was not a hazard contemplated by the standard." At CCH page 53,863.

In a decision which said the Seventh Amendment to the U.S. Constitution did not prevent the Congress from establishing an administrative agency to decide occupational safety and health cases without a jury, the U.S. Supreme Court upheld the fifth circuit's decision. Atlas Roofing Company, Inc v OSHRC, 430 US 442, 97 SCt 1261, 51 LEd2d 464, CCH OSHD 21,615, BNA 5 OSHC 1105.

Had Mr. Evans picked up the plywood as a part of a plan to jump into the 18 foot hole, then perhaps Hayes might have had an argument, but not the one before us today.

Hayes makes another, nonsensical argument in defense of items 2 and 3. Hayes says even though it dug the hole, it did not create the hazard, attributing that to D. W. Wilburn. According to Hayes's drill operator Kevin Dorris, Wilburn was supposed to, and usually did, follow behind Hayes's drilling operation to place a wooden 2 by 4 barricade over the newly dug hole. IV TE 73 Hayes says the secretary is required to prove Hayes "created or controlled the subject caisson hole hazard." See Hayes reply brief, page 8. For this proposition, Hayes cites to American Petroleum Institute v Occupational Safety and Health Administration, 581 F2d 493 (CA 5 1978), CCH OSHD 23,054, BNA 6 OSHC 1959, judgment affirmed 448 US 607 (1980).[10] First of all, the Petroleum Institute case is inapposite; it is not about the cited standards and is

[10] Industrial Union Department, AFL-CIO v American Petroleum Institute, 100 SCt 2844, 65 LEd2d 1010, CCH OSHD 24,570, BNA 8 OSHC 1586.

not even a citation enforcement case. Instead, Petroleum Institute is a pre-enforcement review of a proposed OSHA standard for benzene, a toxic chemical. In its decision affirmed on appeal, the fifth circuit said the secretary of labor had "to find, as a threshold matter, that the toxic substance...poses a significant health risk in the workplace..." At 448 US 614-615,[11] CCH OSHD 24,570, page 30,092, 8 OSHC 1587. Hayes is correct when it argues that labor must prove Hayes created or controlled the hazard. After all, the secretary of labor has the burden of proof. But the question can be answered without resort to a pre-enforcement review of promulgated standards which says nothing about either a hazard presented when a hole is dug in the ground or the burden of proof for a citation contest.

Whether Hayes created the hazard is certainly an issue in the case before us. Whether an employer creates a hazard is dependent upon the facts. When Hayes's operator set his drill rig up to dig a hole with the drill bit poised above the ground, there was no fall hazard; rather, below the drill bit was, we infer, flat or relatively flat ground. On direct examination, the following exchange took place between Hayes and Kevin Dorris, Hayes's drill operator:

> Q. Can you tell me what happened – when you're drilling a thirty-six inch diameter hole going down eighteen feet, what happens to the dirt?
> A. We have to pull it up and swing it over to the side and spin it off into a spoil pile...we try to let the machine do most of the work and then we'll take it and swing it over to the side of the drill or – and spin it off. IV TE 72

As we explained above, the fall protection standard takes effect when a hole is more than six feet deep. 29 CFR 1926.501 (b) (4) (i). When the drill bit is lifted out of a hole and swung to the side, exposing the hole, and the hole is more than six feet deep, then at that point there is a fall hazard. Hayes created the hole and we so find; the hazard presented by the hole is falling into it.

[11] At 100 SCt 2850, 65 LEd2d 1018.

At the point the exposed hole is more than six feet deep, the hazard of falling into it is thus created. We conclude Hayes created the hazard. Wilburn did not dig the hole, Hayes did.

In Brennan v Occupational Safety and Health Review Commission and Underhill Construction Corporation,[12] 513 F2d 1032, 1037-1038 (CA2 1975), CCH OSHD 19,401, pages 23,164-23,165, BNA 2 OSHC 1641, 1645, an administrative law judge vacated a citation charging Underhill with improperly storing construction materials at the outer edge of a building under construction 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 and dismissed the citation; then the federal review commission upheld the dismissal. In a landmark decision, the second circuit reversed the review commission and placed liability for the citation on Underhill even though its own employees were not exposed to the hazard, citing section 5 (a) (2) of the act.[13] In a case before this review commission we said the following about the Underhill decision: [W]"hile 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."[14] Underhill stored the materials improperly, creating the hazard which then exposed another contractor's employees working on the construction site to the hazard. In footnote 1 of its decision, the second circuit said Underhill "had considerable control over and responsibility for the work areas on the building site."[15] Underhill was the creating employer because it improperly stored the

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[12] Indexed as Dic-Underhill in BNA.
[13] 29 USC 654 (a) (2).
[14] Morel Construction, et al, KOSHRC 4147-04, 4151-04, 4949-04, a decision of the Kentucky occupational safety and health review commission, page 7, dated October 7, 2008. Go to koshrc.ky.gov; select commission decisions.
[15] 513 F2d at 1033, CCH page 23,16l, 2 OSHC 1641.

construction materials; the same logic applies to Hayes Drilling when it dug the hole which then exposed the River City employee to the fall hazard.

Our hearing officer sustained Hayes's item 2 citation and the proposed penalty of $2,500. KRS 338.081 (3). We affirm our hearing officer's decision. The fall protection standard applied to the 18 foot fall; Hayes failed to comply with the standard when it dug the hole and then placed the unsecured piece of plywood over the hole. As our hearing officer found, Hayes knew the plywood cover did not comply with the standards. RO 16.

River City employee Billy Evans was exposed to the hazard of the unsecured plywood when he raised it up and fell into the hole. On a construction site an employer who creates a hazard is liable for a citation when employees working for another employer are exposed to that hazard. Underhill Construction, Morel and Ormet, supra.

Item 3

Serious item 3 says Hayes failed to mark the plywood with the words "hole or "cover." Paragraph 1926.502 (i) (4) says "All covers shall be color coded or they shall be marked with the word "HOLE" or "COVER" to provide warning of the hazard." Here again the proposed penalty was $2,500. The fall protection standard applies and its terms were violated; Mr. Evans had access to the hazard, he fell into the hole, and Hayes knew the plywood was not marked. We affirm our hearing officer's decision to sustain both item 3 and the penalty of $2,500.

Issues on discretionary review

In its brief on discretionary review, the secretary of labor said the hearing officer in his recommended order misstated the law about multi employer responsibility on a construction site. Under the multi employer work site doctrine an employer on a construction site is responsible for complying with the occupational safety and health standards. KRS 338.031 (1) (b). If that

employer violates a standard and thereby exposes an employee to the hazard, the creating employer may be cited even though the exposed employee worked for another employer at the construction site. Underhill Construction and Morel, supra.

Hayes and Wilburn are both liable for hazards created on the work site before us. Hayes because it created the hazard and because of its duty to comply with the standards. Wilburn, on the other hand, as general contractor was in control of the work site. Hayes drill operator Kevin Dorris testified Wilburn told him where to dig his holes. IV TE 63-64 and 65. Mr. Dorris said he could not decide for himself where to dig because "if they [Wilburn] don't have a rebar cage for the hole or its something like that...we try to work together with Wilburn so we can meet their schedule...it just works better that way." IV TE 65. Our hearing officer found Wilburn as general contractor was a controlling employer. RO page 8, paragraph 21. Mr. Dorris's testimony reinforces our hearing officer's conclusion about Wilburn.

In his recommended order our hearing officer ruled Wilburn, a controlling employer, "is 'not responsible for any employees other than its own,'" citing to Gilles & Cotting, CCH OSHD 20,448, page 24,424, BNA 3 OSHC 2002, 2003, a federal review commission decision. RO 18. To this the secretary took exception; in his brief the secretary says Gilles & Cotting, supra, was overruled by subsequent cases. We agree with the secretary and reverse our hearing officer on this point

In the Gilles & Cotting case, the commission held "employee exposure was to be determined by a rule of access rather than actual exposure."[16] While the commission in Gilles & Cotting did say an employer was not responsible for employees other than its own, it said, in footnote 2 of its decision, it was not necessary for the commission to revisit that earlier, impliedly unsound, ruling for two reasons: one, the Gilles & Cotting commission held the

[16] See footnote 3, Grossman Steel and Aluminum, CCH OSHD 20,691, BNA 4 OSHC 1185, 1187.

employer liable for the citation because its employees had access to the hazard and thus its employees were exposed to the hazard according to the access rule. Two, the commission, in the same footnote, said it was not necessary to revisit the issue whether an employer could be cited when his own employees were not exposed because "the issue is presented in other cases on review and consideration of the issue in them may be appropriate in view of *Brennan v OSHRC (Underhill Construction Corp)*, 513 F2d 1032 (2d Cir 1975)..."[17] Recall, in Underhill, supra, decided before the Anning-Johnson/Grossman cases we shall next discuss, the second circuit said a general contractor on a construction site who exercised control would be cited if its employees, or employees of other contractors, were exposed to a hazard.

Our review commission in its Morel, supra, decision upheld a citation issued to a controlling employer on a construction site with no employees exposed to the hazard of falling; in Morel we said we found Underhill persuasive. The same reasoning applies to Wilburn.

Three months after its Gilles and Cotting decision, supra, the federal commission in Grossman Steel,[18] issued on May 12, 1976, said:

> ...the general contractor normally has responsibility to assure that the other contractors fulfill their obligations with respect to employee safety which affect the entire site. The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role...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. [19]

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[17] CCH OSHD 20,440, page 24,424, BNA 3 OSHC 2003.

[18] CCH OSHD 20,691, page 24,791, BNA 4 OSHC 1185, 1188.

[19] In Underhill the second circuit in footnote 1 said the company exercised considerable control over the work site; hence in Underhill the court said an employer "in control of an area" can be cited where employees "of other employers engaged in a common undertaking" are exposed to a hazard. 513 F2d at 1038, CCH OSHD 19,401, page 23,165, 2 OSHC 1645. (emphasis added)

In a decision issued the same day as Grossman Steel, the commission in Anning-Johnson Company[20] said the second circuit in Underhill made two "significant..holding[s]:" the court said the department of labor, to prove a citation, would have to show employees had access to a hazard rather than actual exposure. Then, and more importantly for our purposes today, the court said an employer "'in control of an area and responsible for its maintenance' is responsible under the Act when it is shown that a violation 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.'" The commission said it found itself "in general agreement" with the second circuit's Underhill opinion. Anning-Johnson at CCH OSHD 20,690, page 24,782, 4 OSHC 1197. Ever since Anning-Johnson and Grossman were issued in 1976, the federal commission had, until very recently, upheld citations issued to controlling employers on construction sites whose employees had not been exposed to the cited hazard.

Last year, however, a majority on the federal commission in its Summit Contractors[21] decision, Commissioner Thomasina Rogers dissenting, said 29 CFR 1910.12 (a) "prevents the Secretary from enforcing her current multi-employer citation policy to cite a non-exposing non-creating employer..." In his concurring opinion, Chairman Railton in Summit said the dicta footnote in the Grossman Steel decision[22] "took on a life of its own..."[23] Chairman Railton leaves us with the impression the federal commission was the first authority to find a general contractor with no exposed employees liable to be cited for a hazard he did not create. Such, however, is not the case; it was the second circuit court of appeals in its March 10, 1975

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[20] CCH OSHD 20,690, page 24,782, BNA 4 OSHC 1193, 1196-1197.

[21] CCH OSHD 32,888, BNA 21 OSHC 2020. Go to oshrc.gov and click on decisions; then select final review commission decisions for 2007.

[22] Footnote 6, Grossman Steel, at CCH OSHD 20,691, page 24,791, BNA 4 OSHC 1188-1189.

[23] CCH OSHD 32,888, page 53,261, 21 OSHC 2022. In Grossman Steel the federal commission endorsed the idea a controlling employer on a construction site could be cited even though its own employees were not exposed to the hazard; but in footnote 6 the commission said that was dicta because it found Grossman Steel to be properly cited since its employees had access to the hazard.

Underhill decision which first, and definitively, found support in section 5 (a) (2) of the act for issuing a citation to a non creating employer on a construction site whose employees nevertheless were not exposed to the hazard. Both Grossman Steel[24] and Anning-Johnson[25] cited to Underhill in support of their conclusions on multi employer responsibility - what Chairman Railton in Summit erroneously characterized as dicta with no supporting authority.

Summit is on appeal to the eighth circuit[26] where the case has been briefed and argued. This commission in its Morel, supra, decision has said it does not find Summit persuasive and has declined to follow it; We continue to find support for the multi employer work site doctrine in Underhill, supra, Universal Contractors[27] and our statute. KRS 338.031 (1) (b).[28] Morel is now on appeal to Franklin circuit court.[29]

Hayes in its brief says it was denied due process of law because it did not participate in the opening conference or the walk around inspection. Hayes finished its work and left the site in late May; the inspection took place on July 6.

Hayes received due process at the trial which in Kentucky means "A trial-type hearing" and the "opportunity for full rebuttal, and the opportunity to impeach witnesses." Kaelin v City of Louisville, Ky, 643 SW2d 590, 591-592 (1983), section 38, 803 KAR 50:010. Hayes wants the citations dismissed because it did not attend the opening conference or participate in the walk around inspection. KRS 338.111 says the department of labor shall afford an employer and employees or their union "an opportunity" to accompany the CO during the inspection. And 803 KAR 2:070, section 4, subparagraphs (1) and (5), says the secretary shall conduct what has

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[24] Grossman Steel at CCH OSHD 20,691, pages 24,789, 24,790, 24,791, BNA 4 OSHC 1187 and 1188.
[25] Anning-Johnson at CCH OSHD 20,690, pages 24,782, 24,784, BNA 4 OSHC 1196, 1197, 1199.
[26] United States Court of Appeals for the Eighth Circuit, 07-2191.
[27] Universal Construction Company, Inc v Occupational Safety and Health Review Commission, 182 F3d 726 (CA10 1999), CCH OSHD 31,861, BNA 18 OSHC 1769.
[28] KRS 338.031 (1) (b) says "Each employer: Shall comply with occupational safety and health standards promulgated under this chapter."
[29] Franklin Circuit Court, Division II, 08-CI-1831 and 1842.

become known in the trade as opening and closing conferences.[30] For Hayes to succeed here it must show prejudice, that is an inability to defend itself because it did not attend the opening conference or accompany the CO on her walk around inspection. Hayes made no such argument. In GEM Industrial,[31] CCH OSHD 30,762, page 42,748, BNA 17 OSHC 1184, 1187, the federal commission said an employer who complained his constitutional rights were violated must "establish that it was actually prejudiced in the preparation or presentation of its defense on the merits." The same result obtains where labor does not hold a closing conference. Kast Metals Corp,[32] a federal review commission decision. CCH OSHD 21,299, BNA 5 OSHC 1861, 1862-1863. For an employer to prevail in an argument it was denied its rights to attend a closing conference, it must show the inability to attend the closing conference prejudiced its attempts to defend itself.

Hayes argues its citations are defective because they show the violation should be abated on April 19, the date of the accident, while the inspection took place in July. Hayes's brief in chief at page 17. River City masonry foreman William Long testified he saw a barricade placed over the hole within fifteen to thirty minutes after the accident. III TE 76. KRS 338.141 (1) says the "citation shall...establish the time period permitted for correction by fixing a reasonable date by which the alleged violate shall be eliminated..." We find the April 19 abatement date specified on the citations to be reasonable because abatement actually took place on that date. Once Wilburn installed the barricade over the hole, abatement was no longer an issue.

Hayes in its brief says the cited standards do not apply to the violations; we have already found otherwise. When the hole Hayes drilled was more than six feet deep, the fall protection

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[30] Hayes regional manager Harlan Koehler said he attended a meeting with the compliance officer where she discussed possible citations; we find that was the closing conference. IV TE 17.
[31] Go to oshrc.gov. Click on decisions and select final commission decisions for 1995.
[32] Go to oshrc.gov. Click on decisions and select final commission decisions for 1977.

standards took effect. Section 1926.501 (b) (4) (i) says "Each employee on walking/working surfaces shall be protected from falling through holes...more than 6 feet...above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes." (emphasis added) Hayes created the fall hazard when it dug the hole. The fall protection standards require a secured and marked cover be placed over holes which present a fall hazard.

Hayes says it is not responsible for the violations because it maintained, at the trial, it had a drill only contract with Wilburn. All employers are charged with the duty to comply with the occupational safety and health standards. KRS 338.031 (1) (b). If an employer could contract out of the act, all would. A contract will not relieve an employer of his responsibility to comply with the standards. Frohlick Crane Service, Inc v OSHRC, 521 F2d 628, 631 (CA10 1975), CCH OSHD 19,922, page 23,712, BNA 3 OSHC 1432, 1433. See also Baker Tank Co/Altech, A Division of Justiss Oil Co, CCH OSHD 30,734, page 42,684, BNA 17 OSHC 1177, 1180.

Hayes in its brief maintains the unmarked and unsecured plywood cover was a "reasonable temporary alternative safety measure taken because Wilburn failed immediately to fulfill its responsibilities..." Hayes brief, page 20. Hayes says it did not have any employees capable of erecting wooden barriers. Respondent employer says it could utilize a temporary, alternative safety measure because it was not a creating employer.[33] While we have found Hayes created the fall hazard when it dug the hole, its defense, made in error, merits an explanation.

In Anning-Johnson Company, supra, a companion case to Grossman Steel, supra, Commissioner Cleary, writing for the majority, posed the following question: "Is a construction subcontractor liable under the Act when its employees have access to hazards that it did not

[33] While we have decided this issue on other grounds, we find the plywood could not be considered a realistic, alternative abatement because it violated at least two standards; it was unsecured and was not marked with the words "cover" or "hole." These two violations led Mr. Evans to believe he could lift the plywood up and throw it to one side.

create and over which it had no control?" At CCH OSHD 20,690, page 24,780 and 4 OSHC 1195. Anning-Johnson, a drywall subcontractor,[34] worked on a building under construction. The building had no perimeter guards (a fall hazard) or fire fighting equipment; construction debris, a tripping hazard, was not cleared from work areas and the building's stairwells were not guarded to prevent falls. Anning Johnson employees worked without safety belts.[35] Anning-Johnson received citations for not providing fall protection, for not removing debris and for not providing fire fighting equipment. Administrative Law Judge Dern dismissed Anning-Johnson's citations; he said an employer cannot be held liable for a section 5 (a) (2) violation, KRS 338.031 (1) (b) in Kentucky, "'when his employees are exposed to [violative] conditions which he did not create or control.'" CCH OSHD 20,690, page 24,780 and 4 OSHC 1195.

In its decision the federal commission reversed its ALJ; Commissioner Cleary began his analysis with a discussion of Underhill Construction, supra, which the second circuit court of appeals had recently issued. In Underhill the court said an employer on a construction site who creates a hazard must comply with the standards when his employees or the employees of another employer have access to the hazard. No Underhill employee had access to the hazard.

At a "common construction site," the commission said, employers engage in actions to eliminate hazards "that are actually controlled by one or more employers and to which their employees are exposed." Then the commission recognized the "duties arising under the Act are to be read in the light of the social purpose of assuring 'so far as possible every working man and

[34] The commission's Anning-Johnson case contained two sets of facts: these facts pertain to docket number 3694.
[35] Full body harnesses are now used for fall personal fall protection.

woman in the Nation safe and healthful working conditions.'"[36] At CCH OSHD 20,690, page 24,783, 4 OSHC 1198.

Commissioner Cleary said once Anning-Johnson, the subcontractor, established he neither created nor controlled the hazard, he could defend against the charge, the citation, by demonstrating he protected his employees "by means of realistic measures taken as an alternative to literal compliance with the cited standard." At CCH OSHD 20,690, pages 24,783-24,784 and 4 OSHC 1198. In this situation a construction subcontractor would be prevented from abating the hazard in compliance with the standard because of craft jurisdiction difficulties; for example, an electrical contractor could not erect wooden handrails to protect against falls because his employees did not belong to the carpenter's union.

Commissioner Cleary said section 5 (a) (2) imposes a duty on construction site employers, who neither create nor control a hazard, to comply with the act when they know of a hazard, or should have with the exercise of reasonable diligence, "in light of the authority or 'control'" these employers retain over their "*own* employees..." At CCH OSHD 20,690, page 24,784 and 4 OSHC 1198. In other words when an employer recognizes his workers are exposed to, say, a fall hazard, a hazard he neither created nor controlled, he is under a duty, according to the act, to comply with the standards to protect his employees by taking realistic, alternative measures to protect them.

The Anning Johnson decision recognizes an Underhill employer's duty to comply with the act when employees, working for another employer, are exposed to hazards he creates. An Anning-Johnson employer, conversely, has employees who are exposed to a hazard created by another employer; this Anning-Johnson employer has a statutory duty to comply with the act

[36] 29 USC 651 (b). See also KRS 338.011 which says in part "it is the purpose and policy of the Commonwealth...to promote the safety, health and general welfare of its people by preventing any detriment to the safety and health of all employees..."

for the benefit of his own employees, as the federal commission has long held. Grossman Steel and Aluminum, CCH OSHD 20,961, page 24,789, BNA 4 OSHC 1185, 1187, KRS 338.031 (1) (b) and 29 USC 654 (a) (2). The duty of the Anning Johnson employer to comply with the act for the benefit of his employees does not disappear when another employer creates the hazard, so long as the Anning-Johnson employer either recognizes the hazard or could have with the exercise of reasonable diligence.[37] This Anning-Johnson/Grossman defense makes sense, in light of the act's purpose "to assure every employee a safe and healthful work place," on a common construction site where employers, engaging in their own craft, perform tasks which may put other employees at peril. As Chairman Barnako put it in his Grossman Steel decision, issued on the same date as Anning-Johnson:

> ...a subcontractor cannot be permitted to close its eyes to hazards to which its employees are exposed, or to ignore hazards of which it has actual knowledge...We therefore expect every employer to make a reasonable effort to detect violations of standards not created by it but to which its employees have access...Our holding does require each employer to take reasonable steps to protect its employees against known hazards which the employer can reasonably be expected to detect...
>
> At CCH OSHD 20,691, pages 24,791-24,792, 4 OSHC 1189

This Anning-Johnson/Grossman defense requires the employer to prove three things: he must prove he did not create the hazard, he must prove he has no control over the hazard, for reasons of craft jurisdiction or otherwise, and he must prove the realistic, alternative means he used to protect his employees.

In its decision the commission said an employer's duty to comply with the act, the standards, should be read in harmony with the declared purpose of the act to assure workers of "safe and healthful working conditions." Anning-Johnson, at CCH OSHD 20,690, page 24,783, 4 OSHC 1198.

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[37] The employer knowledge requirement is derived from the definition of a serious violation. KRS 338.991 (11).

Hayes, as we have stated, cannot avail itself of this Anning-Johnson/Grossman defense since it created the fall hazard when it dug the hole. Hayes testified it had, on other jobs, placed metal barriers around the holes; it could provide these metal barriers because they did not require carpenters. IV TE 11. Or Hayes could have left the drill bit in the hole until Wilburn was ready to install the 2 by 4 wooden barricade; employers must protect employees from falling into holes "more than 6 feet...above lower levels." 1926.501 (b) (4) (i). This standard does not take effect until the potential fall is greater than six feet.

We adopt the hearing officer's recommended order to the extent it is consonant with our decision.

We affirm our hearing officer's decision to dismiss item 1 issued to Hayes Drilling. We sustain serious items 2 and 3 for Hayes Drilling as well as the $2,500 penalty for each item.

It is so ordered.

January 5 2009.

Kevin G. Sell
Chairman

Sandy Jones
Commissioner

William T. Adams, Jr.
Commissioner

Certificate of Service

I certify a copy of the above decision on the merits for Hayes Drilling, KOSHRC 4251-05, 4248-05, 4253-05, was served this January 5, 2009 on the following in the manner indicated:

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