COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4332-06

COMMISSIONER, DEPARTMENT OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

BOLAND-MALONEY LUMBER COMPANY, INC — RESPONDENT

* * * * * * * * * *

Melissa Jan Williamson, Frankfort, for the commissioner. Joseph A. Worthington, Louisville, for Boland-Maloney Lumber.

DECISION AND ORDER OF THE REVIEW COMMISSION

This case comes to us on a petition for discretionary review filed by Boland-Maloney. 803 KAR 50:010, section 47 (3). Boland says our hearing officer erred when she affirmed a serious fall protection citation and the $3,500 penalty. We granted review and asked for briefs. Boland was engaged by Pinnacle Properties to provide a pre-engineered residential building on Pinnacle's site in Louisville; sections of the building were assembled elsewhere and then transported to the work site. Boland hired M/N Construction to frame the building on site. M/N in turn hired Mr. Torres who supplied the workers. Recommended order, page 3 (RO 3).

Pinnacle Properties, the owner of the construction site, purchased the building from Boland; Boland's job then was to frame the building on site. Daniel McDonald, Boland's employee, said he worked in "sales particularly in the turnkey service of our company, involved in assisting outside salesmen and servicing the customer as well." Transcript of the evidence,

page 86 (TE 86). As we found from the facts, however, Mr. McDonald exercised considerably more authority than that.

KRS 336.015 (1) grants the commissioner of labor the authority to enforce 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 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]

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[1] In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2001), 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.

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."

This case began when Compliance Officer (CO) Seth Bendorf conducted a referral inspection of the Boland-Maloney work site. When he arrived he saw employees "installing felt paper, or making repairs to felt paper on a residential roof prior to shingling..." TE 19. He held an opening conference with Dan McDonald who was with Boland, Mike Stucker with M/N Construction and Miguel Torres who supplied the laborers. TE 19. These same three individuals participated in the closing conference with the CO. TE 20.

During his inspection the compliance officer took photographs of employees working on the roof, exhibits "Three-one, Two, Three and Four." TE 22. CO Bendorf said exhibit Three-one showed an employee on a steep roof which he defined as "anything with a pitch of more than four and twelve;" this definition, he said, came from the standards. TE 22-23. He said he used a roofing calculator to determine the pitch. TE 23. He said the bottom edge of the roof depicted in Three-one, the eave, was "approximately eighteen feet, seven inches" above the ground. TE 23. He said the roof depicted in Three-two was "approximately twenty-four feet, three inches above the ground with no fall protection." TE 23. Mr. Bendorf measured the heights with a Leica Disto Laser. TE 24.

Number Three-three "depicts two individuals, the same one that has been in Photographs One and Two, as well as a second individual on the roof with no fall protection..." TE 24.

These observations led the CO to issue a citation to Boland. Citation one, exhibit 2, says:

> 29 CFR 1926.501 (b) (11) (As adopted by 803 KAR 2:412): Each employee on a steep roof with unprotected sides and edges 6 feet...or more above lower levels was not protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems:
>
> > a. Three sub-contractor employees were working on a steep roof, located at Unit 1 & 2 Manner Pointe, up to approximately 24 feet 3 inches above the ground with no fall protection in place.

This serious citation which mirrors the language found in the standard carried a $3,500[3] penalty.

Our hearing officer in her recommended order affirmed the serious citation and penalty of $3,500. She said Boland was a controlling employer: "under Kentucky's multi-employer citation policy, Boland-Maloney was properly cited for a serious violation." RO 7. Our hearing officer found Mr. McDonald was the only Boland employee on the work site. RO 6.

In all of our cases, the department of labor has the burden of proof. 803 KAR 50:010, section 43 (1). In Ormet Corporation, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), the federal review commission said:

> In order to prove that an employer violated a standard, the Secretary must show that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew,[4] or with the exercise of reasonable

[3] The penalty, its calculation and amount, were not at issue: the CO figured the gravity based penalty to be $5,000 because it was a high serious hazard (high, medium and low being the choices) and greater probability because the employees worked at height (greater and lesser are the choices). Then for penalty credits the CO found 20 % for size (the number of employees), no good faith credit because of the high serious/greater probability gravity based penalty (25 %, 15 % or 0 % are the choices here) and 10 % credit for history (no prior citations, 10 % being the maximum permitted). TE 45-48.

[4] The comma should come after the word "or," not before it. Nevertheless this is how it is punctuated by OSHRC on line as well as CCH and BNA.

diligence, could have known of the violative conditions.

We find because fall protection is at issue in this case, the standard applies. Since no fall protection was provided, the terms of the standard were violated. Here the facts show unprotected employees worked on the steep roof at heights from 18 to 24 feet above the ground below; the cited standard says employees must be protected from falling when they are working at more than six feet of height. 29 CFR 1926.501 (b) (11). Photographs Three-one, two and three show employees right at the edge of the steep roof and so labor proved employee access to the hazard of falling. On review to the commission, Boland raises the issue of employer knowledge, the fourth element which labor must prove. Ormet.

For this serious violation, labor may prove actual knowledge of the violative conditions or constructive knowledge. The requirement for proving employer knowledge is found in KRS 338.991 (11), the definition of a serious violation; the statute says in part:

> ...a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists...unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.
>
> (emphasis added)

In Kokosing Construction Co, CCH OSHD 31,207, BNA 17 OSHC 1869 (1996), the company was cited for permitting employee exposure to unguarded rebar which presented an impalement hazard. Although there was no testimony company officials knew about the unguarded rebar, the compliance officer testified he "observed the unguarded rebar in plain view when he entered the work area to conduct his inspection and that it would have been in plain view of Kokosing's employees because the work area was 'traveled.'" At CCH page 43,723, 17

OSHC 1871. In its decision the federal commission agreed with its administrative law judge and found constructive knowledge:

> The conspicuous location, the readily observable nature of the violative condition, and the presence of Kokosing's crews in the area warrant a finding of constructive knowledge.
>
> CCH OSHD page 43,723, 17 OSHC 1871

In our case Compliance Officer Bendorf took photographs of the employees working on the roof without the benefit of fall protection. TE 24 and exhibits Three-one, two and three. Mr. Bendorf said he was told the employees worked for Miguel Torres who provided the workers for M/N. TE 33-35. CO Bendorf said he observed the unprotected workers on the roof for around fifteen minutes TE 40.

Mr. McDonald, Boland's manager (he did "sales" and installations for Boland, TE 86), said he "knew there were men up on the roof because we could hear them hammering." TE 111. McDonald said he would call safety violations to M/N's attention. TE 106. For this particular roof felt repair work, Mr. McDonald testified he summoned Mr. Torres, M/N's sub subcontractor, directly. TE 129. On previous jobs, McDonald had told Mr. Torres, who had worked for him at that time, to use fall protection. TE 133. McDonald said "If they were not tied off or doing something...I would stop the job." TE 134.

We find Boland, through Mr. McDonald, had constructive knowledge the three workers were on the roof. He called Mr. Torres to get the men to come to the site to do the repair work. Even though he did not see the men on the roof, he heard them hammering when he was standing inside the uncompleted building; from this we infer McDonald knew the men were on the roof to do the repair work. Compliance Officer Bendorf saw the three men on the roof, working without fall protection, and took photographs which he introduced into evidence. Even though

Mr. McDonald did not actually see the three men on the roof without fall protection, he had the authority to issue orders when safety was a concern. Had he walked outside and looked up, he would have seen what the CO saw: the men on the roof without fall protection. This violation was in plain sight. Had Mr. McDonald been reasonably diligent, had he walked outside to see if the roofers had fall protection, he would have seen the men working without fall protection. Kokosing, supra.

In New Mexico Steel Erectors, Inc, CCH OSHD 22,199, an administrative law judge said a fall protection violation "was readily discoverable by sight or sound. Employees on a construction site had been using a stairway with an unsafe rail. Apparently employees could be heard using the stairway and thus alerting supervisors to their presence. The hammering overhead drew Mr. McDonald's attention to the roofing work; had he exercised reasonable diligence and walked out to look at the workers, he would have seen they had no fall protection, just as New Mexico Steel Erectors could have observed its workers using the stairway with an unsafe hand rail.

In its brief to the review commission Boland said McDonald never actually saw the workers on the roof. TE 109. While this is true, labor may prove constructive knowledge where circumstances permit as they have here. Kokosing Construction, New Mexico Steel Erectors, supra, and KRS 338.991 (11). We affirm our hearing officer's recommendation and conclude the department of labor proved Boland-Maloney had constructive knowledge of the violation.

Our hearing officer found Boland a controlling employer. We agree with this as well and adopt her order as our own. As we said in Morel Contracting, et al,[5] KOSHRC 4147-04, 4151-04, 4149-04:

> ...a controlling employer may be cited for a violation of

[5] The commission's decisions are on line at koshrc.ky.gov. Select decisions of the KOSH review commission.

> the standards even though his own employees are not exposed to a hazard.
>
> Morel decision, page 8

Boland, of course, argues it is not an employer in control of the work site. But Boland's own witness, Mr. McDonald, proves otherwise. When Pinnacle bought the building, Boland hired M/N Contractors as a subcontractor to erect the pre-engineered building to the point, after the roofing felt was installed, where Pinnacle could take over to finish it. TE 129. Dan McDonald, Boland's employee, confirmed this when he said, discussing a change order which is an addition to the plans for the structure: "This would have been a change order, yes. And I needed Mike [Stucker] there also, to tell me what he was going to charge me and so I would know how much to make the change order for." TE 96. We find Boland hired M/N as a subcontractor. TE 124.

While M/N was on site, McDonald made regular visits to make sure the structural work was going according to plans and was to code. TE 89. If Mr. McDonald's inspections revealed deficiencies, he prepared punch lists[6] for M/N. He said "I like to try to be at every job when the trusses are being set to make sure that they have the proper amount of braces. TE 94. Mr. McDonald said he called Mike Stucker, president of M/N, to see if he had any problems with the work. TE 94. On the day of the CO's inspection McDonald met with Mr. Stucker and Mr. Torres because he had items "I wanted him and Mike both to see." TE 98. He told both men "I didn't like the way that this wall lined up with this wall right here going up, because the customer was going to experience some drywall problems. This was the third time that I asked them to fix it." He said he also had a "window issue." TE 104.

[6] The Oxford English Dictionary, online, says a punch list is "a list of items such as small repairs, unfinished work, etc., that must be completed in order to fulfil a construction contract..."

In Brennan v OSHRC and Underhill Construction Corp, 513 F2d 1032, 1038 (CA2 1975), CCH OSHD 19,401, page 23,165, BNA 2 OSHC 1641, 1645, the court 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 employees engaged in a common undertaking.

Boland argues Mr. McDonald could not have exercised control over the work site because he supervised other jobs. Mike Stucker, president of M/N, said he might have anywhere from six to twenty jobs going at the same time. TE 147 and 153-154. This demonstrates an employer in the construction business might have any number of jobs in progress. Still, an employer must comply with the occupational safety and health standards.[7] KRS 338.031 (1) (b).

Boland's Mr. McDonald hired M/N as a subcontractor. McDonald took care to make sure the job went according to plan and took steps to correct deficiencies, taking them up with Mr. Stucker. He had the authority to stop unsafe work practices. Our hearing officer made the correct decision when she found Boland to be a controlling employer.

While we have held Boland-Maloney was a controlling employer who could be cited for the fall protection violation even though it had no employees with access to the hazard, other companies have managed their affairs in such a way as to avoid citation. Such a company is Parsons Brinckerhoff which had a contract with the US postal service. Parsons Brinckerhoff Construction Services, Inc and Montgomery KONA, Inc, a federal ALJ decision, CCH OSHD 31,702 (1998). According to the facts of the case:

> Under its contract with the Postal Service, Parsons Brinckerhoff administered twenty construction contracts and seven or eight contracts with architect or engineering firms. Each of these companies contracted directly with the USPS, and none,

[7] We use standards and regulations interchangeably.

> including Montgomery KONE, had a contractual relationship with Parsons...Parsons had two engineers, an architect, a secretary and a project manager on the work site.
>
> Parsons provided coordination and communication between the contractors and the USPS, coordinated work scheduling among the contractors, and monitored the progress of the work by each contractor...
>
> Parsons represented the USPS and acted as its 'eyes and ears' at the work site...performing daily inspections to monitor the progress of the contractors to assure that their work was in accordance with contract specifications.
>
> CCH OSHD 31,702, pages 46,077-46,078

From these facts, the secretary said Parsons had "sufficient control over safety" and issued a citation to the company, based on the exposure of a Montgomery employee. Parsons, however, said the construction standards did not apply to it, based on their work on site. Parsons said it "provided only construction management services, had no exposed employees, and was not responsible for employee safety." At page 46,073. In his recommended order dismissing Parsons's citation, the ALJ said the constructions standards did apply to Parsons; Parsons would have been subject to citation if one of its employees were exposed to a hazard. At page 46,078.

After reviewing the testimony, the ALJ said while Parsons "may have had the authority to require disciplinary action against employees of trade contractors...that authority is far short of the authority to give 'explicit safety instruction to the trade contractors'...it does not give it [Parsons] the authority to dictate what procedures should be implemented..." CCH page 46,080.

We find Parsons particularly significant for our case because the company did not have a contractual relationship with any of the subcontractors on the USPS construction work site. Boland, on the other hand, had a contract with M/N. TE 43 and 95-96. Boland also had the authority to curtail unsafe practices.

M/N Construction had a subcontract with Boland to erect the pre-engineered building on the work site; for this relationship, it makes no difference the contract was oral and perhaps executory. M/N was responsible to Boland for its work, not Pinnacle Properties, the owner. In fact M/N's president did not even know the property owner's name. TE 148. Boland inspected the work to make sure it met the building codes and gave instructions to M/N to correct any deficiencies. On the day of the inspection Boland summoned the Torres employees directly to come to work on the roof to repair the felt paper which had been disturbed by a storm. Dan McDonald, Boland's only employee on the work site, testified he had the authority to order Mr. Torres's employees off the roof if he found them performing work at height at an unsafe manner. TE 138.

Parsons, under contract with the postal service, reported construction deficiencies to the post office, the owner of the building. Boland when it discovered problems on the job gave instructions directly to M/N, its subcontractor, to fix them.

Citing to Blount International Limited,[8] a review commission decision, CCH OSHD 29,854, BNA 15 OSHC 1897 (1992), the ALJ in the Parsons case said "A general contractor is properly chargeable with responsibility for the actions of its subcontractors." But the ALJ found Parsons was not a general contractor. At page 46,078. Boland on the other hand had a contract with M/N and supervised and corrected its work.

Defenses Raised By
Boland-Maloney

I.

Whether 29 CFR 1910.12 (a)

[8] Blount cited to Grossman Steel & Aluminum Corp, CCH OSHD 20,691, page 24,791, BNA 4 OSHC 1185, 1188 (1976), where the federal commission said general contractors have the "responsibility to assure that other contractors fulfill their obligations with respect to employee safety which affect the entire site." Blount at CCH OSHD 29,854, page 40,749, 15 OSHC 1899

Prohibits The Secretary From Issuing Citations To Employers With No Exposed Employees?

In 1975 the second circuit court of appeals in Underhill Construction, supra, said an employer in control of a construction site could be cited for a violation even though he had no employees exposed to the hazard; this rule became known as the multi employer work site doctrine. Very rapidly, Underhill became the law of the land. In the case at bar we have held Underhill applies to the facts of our case.

Several years ago, the federal review commission in Summit Contractors,[9] CCH OSHD 32,888, BNA 21 OSHC 2020 (2007), in a two to one decision, said an obscure federal regulation found at 29 CFR 1910.12 (a) prohibited multi employer citations where the employer had no exposed employees. Here is the regulation:

> **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.
>
> (emphasis added)

The federal commission's Summit majority relied on the last sentence of the regulation.

The Summit Contractors decision came as a big surprise to the US secretary of labor who had never in 37 years spent enforcing the act[10] interpreted the regulation to prohibit a multi employer citation. Nevertheless, the Summit commission held the last sentence of 1910.12 (a) did prohibit multi employer citations.

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[9] Go to oshrc.gov. Select decisions and click on final commission decisions for 2007.
[10] The occupational safety and health act, 29 USC 651 et seq.

Our Kentucky review commission in Morel Contracting, supra, said we did not find Summit persuasive and declined to follow it; then we listed our reasons. First of all we cited to Secretary of Labor v Trinity Industries, Inc and OSHRC,[11] 504 F3d 397, 402 (CA3 2007), CCH OSHD 32,915, page 53,520, BNA 21 OSHC 2161, 2163, where the third circuit, writing just after Summit had been issued, said without analysis "We find neither case controlling or particularly persuasive" and upheld the citation alleging multi employer responsibility. The other case the third circuit referred to was Nationwide Mutual Insurance Co v Darden,[12] 503 US 318 (1992), where the US supreme court had said the common law definition of an employee was to be used when a federal law, such as ERISA, did not define the term, unless the congress in drafting the act suggested otherwise. 503 US at 323.

In Kentucky the multi employer work site doctrine had been the law since the late 1970's. Morel Construction Co, Inc, supra, and Koker Drilling Company.[13] KOSHRC 4133-04 and 4131-04. Similarly, the multi employer doctrine has been adopted by a significant majority of the federal circuits.[14] In our Morel decision we said, "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 182 F3d 728, CCH page 46,985, 18 OSHC 1770. Our Morel decision at page 8.

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[11] 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.

[12] In its 32 page reply brief, Boland raises the Darden issue which we will discuss at the foot of our decision.

[13] Go to koshrc.ky.gov; select decisions of the review commission.

[14] "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);" See also Universal, just above, which considered and rejected the fifth circuit's very brief discussion of the multi employer doctrine. 182 F3d at 728 to 731.

One of the key issues in the Summit case was who should interpret the regulations, the secretary or the commission. Because of a split among the circuits, the US supreme court had to resolve the matter. In "Martin v Occupational Safety and Health Review Commission and CF&I Steel Corp, 499 US 144, 111 SCt 1171, 113 LEd2d 117 [1991], 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 to 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." Our Morel decision at page 13. To support their decision, the supreme court said while the commission hears only those cases brought to it for review, the secretary of labor writes the regulations, enforces them through an inspection process and litigates those cases where an employer has filed a notice of contest.[15] Rather than accepting the rule laid down by the supreme court in CF&I Steel, however, the two commissioners said they could interpret 1910.12 (a) themselves because its meaning was so clear, a conclusion belied by the eighth circuit's reversal of their decision. Solis v Summit Contractors, Inc, 558 F3d 815 (CA8 2009), CCH OSHD 32,990, BNA 22 OSHC 1496.

On appeal to the eighth circuit in St Louis, the court interpreted the sentence to mean a contractor who was in control of a construction site must protect his employees by enforcing all the safety and health standards for the benefit of all employees so engaged at the site. 558 F3d 827-828. This ruling made sense to our commission. At a construction site one regularly encounters a number of subcontractors performing specialized tasks.

When the US congress passed the occupational safety and health act in 1970, it understood the department of labor would have a difficult time writing all the regulations it would need to protect employees on the job. So it built into the act a mechanism whereby the

[15] KRS 338.141 (1) and 29 USC 659 (a).

department could adopt "national consensus standards, and any established Federal standard." These standards could be adopted as safety standards without going through the lengthy drafting process which would then be subject to notice and comment rulemaking. 29 USC 655 (a). Section 1910.12 (a) did just that: it adopted the existing 1926 standards as occupational safety and health standards. As a brief review of the standard reveals, 1910.12 (a) was adopted according to section 6 (a) of the act, 29 USC 655 (a), without notice and comment rulemaking. This fact is confirmed by 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, which in our Morel decision we referred to as Underhill II to distinguish it from the 1975 Underhill decision we have cited above. In its decision the Underhill II court cited to the federal register to confirm the fact 1910.12 (a) was adopted 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."[16]

Because 1910.12 (a) was adopted without notice and comment rulemaking which could only be accomplished under the authority of section 6 (a) within the two year window specified in the statute, only existing federal standards or national consensus standards could be so promulgated. In Underhill II, the second circuit said an effective date was not a statutorily qualified standard, and so could not be adopted by section 6 (a). As we discussed in our Morel decision, the same reasoning applied to the last sentence of 1910.12 (a), relied upon by Boland and the two majority commissioners in their Summit decision. In other words, the last sentence was not intended to apportion the duties of employers on a construction site because it was not

[16] Page 21 of our Morel decision, supra.

an existing federal standard when it was adopted. As we said, 1910.12 (a) was written to adopt an existing federal standard, 1926.

When the eighth circuit issued its decision in the Summit case, labor had filed an appeal, the court upheld the multi employer work site doctrine and interpreted 1910.12 (a) to mean:

> (1)...that an employer shall protect the employment of each of his employees ('part (1)') and (2) that an employer shall protect the places of employment of each of his employees ('part (2)')... Stated differently, part (1) provides that an employer shall protect only his employees...In part (2), the term 'of each of his employees' limits the term 'places of employment' such that the employer shall protect the places of employment where the employer actually has employees.
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> Summit Contractors, Inc, supra, at 558 F3d 815, 824 (CA8 2009), CCH OSHD 32,990, page 54,159, BNA 22 OSHC 1496.

In other words, on a construction site the employer, to protect his employees, must protect the entire work site for the benefit of his own employees.[17]

We had written our Morel decision before the eighth circuit issued Summit Contractors on February 26, 2009; we now adopt the eighth circuit's reasoning.

Boland in its reply brief argues the employer's duty to comply with the standards must be read together with the general duty clause which is found in the same statute. KRS 338.031. This argument is at best misinformed. As we shall demonstrate, KRS 338.031 is written in two distinct parts which have never been read together as Boland suggests:

> **338.031 Obligations of employers and employees.**
>
> (1) Each employer:
>
> (a) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical

[17] For a more complete account of our analysis of the Summit Contractors, multi employer, issue please go to koshrc.ky.gov and select the Morel decision dated October 7, 2008, pages 4 through 25.

harm to his employees;

(b) Shall comply with occupational safety and health standards promulgated under this chapter.

(2) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

(emphasis added)

KRS 338.031 is identical to 29 CFR 655, known in the trade as section five of the act. For this reason, the Kentucky supreme court in Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2001), said "As KOSHA[18] is patterned after the federal act and must remain as effective as its federal counterpart, KOSHA should be interpreted consistently with federal law."

Section (1) (b), KRS 338.031 says employers must enforce the occupational safety and health standards; in Kentucky that means the general industry standards, 29 CFR 1910, and the construction standards, 29 CFR 1926. Boland in our case was cited under the authority of 1926 because the work and employee exposure took place at a construction site where Boland and M/N were assembling the pre-engineered building. Notice, while section (1) (b) says employers shall comply with the standards, there are no words of limitation about employees to whom this duty is owed. Section 1 (b) is sometimes referred to as the specific duty clause.

Section (1) (a) of the statute is known as the general duty clause. It was written for those situations where there is no safety and health standard. To prove a general duty clause case, the secretary must prove an employer's own employees were exposed to a hazard and either he or his industry knew about the hazard. See National Realty & Construction v OSHRC, 489 F2d 1257, 1265 (CADC 1973), note 32, CCH OSHD 17,018, BNA 1 OSHC 1422, for industry recognition

[18] KOSHA stands for Kentucky occupational safety and health act.

of a hazard and Brennan v OSHRC and Vy Lactos Laboratories, Inc, 494 F2d 460 (CA8 1794), CCH OSHD 17,573, BNA 1 OSHC 1623, for employer recognition.

Boland cited to Senate Report No 91-1282, page 9, for the proposition congress "intended to make employers responsible only for 'the health and safety of *their* own employees.'" This section is about the general duty clause and says nothing about the specific duty clause. The same is true for House Report No 91-1291, page 21.

Melerine v Avondale Shipyards, Inc, 659 F2d at 711, note 17, (CA5 1981), CCH OSHD 25,735, BNA 10 OSHC 1075, cited by Boland, is a personal injury case; it is not about a contested OSHA citation at all. The US department of labor was not a party to the case. Melerine, note 17 refers to Anning-Johnson Co v United States, 516 F2d at 1089 (CA7 1975), CCH OSHD 19,684, BNA 3 OSHC 1166, 1172. Anning-Johnson, a subcontractor was cited for violating a fall protection standard. 29 CFR 1926.500. The court said it would not impose liability on the employer for exposing its employees to a nonserious hazard which the employer did not create. The seventh circuit in its Anning-Johnson decision persuaded[19] the federal review commission to devise the Anning-Johnson/Grossman Steel rule which says a noncontrolling employer may avoid a citation if it could not with the exercise of reasonable diligence know of the presence of the violation. Anning-Johnson Co, CCH OSHD 20,690, BNA 4 OSHC 1193 (1976) and Grossman Steel and Aluminum Corporation, CCH OSHD 20,691, BNA 4 OSHC 1185 (1976). To make use of the Anning-Johnson/Grossman defense and avoid a citation, an employer must show he has employees exposed to the hazard but has no control over the hazard. Both Anning-Johnson and Grossman Steel cite with approval to the Underhill case, supra, which

[19] Professor Mark Rothstein in Occupational Safety and Health Law, 2010 edition, page 270, said there was some "judicial prodding."

says a controlling employer on a construction site may be cited even though his employees were not exposed to the hazard.

When Boland says "the two clauses...are read together," referring to the general and specific duty clauses found it KRS 338.031 and 29 USC 654 (a), it reveals it does not understand the two were written to perform such distinct and separate tasks. There are no cases which say the general and specific duty clauses shall be read together. There is no support for Boland's position in the legislative history either. They are very different statutes: one directs the employer to be aware of hazards found in his own industry, hazards for which there are no standards; this general duty clause is limited to an employer's own employees. KRS 338.031 (1) (a). The other, section (1) (b), says an employer must comply with the standards, all of them; it contains no employee limitation.

In its reply brief Boland argues that the secretary's evolving compliance manual somehow demonstrates her interpretation of 1910.12 (a), not to issue multi employer citations. Unfortunately, the two commissioners who authored the Summit decision made the same mistake. Here is what the US supreme court in the Chevron case had to say about the evolution of agency thought developed over a period of time as reflected in its internal documents which are not enacted into law:

> An initial agency's interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.
>
> Chevron, USA, Inc, Natural Resources Defense Council, 467 US 837, 863-864, 104 SCt 2778, 2792, 81 LEd2d 694 (1984).

Then in United States v Mead Corporation, 533 US 218, 121 SCt 2164, 150 LEd2d 292 (2001), the court said:

> *Held*: Administrative implementation of a particular statutory provision qualifies for Chevron deference. Such delegation may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice and comment rulemaking, or by some other indication of comparable congressional intent.

Recall in CF&I Steel, supra, the US supreme court said deference is owed to the secretary when she issues statutorily authorized citations. In other words, when the secretary issues a multi employer citation, as she has since January 29, 1972,[20] she has interpreted the statute to permit such citations and interpreted 1910.12 (a) to the same effect as well. A statutorily authorized citation is entitled to more judicial deference than, say, a compliance manual which is neither a statute nor a regulation. Chevron and CF&I Steel.

II.

Boland Says It Is Not
In The Construction Business.

Generally, the department of labor enforces two separate sets of safety and health standards: general industry standards and construction standards. Boland in its supplemental brief argues it cannot be cited because its "outside sales person" was not "engaged in construction work" and so is not subject to 29 CFR 1926, the construction standard. This issue involves the second of the four elements the secretary must prove for a citation to stand, whether the standard applies. Ormet, supra,

Boland is either in the construction business or in general industry. In Brock v Cardinal Industries and OSHRC, 828 F2d 373 (CA6 1987), CCH OSHD 28,033 BNA 13 OSHC 1377, Cardinal, working in a factory, made sides, floors and roof trusses which were transported to a construction site where they would become part of a building. Cardinal defended its general industry citation by saying it should have been cited under the construction standard. In its

[20] Summit Contractors, 558 F3d at 819.

decision the court of appeals disagreed; it said where construction materials are taken to a site where they become part of a building and when the work is done, the workers leave the site but the building remains, that is construction. On the other hand, the factory which builds the pieces must be cited according to the general industry standards. The same logic applies to Boland. The company which made the pre-engineered pieces to be assembled on the site where Compliance Officer Bendorf found Boland and M/N was working in general industry. Boland and M/N assembled the building from the parts it received; when Boland and M/N were finished and departed, the building remained on site. When Boland hired M/N as its subcontractor and controlled the work at the site where the building would remain, it was engaged in construction work.

As we have shown, Boland's Dan McDonald was much more than a salesman; he hired the subcontractor M/N and then supervised the company's work. He called Mr. Torres to get his men to come to repair the roofing felt. He had the right to stop work when it appeared to be unsafe.

III.

Nationwide Mutual Insurance v Darden

Boland in its reply brief says "the Commission's broad interpretation of employer, and thus liability based on control, is no longer permissible because of the Supreme Court's decision in Nationwide v Darden," supra. At page 15.

Darden was an ERISA case; the act enables a "participant," otherwise defined as an employee, to enforce "provisions of ERISA." At 503 US 321. In Darden the court said where the act defined an employee as "any individual employed by an employer," it would "adopt a common-law test for determining who qualifies as an 'employee' under ERISA..." At 503 US

320 and 323. To adjudicate controversies about the ERISA act, courts want to know if there is an employer – employee relationship. Darden.

Occupational safety and health law, on the other hand, is concerned not only with the employee-employer relationship as it affects employee safety and health, but with the places where employees work – the work place. This concern for the work place can be found in several provisions of the act.[21] In the act's congressional findings and purpose, section 2 (b) (1),[22] it says "The Congress declares it to be its purpose and policy...to assure so far as possible every working man and woman in the Nation safe and healthful working conditions...by encouraging employers and employees in their efforts to reduce the number of...hazards *at their places of employment...*" (emphasis added) Section 4 (a) of the act, 29 USC 653 (a) says "This Act shall apply with respect to employment *performed in a workplace.*" (emphasis added) In the penalty section it says "a serious violation shall be deemed to exist *in a place of employment* if there is a substantial probability that death or serious physical harm could result from a condition which exists...in such *place of employment...*" Section 17 (k).[23] (emphasis added) Section 3 (6) of the act defines employee as "an employee of an employer who is employed in a business of his employer..." Because the definition of employee does not refer to a place of employment and yet the act elsewhere does so refer, the act is directed to, one, employees and, two, their places of employment.

The same holds true for our Kentucky act. In KRS 338.011 it says: " the General Assembly declares that 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, both public and private...arising out of *exposure to harmful conditions and*

[21] 29 USC 651, et seq.
[22] 29 USC 651 (b) (1).
[23] 29 USC 666 (k).

practices at places of work..." (emphasis added) Then KRS 338.021, exclusions, contains perhaps the clearest statement, state or federal, of the act's twin concerns: it says "This chapter applies to all employers, employees, *and places of employment...*" (emphasis added) KRS 338.133 (1) says "If in the discretion of the executive director it is believed that *a place of employment*, equipment or practice is substantially dangerous...then the executive director may apply...for a temporary injunction." (emphasis added) Kentucky's definition of a serious violation, KRS 338.991 (11), is identical to the federal statute quoted above. KRS 338.015 (2) says "'Employee' shall mean any person employed..."

In its decision reversing the federal review commission, and upholding the multi employer doctrine, the eighth circuit court of appeals referred to Summit Contractor's argument that section 654 (a) (2) of the act, KRS 338.031 (1 (b), "limits an employer's duty to provide a safe workplace only for his employees." At 558 F3d 828. This statute says "(1) Each employer...Shall comply with occupational safety and health standards promulgated under this chapter." Summit argued because the definitions section of the act defines occupational safety and health standards as "a standard which requires conditions...reasonably necessary or appropriate to provide safe and healthful employment and *places of employment*," an employer's duty is limited to his own employees; (emphasis added) Summit cited to Darden, supra, to support its argument.

In answer to Summit's argument, the court said:

> This argument contains the same defect as Summit's argument with respect to section 1910.12 (a). Specifically, to make both terms meaningful, the use of the term 'places of employment' must provide something different than the term' employment.' We agree that the term 'places of employment' limits the employer's duty to worksites where he has employees. However, it is not limited to only the 'employment' of his employees because that interpretation would render the phrase "places of

> employment' redundant of 'employment' and, therefore, superfluous.
>
> Summit Contractors, at 558 F2d 828.

Here the eighth circuit answers two questions at the same time. One, the last sentence of 1910.12 (a) which says "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" does not prohibit the secretary from issuing multi employer citations. Two, because the act[24] is directed to employees and also to their places of employment and because of the complexities found in the working environment, especially on construction sites, Darden, supra, does not apply to occupational safety and health cases.

Summit Contractors is not the only case to say Darden does not apply to OSHA cases. In the Secretary of Labor v Trinity Industries, Inc, 504 F3d 397, 402 (CA3 2007), CCH OSHD 32,923, BNA 21 OSHC 2161, 2163, the third circuit said it would not follow Darden since it was an ERISA case which did not apply to OSH law:

> that case was decided under ERISA and has no impact on the question of whether the scope of the OSH Act is broad enough to cover workers who are not employees under the common law definition. Courts have frequently ruled that the OSH Act, and the regulations promulgated thereunder, sweep broadly enough so as to allow the Secretary to impose duties on employers to persons other than their employees. See e.g., United States v Pitt-Des Moines, Inc, 168 F3d 976, 982-83 (CA7 1999) [BNA 18 OSHC 1609.]

Darden, supra, and the multi employer work site doctrine present very different issues; and yet they share one common factor: for each there must be an employer and an employee.

But Darden does not apply to occupational safety and health cases because the OSH law touches both the employer-employee relationship as it affects employee safety and also the

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

safety at an employee's work place; thus the law has a much broader sweep than it would appear from a first read.

It is this statutory concern for an employee's work place, his working conditions, which compelled the second circuit court of appeals in its Underhill decision to find within the law a requirement that an employer in control of a construction site must enforce the safety and health standards for the benefit of all the employees at the site, including his own. "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.'" 513 F2d at 1038, CCH OSHD 19,401, page 23.165, BNA 2 OSHC 1645. In fact, the controlling employer enforces all the standards at the site for the benefit of his own employees, and others, who work there. Dan McDonald, Boland's employee and manager at the site, protects his own safety by making sure his subcontractor follows the law whether it is fall protection or some other standard.

While the federal commission has in several instances applied Darden to its cases,[25] its decision on remand from the eighth circuit's Summit decision being an exception, we do not find the commission's Darden reasoning persuasive as we have just demonstrated. Our occupational safety and health law addresses complexities within the working environment not presented in ERISA cases. Darden at 503 US 323. In any event, the federal commission decisions which cite to Darden have not attempted to distinguish either the third circuit's Trinity Industries, decision, supra, or for that matter the eighth circuit's remand of Summit Contractors, supra.

We affirm our hearing officer's recommended order which upheld both the serious citation and the penalty of $3,500.

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[25] AAA Delivery, an OSHRC decision, CCH OSHD 32,796, BNA 21 OSHC 1219, 1220 (2005); Lake County Sewer Company, an OSHRC decision, CCH OSHD 33,002 (2009).

It is so ordered.[26]

July 1, 2010

Faye S. Liebermann
Chair

Michael L. Mullins
Commissioner

Paul Cecil Green
Commissioner

Certificate of Service

I certify a copy of this decision and order of the review commission was served this July 1, 2010 on the following in the manner indicated:

By messenger mail:

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By US mail:

Joseph A. Worthington

[26] An aggrieved party has thirty days from the day we issue this decision to file an appeal in Franklin circuit court. KRS 338.091 (1).

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