COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4334-06

COMMISSIONER OF DEPARTMENT OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

DAVID GAINES ROOFING, LLC — RESPONDENT

* * * * * * * * * *

John Burrell for the complainant. John Gray for the respondent.

DECISION AND ORDER
OF THIS REVIEW COMMISSION

This case comes to us on respondent's petition for discretionary review of the hearing officer's recommended order. We granted review and asked the parties for briefs. 803 KAR 50:010, sections 47 (3) and 48 (1).

KRS 336.015 (1) charges the commissioner of labor with the enforcement of the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the executive director of the office of occupational safety and health compliance issues citations. KRS 338.141 (1). If the cited employer notifies the executive director of his intent to challenge a citation, the Kentucky occupational safety and health review commission "shall afford an opportunity for a hearing." KRS 338.141 (3).

The Kentucky General Assembly created the review commission and authorized it to "hear and rule on appeals from citations." KRS 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended

order may file a petition for discretionary review (PDR) with the review commission; the review commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the commission takes a case on review, it may make its own findings of fact and conclusions of law. In Brennan, Secretary of Labor v OSHRC and Interstate Glass[1], 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799 page 21,538, BNA 1 OSHC 1372, the eighth circuit said when the commission hears a case it does so "de novo." See also Accu-Namics,[2] Inc v OSHRC, 515 F2d 828, 833 (CA5 1975), CCH OSHD 19,802, page 23,611, BNA 3 OSHC 1299, 1302.

On February 22, 2006 a compliance officer with the Kentucky department of labor inspected a David Gaines Roofing work site in Lexington, Kentucky where he found two employees on a steep roof. These two David Gaines employees, working without fall protection, were installing a roof on a house under construction. Because the two employees in the course of their work were exposed to falls from ten to twenty feet, the department issued a repeat serious citation to David Gaines Roofing; the citation said the company did not protect its employees from the hazard of falling. Transcript of the evidence, page 21 (TE 21). The repeat citation, based on two prior violations of the same steep roof standard, carried a penalty of $4,000. Exhibit 1.

"Any employer who...repeatedly violates the requirements of...this chapter, including any standard...may be assessed a civil penalty of up to seventy thousand dollars ($70,000) for each violation." KRS 338.991 (1). In George Hyman Construction

[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] At 3 OSHC 1302, the court said "the *Commission* is the fact-finder, and the judge is an arm of the commission..."

Company v OSHRC, 582 F2d 834 (CA4 1978), CCH OSHD 22, 963, page 27,765, BNA 6 OSHC 1855, 1858, the fourth circuit said "only that a single prior infraction need be proven to invoke the repeated violation sanction..." Labor in our case proved two previous violations of the same standard. TE 30 and exhibits 3 and 4. In its decision the fourth circuit said "The crux of the repeated violation penalty is [the] failure to correct safety hazards." At 582 F2d 840, CCH page 27,766 and 6 OSHC 1859. No proof of intentional flaunting of the act is required. We adopt the court's reasoning in George Hyman.

Our hearing officer in her recommended order affirmed the repeat citation and the $4,000 penalty. Recommended order, page 7 (RO 7).

In this case the department of labor charged respondent David Gaines with violating the steep roof standard. 29 CFR 1926.501 (b) (11)[3] says:

> Each employee on a steep roof with unprotected sides and edges 6 feet...or more above lower levels shall be protected from falling by guardrail systems with toe boards, safety net systems, or personal fall arrest systems.
>
> 1926.501 (b) (11)

A steep roof is defined as "having a slope greater than 4 in 12 (vertical to horizontal)." 29 CFR 1926.500(b). Compliance Officer Bledsoe said the roof had a six to twelve pitch which proved the steep roof characterization. TE 21. In order for an employer to be in compliance with the steep roof standard, his employees must be protected from falls by either a guard rail system, a safety net or a personal fall arrest system. At the time of the inspection, the David Gaines employees had no fall protection systems in place. TE 29. The CO said a personal fall arrest system is a harness worn by the employee which is

[3] Adopted in Kentucky by 803 KAR 2:412, section 2 (1) (a).

then attached to a point on the roof to prevent the employee from falling to the ground. TE 45-46.

In order for a citation to be sustained, the department of labor must prove l) the standard applies, 2) the standard was violated, 3) employees were exposed and 4) the employer knew or with the exercise of reasonable diligence could have known of the violations. Ormet Corporation,[4] a federal review commission decision, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135. On review David Gaines takes issue with the fourth element, employer knowledge. At the time the inspection began, the time when the compliance officer observed the David Gaines employees working on the roof without fall protection, Mr. Gaines was not on site. David Gaines brief, page 2 and TE 123.

The employer knowledge requirement is found within the definition of a serious violation. KRS 338.991 (11) says:

> ...a serious violation shall be deemed to exist...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)

From the wording of the definition of a serious violation, the courts and the federal review commission have concluded employer knowledge may be either actual or constructive. In Ames Crane and Rental Service, Inc,[5] CCH OSHD 19,724, page 23,534, BNA 3 OSHC 1279, the federal review commission defined reasonable diligence:

> [R]easonable diligence implies, as between the employer and

[4] Go to oshrc.gov. Click on decisions; then select final commission decisions for 1991.
[5] For the commission decision go to oshrc.gov. Click on decisions and select final commission decisions for 1975. This case was affirmed in, Ames Crane and Rental Service, Inc v Dunlop and OSHRC, 532 F2d 123 (CA8 1976), CCH OSHD 20,578, 4 OSHC 1060.

> employee, such watchfulness, caution, and foresight as, under all the circumstances of the particular service a corporation controlled by careful, prudent officers ought to exercise... Wabash Railway, Co v McDaniels, 107 US 454, 460, 2 SCt 932, 27 LEd 605 (1883).

KRS 338.031 (1) (b) says the employer shall comply with the occupational safety and health standards. In the case at bar, the David Gaines employees worked on the roof of a house, at height, without fall protection. Thus, the department of labor proved a violation of the steep roof standard which applied to the working conditions at the time of the inspection. David Gaines Roofing to us argues he could not enforce the standard because he was not at the job site. In other words, he had no knowledge his employees were violating the standard.

In its petition for discretionary review David Gaines says it trained its employees on fall protection and provided equipment. The fall protection harnesses were on the job site but in an employee's truck. Mr. Gaines says he cannot make his workers use the fall protection when he is not on the job site - when he is at other jobs. In essence David Gaines argues he can, one, train his men, two, equip them with harnesses and, three, leave them to their own devices.

In Hackensack Steel Corporation,[6] CCH OSHD 31,724, page 51,555, BNA 20 OSHC 1387, a federal review commission decision, employees worked on a steel erection construction project. Hackensack connectors worked on the steel structure but wore neither fall protection harnesses nor hard hats in violation of the standards. Hackensack's defense was its foreman had no knowledge of the violations. The foreman, at the time the CO observed two steel connectors working without fall protection or hard

[6] Go to oshrc.gov. Click on decisions and select final commission decisions for 2003.

hats, was on the ground selecting steel beams to be hoisted into place. CCH page 51,555, 20 OSHC 1389.

At the trial Hackensack said because the foreman did not observe his connectors, he could not have known they were not wearing the hard hats or fall protection equipment. In its decision the federal commission said the foreman sent the men aloft to work and so knew they would need the fall protection equipment and the hard hats. Hard hats were necessary because as the steel beams were lifted into place, they came close to the connectors' heads.

Hackensack had been previously cited for similar violations. Concluding the employer had constructive knowledge of the violation, the commission said the "employer cannot hide behind lack of knowledge of work practices when it fails to properly train and supervise its employees. CCH page 51,557, 20 OSHC 1391.

In the case at bar David Gaines Roofing had in the past been cited for steep roofing violations. Mr. Gaines had trained his men but then absented himself from the work site, putting himself in a position where he could not enforce the steep roof standard. Given its history of prior violations, David Gaines Roofing must do more than simply train its men about fall protection and then take no steps to ensure compliance with the fall protection standards. The employer has a statutory duty to comply with the occupational safety and health standards. KRS 338.031 (1) (b).

> This is not to suggest that he [the foreman] had to monitor the connectors the entire time they were on the steel. However, we find that it is reasonable to expect him to have checked from time-to-time or direct another employee – such as the signalman, who was in visual contact with the connectors – to appraise him of the situation.
>
> Hackensack Steel Corporation, CCH page 51,556, 20 OSHC 1390.

David Gaines Roofing, regardless of the number of roofing crews it has out on jobs, must comply with the act. To protect its workers from falls, Hackensack suggests that it is reasonable, and we agree, for David Gaines Roofing to monitor for compliance with the act, whether by periodic inspections or the appointment of a worker to act in the company's stead. David Gaines Roofing with the exercise of reasonable diligence could have known its employees worked on the steep roof without fall protection. Respondent, a roofing contractor, knew his men would be working on the roof at a sufficient height to require fall protection. Respondent cannot avoid the citation simply by absenting himself from the work site. The company's violation of the steep roof standard could have been prevented by the exercise of reasonable diligence.

In N and N Contractors, Inc v OSHRC, 255 F3d 122, 127 (CA4 2001), CCH OSHD 32,360, page 49,665, BNA 19 OSHC 1401, 1403, an employee not using fall protection lost his footing and fell from a building under construction. N and N contended it did not have constructive knowledge of the violation. The court said:

> An employer has constructive knowledge of a violation if the employer fails to use reasonable diligence to discern the presence of the violative condition...Factors relevant in the reasonable diligence inquiry include the duty to inspect the work area and anticipate hazards, the duty to adequately supervise employees, and the duty to implement a proper training program.

We find the two prior citations, only one is needed according to George Hyman, supra, and David Gains Roofing's failure to supervise his two employees or otherwise make provision for enforcing the steep roof standard on February 22, 2006 proved respondent had constructive knowledge of the violation. We conclude David Gaines Roofing violated KRS 338.031 (1) (b) and the cited standard.

We affirm our hearing officer's recommended order. We sustain the repeat serious citation and the $4,000[7] penalty. KRS 338.081 (3).

It is so ordered.

July 1, 2008.

Kevin G. Sell
Chairman

Sandy Jones
Commissioner

William T. Adams, Jr.
Commissioner

[7] David Gaines Roofing, in its petition for discretionary review, did not question the calculation of the penalty.

Certificate of Service

I certify a copy of this decision and order for the David Gaines Roofing case has been served on the following in the manner indicated on July 1, 2008:

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