COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4540-07

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY COMPLAINANT

v

GILBANE BUILDING COMPANY RESPONDENT

* * * * * * * * * *

Melissa Jan Williamson, Frankfort, for the secretary. Robert M. Connolly, Louisville, for the respondent.

DECISION AND ORDER OF THE REVIEW COMMISSION

This case is before the commission on the secretary's petition for discretionary review (PDR); complainant asks the commission to reverse our hearing officer who dismissed the single, serious citation which carried a proposed penalty of $975.

Gilbane, a general contractor responsible for construction of a parking garage at the UK campus in Lexington, hired Mason Structure, Inc as its subcontractor for masonry work. Transcript of the evidence, pages 54 and 55 (TE 54, 55). Mason used scaffolds to install brick and concrete block on the skin of the building. Mason received a citation for the same violation.

KRS 336.015 (1) charges the secretary 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 commissioner of the department of workplace standards issues citations. KRS 338.141 (1). If the cited employer notifies the commissioner 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]

[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.

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."

Facts

Our hearing officer found Gilbane controlled the work of its subcontractors and could thus be cited for a violation of the occupational safety and health standards committed by the subcontractor whose employees had access to the alleged hazards. Because Gilbane is the general contractor with no employees exposed to the hazard, we are presented with a multi employer issue. TE 70.

Mason Structure used a Mason-Jax scaffold for the work; exhibit 2a is a photograph the compliance officer took of the Mason-Jax scaffold. A scaffold is a structure which allows employees to work up off the ground and next to the side of a building, supported by the scaffold. This Mason-Jax scaffold along its complete length can be raised or lowered by mechanical cranks. Essentially, the scaffold is assembled on the ground next to the

building. As each level of brick or concrete block is put in place, the scaffold is cranked up to the next level. When the work is done at the top of the wall, then the scaffold is cranked back down to the ground and disassembled. Gilbane witnesses testified this scaffold had been on the job site for months. TE 114. This scaffold is supported by ladders which are called uprights in the standard. The masons stand on the "mason level" next to the building; behind the mason level is a work table and tender level which the mason's assistants use to keep the masons supplied with brick, tools and mortar. See exhibit 2a where the CO, using an ink pen, labeled the various work stations.

While the scaffold structure itself is a steel framework, the employees stand on wooden planking to work. During his inspection, the compliance officer found gaps in the planking. According to the cited standard, platforms on which employees stand to work must be fully planked except where the employer can demonstrate a need for a wider space between planking boards. Labor issued a citation which says the working surface of the scaffold was not "fully planked;" at the hearing the proposed penalty was adjusted from $1,750 to $975[3] because the department of labor had changed how it calculated the penalties.

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[3] For the penalty the compliance officer found lesser severity because of a tripping hazard (high, medium and low being the choices) because he said any injuries would not be irreversible. TE 50. He found lesser probability of an injury (greater or lesser). This is the lowest possible serious violation. Those two factors produced an unadjusted penalty of $1,500. TE 51. Then he said Gilbane qualified for 25 % for good faith because of their safety programs (25 %, 15 % or 0 %). TE 51. The company also got 10 % credit for not having any other serious citations for the past three years; the total credit of 35 % produced a penalty of $975. TE 51.

The cited standard applies to all types of scaffolds which are planked or decked. The standard says:

> 1926.451[4] (b) Scaffold platform construction.
>
> 1926.451 (b) (1) Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports as follows:
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> 1926.451 (b) (1) (i) Each platform unit (eg, scaffold, plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1...inch wide, except where the employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform).
>
> 1926.451 (b) (1) (ii) Where the employer makes the demonstration provided for in paragraph (b) (1) (i) of this section, the platform shall be planked or decked as fully as possible and the remaining open space between the platform and the uprights shall not exceed 9 1/2 inches...
>
> (emphasis added)

Gaps, we shall use the terms gap and space interchangeably, between the planks shall be no more than 1 inch except where the employer can demonstrate larger gaps are necessary to accommodate the scaffold structure or for some undefined reason, and in that event the gaps may be no more than 9 and 1/2 inches.

Whether Labor Proved the Elements of a Violation.

[4] Adopted in Kentucky by section 2 (1), 803 KAR 2:411.

We must determine whether the secretary of labor proved all elements of the citation. 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,[5] or with the exercise of reasonable diligence, could have known of the violative conditions.

We find the standard applies; Mason Structure, Gilbane's subcontractor, was using the scaffold to install the brick and concrete block on the sides of the parking garage. The cited standard by its very terms applies to "Scaffold platform construction." That is element one. Then we know a Mason employee was working on the scaffold. TE 47. That is element three.

Ormet Element 2, did Gilbane Violate the Terms of the Standard?

Element two, whether Gilbane violated the terms of the standard, was a bit more difficult for labor to prove. Labor's compliance officer took no measurements. He said he was not permitted to climb the scaffold because he may not place himself in harm's way. TE 37. Gilbane had a general superintendent on site who oversaw the work of the masonry contractor as well as subcontractors for elevators, electrical, plumbing, excavation and landscaping. Recommended order, page 7 (RO 7). Although there was one gap

[5] 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.

of more than 1 inch which did not have scaffold structure passing through it, the hearing officer dismissed the citation. RO 13.

The hearing officer said Gilbane's supervisor was not familiar with the crank up Mason-Jax scaffold. But neither was the CO who, the hearing officer found, "did not know whether gaps in the planking...that were larger than 1" but less than 9 1/2" constituted a violation." RO 8. In his findings of fact the hearing officer said the planks shifted when the scaffold was raised or lowered. RO 4. The hearing officer also found no gaps exceeded 9 1/2 inches. RO 5. Our hearing officer then found "at least one gap in the planking between the work table and the tender areas was "6 to 8" wide...This was not in a section through which bracing passed." RO 6. This gap is shown in photographic exhibit 2g. His finding of fact which goes against his ultimate conclusion to dismiss the citation actually confirms a violation of the standard which specifies gaps may be no more than one inch except where the structure passes through, or for some other necessary purpose.

When questioned on direct examination about the 2g gap, the compliance officer said a Mason employee shown in the photograph measured it for him. TE 41-42. This triggered a hearsay objection from Gilbane's lawyer.

In our cases the compliance officer regularly is permitted to testify about what a party's employee has told him during an inspection. This exception to the rule against hearsay testimony is permitted by Kentucky rule of evidence 801A (b) (4) (KRE 801A (b) (4)). To qualify for this exception, labor must ask

the compliance officer who the employee works for, his employer must be a party to the case, and what work the employee does for his employer.

If the employee from whom the hearsay information comes is, one, an employee of a party to the case (usually the cited employer) and, two, the information is something the employee should know about because of his job responsibilities, then the hearsay testimony is permitted.[6] Had the objection to the hearsay testimony at the trial focused on KRE 801A (b) (4), then the hearsay would have been inadmissible because the employee worked for Mason Structure and Mason was not a party to this case.

But our hearing officer permitted the hearsay testimony; he said it was "a present sense impression" because the Mason employee uttered the measurements while at the same time he was looking at his tape measure. According to KRE 803 (1), a present sense impression is "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." (emphasis added) Here the Mason employee was observing his own measurement and immediately said "six inches" and "eight inches." Mr. Head's ruling is correct as the following will demonstrate.

In Robert G. Lawson's *The Kentucky Evidence Law Handbook*, 4th edition, section 8.60 (3), page 668, Professor Lawson said the statement must describe

[6] A good example of the operation of this rule is a meat cutter's statement which was not permitted to be used in court even though the meat cutter worked for the supermarket which was a party to the case. This was because while the meat cutter had information about a customer who slipped on some water in an aisle in the supermarket, the meat cutter did not work out in the store but behind the meat counter.

or explain an event. It is not enough to qualify for admission if the statement is merely "*about* a perceived event." Mason's employee performed the two measurements and described them at the same time.

In its brief to the hearing officer, Gilbane referred to the hearsay testimony of the Mason employee. Brief to the hearing officer at page 12. But Gilbane did not take issue with the hearing officer's ruling the employee's statements about his measurements complied with the hearsay exception found in KRE 803 (1), a present sense impression. Then in its brief to the commission, Gilbane did not argue the hearing officer erred when he admitted the testimony. Gilbane has abandoned its objection made during the CO's testimony.

According to the standard, spaces between scaffold planks are to be no more than "1 inch...except where the employer can demonstrate that a wider space is necessary." (emphasis added) "Except where" means the employer must prove, for each place where a gap of more than one inch exists, the wider space is necessary for some reason. By this standard imposed logic, if an employer discovers a gap of more than one inch, he must determine if it is necessary; if the gap is necessary, then he remains in compliance. If, however, that particular gap is not necessary, then it must be narrowed to 1 inch.

Of course, no gap between planks may be more than 9 and 1/2 inches. Just because an employer has proved a particular gap of more than one inch is

necessary, that does not mean all gaps wider than one inch are permitted under the standard. Each gap must earn the exception according to its own circumstances. For example, our hearing officer found the gap depicted in photographic exhibit 2g measured from 6 to 8 inches in width. He said "This was not a section through which bracing passed." RO 6. In other words, the six to eight inch gap violated the standard because no bracing passed through it. Therefore, according to the standard, it was incumbent upon respondent to demonstrate, if it could, that the gap was necessary for some other purpose. That was Gilbane's job at the hearing and on review to us as well in light of our hearing officer's finding.

Gilbane's brief, however, makes no attempt to justify the 6 to 8 inch gap in the 2g photograph; Gilbane made no attempt to demonstrate the gap was necessary. Therefore, we find the 6 to 8 inch gap in photographic exhibit 2g to be in violation of the cited standard. RO 6 and TE 40-43.

In *The Haskell Co,* CCH OSHD 32,201, BNA 19 OSHC 1268 (2000), a federal administrative law judge affirmed a citation which alleged a 1926.451 (b) (1) violation; in that case "the space between planks was 6-8 inches." CCH page 48,762, 19 OSHC 1269. The ALJ found constructive knowledge[7] of the violation because it was in "plain view." CCH page 48,763, 19 OSHC 1270. (emphasis added)

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[7] Constructive means something has come to be by operation of law. Black's Law Dictionary, revised fourth edition, page 386. Constructive knowledge of a violation arises where the secretary can, for example, prove the employer should have exercised reasonable diligence but did not.

In *R. P. Carbone Construction Company*, v *Occupational Safety and Health Review Commission*, 166 F3d 815, 819 (CA6 1998), CCH OSHD 31,743, BNA 18 OSHC 1551, the court said "Assuming that he [Rosario Carbone, the company's only employee on site] walked around the site once or twice every day, he should have observed the unprotected workers during the two weeks they had been on the steel structure without being tied off." At 166 F3d 819, CCH page 46,362, 18 OSHC 1554.

Then in *Burch Construction, Inc*, CCH OSHD 32,882, pages 53,234 – 53,235, BNA 21 OSHC 1934, 1935 - 1936 (2007), the federal ALJ dismissed a scaffold planking citation. While the compliance officer estimated the gap between a scaffold platform and the scaffold upright to be "approximately 10 inches," a violation, two company witnesses said the gap "did not exceed 9 inches." Federal ALJ Loye said he "preferred" the testimony of Burch's employees because the CO "never accessed the scaffolding." In other words the compliance officer estimated the distance instead of measuring it.

In *Haskell* and *Carbone* the violations were both in plain sight; the *Carbone* violation was of long standing duration. In the case at bar, the Mason-Jax scaffold had been on site for months and the 2g violation was in plain sight because the compliance officer was able to observe it and, take a photograph. *Burch* reinforces our view a standard where compliance is measured in inches demands actual measurement before we will sustain a citation.

This leads us to a consideration of other spaces the compliance officer found to be in violation of the standard. We have several problems with all of them. First, the citation is written in general, all inclusive language; it says in part "The working surface...was not fully planked." Exhibit 1, page 4. Given the discrete alleged violations depicted in the photographic exhibits and the accompanying testimony of the CO, we would have expected each to be listed as a separate instance of the serious citation. Although writing a citation is the secretary's job and not ours, we think better practice would have been to list each alleged violation of the standard in its own instance.

Second, Gilbane's argument the photographs are compromised because they were taken at an angle makes sense to us. Gilbane said if the boards on either side of a photographed space were not on the same horizontal plane, and it was difficult to say for sure either way from the photographic evidence, then an existing space would seem to be wider. Similarly, if the end of a board rested on top of the end of a second board, a gap would be visible if the two boards were observed at an angle; but there would be no gap if the two boards were observed directly above or below.

Third, except for the 2g gap, the compliance officer obtained no measurements. Instead of measurements, the compliance officer estimated the dimensions, a practice we find less than satisfactory and certainly not definitive. *Burch* and 1926.451 (b) (1).

Because of our problems with the other gaps, we find, labor proved only one instance of a violation of the standard: the six to eight inch space depicted in photograph 2g and measured by the Mason employee whose right leg and tape measure are also visible in the photo.

Gilbane did, however, demonstrate certain gaps were necessary. Gilbane put on a number of witnesses with considerable experience in construction. James Parker testified for Gilbane. Mr. Parker works for Bil-Jax scaffolds, the manufacturer of the Mason-Jax scaffold. TE 134. He said the braces, the steel tubes which are attached to the steel framing and form an X shape which can be seen in photo 2a, require gaps between the boards where the braces pass between them. TE 136. He said planks at the ends are supposed to overlap. TE 138.

Mr. Parker said movement of the planks during the raising and lowering of the scaffold cannot be helped. TE 139, 159 and 181-183. He said gaps were an inevitable part of the Bil-Jax design and referred to page 1 of exhibit 11 which shows a built-in 2 3/4 inch gap in the scaffold frame. Then he referred to photo 2c which shows to the viewer's left a gap of 2 and 3/4 inches corresponding to the same gap found on page 1 of exhibit 11, a diagram of a Bil-Jax scaffold. The witness pointed to two brackets into which the ends of two planks were to be inserted. He said this gap between the brackets was 2 and 3/4 inches. Mr. Parker with a ball point pen circled the 2 and 3/4 inch gap. He said this gap was a part of the design. By implication, he was saying

the gap was a necessary part of the scaffold design. We find this 2 3/4 inch wide gap depicted on page 1 of exhibit 11 is necessary for the Mason-Jax scaffold to move up and down. 1926.451 (b) (1) (i).

Mr. Parker[8] directed attention to a gap of 4 and 1/2 inches, photograph 2c. TE 147. From our review of 2c, we can see the gap depicted has a structural brace running between the boards. We find Gilbane proved this 4 and 1/2 inch gap was necessary. Mr. Parker also said the Mason-Jax scaffold would need three inch gaps to facilitate movement of the boards when the scaffold was cranked up or down. TE 171-172. We find Gilbane has proved these gaps were necessary. 1926.451 (b) (1) (i).

Gilbane, principally through Mr. Parker, easily proved it was necessary for the Mason-Jax scaffold to have gaps up to 4 and 1/2 inches due to the scaffold framing. Similarly, Mr. Parker testified the scaffold generally would require gaps of three inches when the scaffold was raised or lowered. But as we have found, the company at the trial did not attempt to justify gaps larger than 4 and 1/2 inches. The same cannot be said of our hearing officer. In his recommended order, he said:

> It would not be clear from the scaffold specifications or from the scaffold's operation whether a gap of more than 1" but less than 9 1/2"' violated the regulation. No gaps were shown to be greater than 9 1/2."
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> RO 13

[8] Mr. Parker was asked about photo 2g. He said he could not tell how wide the gap was. TE 167. Despite Mr. Parker's inability to estimate the width of the gap depicted in 2g, the Mason Structure employee who measured the 2g gap said it was 6 to 8 inches wide. We find the Mason employee's measurement to be more credible.

In its brief to the commission Gilbane quotes with approval this passage from the recommended order and urges it upon the commission. We reject this portion of our hearing officer's analysis. Gilbane's theory, following the hearing officer's lead, is once it proved some gaps of up to 4 and 1/2 inches were necessary, that would mean any gap up to 9 and 1/2 inches was permissible. This is not what the standard says. We interpret the standard to say in part, and here we are paraphrasing, 'each platform shall be installed so that the spaces are no more than one inch wide, except where the employer can demonstrate a wider space is necessary.' The cited standard requires that demonstration for each gap. When inspecting a scaffold for gaps, the employer, to avoid a violation, must justify each gap wider than one inch.

Element 4, whether labor proved Gilbane had knowledge of the violation, *Ormet*.

Our statute defines what labor must prove to establish employer knowledge. KRS 338.991 (11)[9] 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... unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.
>
> (emphasis added)

Here is a better statement of the knowledge requirement:

[9] This language found in KRS 338.991 (11) is mirrored in 29 USC 666 (k) which is otherwise known in the trade as section 17 of the act.

> OSHA must prove that the employer actually knew, or could have known, with the exercise of reasonable diligence, of the physical circumstances that violate the Act.
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> Randy S. Rabinowitz, *Occupational Safety and Health Law*, second edition, page 85.

It always falls on labor to prove employer knowledge of the violation, actual knowledge or constructive knowledge. *Ormet, supra.* This means it is always a question of fact and not of law. This is underscored by *Martin v Milliken and Company and OSHRC*, 947 F2d 1483 (CA11 1991), CCH OSHD 29,536, BNA 15 OSHC 1373, where the court said the commission "found as a matter of fact that the Secretary had failed to carry its burden of proving that Milliken could have known of the impermissible exposure with the exercise of reasonable diligence." At 947 F2d 1484, CCH page 39,882, 15 OSHC 1374. The court then said:

> What constitutes reasonable diligence will vary with the facts of each case. We think that this determination is appropriately considered to be a question of fact... This holding is consistent with the decisions of other courts of appeals which have squarely addressed the issue...*Dunlap v Rockwell International*, 540 F2d 1283, 1287-88 (CA6 1976)...
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> At 947 F2d 1485, CCH page 39,882, 15 OSHC 1374

Constructive knowledge may be proved in a number of ways. To name a few: the hazard was in plain sight, the employer failed to inspect his work place to discover hazards, the employer had been cited for the same violation in the recent past, the employer failed to enforce his rules. For each one of

these examples, the employer would have known of the hazard, constructive knowledge, if he had exercised reasonable diligence.

(a)

Our Hearing Officer's Conclusions of Law

Our hearing officer found Gilbane exercised reasonable diligence and dismissed the citation. But our hearing officer said it was a conclusion of law which it is not. *Milliken.* Here is what our hearing officer said in his findings of fact:

> By agreement Mason Structure used tags that it gave to Gilbane's superintendent to verify that its competent person checked the scaffold for OSHA compliance... The superintendent also specifically asked Mason Structure's competent person about gaps between the work table and tender level areas where the scaffold bracing passed through the planking. The competent person assured Gilbane's superintendent that the gaps complied with OSHA regulations...Gilbane's superintendent was not familiar with crank-up scaffolding and its need for gaps to allow bracing to pass through as the work platforms were raised, and thus he relied on Mason Structure's competent person to advise him correctly about OSHA compliance...
>
> RO 8 (emphasis added)

Then here are the hearing officer's conclusions of law on the subject of reasonable diligence:

> ...the Hearing Officer concludes general contractors can use these subcontractors to make them aware of hazards in the same way the federal review commission has found that employers can utilize agents to make

> them aware of hazards.[10] See *North American Rockwell Corp*, [the federal review commission decision, citations omitted] affirmed *sub nomine Dunlop v Rockwell International* [citations omitted]...The general contractor's use of subcontractors to identify hazards must comport with employer's duty to exercise reasonable diligence. For instance, as in *North American Rockwell*, the subcontractor/agent must be 'reputable and qualified.'
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> RO 12 (emphasis added)

Our hearing officer erred when he concluded the *Rockwell* case simply stands for the proposition an employer can defer to agents or subcontractors and let them inspect for violations and anticipate hazards. Rockwell did more than that.

In *Dunlop v Rockwell International*, 540 F2d 1283 (CA6 1976), CCH OSHD 21,025, 4 OSHC 1606, Rockwell made "brake shoes with linings containing asbestos."[11] Federal OSHA cited the company for exposing a grinder employee to excessive levels of asbestos fibers. At the trial Rockwell proved it had installed "an extensive filtering and exhaust system on grinder #048 and...it had retained an independent testing laboratory to check for excessive amounts of asbestos fibers..." At 540 F2d 1285, CCH page 25,290, 4 OSHC 1607. Rockwell also proved that in "three prior tests...the number of asbestos fibers...was within then-existing safety standards." At 540 F2d 1285, CCH page 25,290, 4 OSHC 1607.

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[10] Actually all employers have a duty to comply with the standards and to inspect to make themselves aware of hazards.

[11] Commissioner Van Namee's concurring opinion in *North American Rockwell Corporation*, BNA 2 OSHC 1710, 1711 (1975). At some point the employer's name before the federal commission was changed to *Rockwell International* when the case came before the sixth circuit court of appeals. 540 F2d 1283 (CA6 1976).

Affirming the commission's decision, the sixth circuit said:

> The commission's findings of fact[12]were that Rockwell could not have known that the exhaust system of grinder #048 would not function effectively on the day the Secretary tested. On that date the exhaust systems on Rockwell's other grinders were functioning properly and on three prior occasions tests demonstrated that all of the exhaust systems were functioning effectively. The Act asks employers to make a reasonable and diligent effort to comply with safety standards, neither the Secretary, the Commission, nor this court can hold an employer to a higher standard.
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> At 540 F2d 1292, CCH page 25,295, 4 OSHC 1612

When Rockwell hired Clayton and Associates of Southfield, Michigan, (At 540 F2d 1287, CCH page 25,296, 4 OSHC 1608), an independent testing laboratory, it had already inspected its work area to "anticipate hazards," the hazard of asbestos fibers. Rockwell knew it had asbestos in its work place and then it took steps to ascertain whether it was in violation of the asbestos standard. 29 CFR 1910.1001. See *Rothstein* and *N & N Contractors, supra.*

It is easy to understand why Rockwell, once it had inspected its work place to anticipate hazards, hired an independent laboratory to search for asbestos. To conduct atmospheric testing for asbestos, a technician collects air from an employee's breathing zone which is drawn through a narrow tube into a small filter. The filters collected as a result of the monitoring are then examined in a laboratory by a microscope to facilitate "Fiber counts." These tests are very sophisticated. Here is but one example of the standard's complexity:

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[12] In its decision the sixth circuit said the inquiry into reasonable diligence is a question of fact, not of law. At 540 F2d 1288, CCH page 25,292, 4 OSHC 1609.

> "The microscope shall be fitted with a Walton-Beckett eyepiece graticule calibrated for a field diameter of 100 micrometers..."
>
> Mandatory Appendix A to 29 CFR 1910.1001, Sampling and Analytical Procedure, section 9.

Rockwell, the sixth circuit concluded, was reasonably diligent because it knew it had asbestos in its work place and took steps to find out if its employees were exposed to harmful levels. Rockwell did not, we surmise, conduct the atmospheric testing itself because of the difficulties involved: careful collection of the fibers which are then examined through a microscope fitted with a Walton-Beckett eyepiece.

In *Odyssey Capital Group III, LP v Occupational Safety and Health Review Commission*,[13] 26 Fed Appx 5, 6 (CADC 2001), WL 1699421, CCH OSHD 32,522, BNA 19 OSHC 1735, 1736, Odyssey was cited for permitting its workers "to remove asbestos-containing ceiling plaster." Odyssey said it exercised reasonable diligence when it relied on "two independent, albeit non-compliant, studies indicating that the level of asbestos-containing material at its apartment complex fell below the regulatory threshold." Rejecting the employer's defense, the court said:

> Because the studies relied upon by the company did not comply with the regulatory requirements, the company did not exercise reasonable diligence.
>
> At 26 Fed Appx 7, CCH page 50,501, 19 OSHC 1736

[13] Although this case was designated by the court of appeals as not to be published, it is available on Westlaw and is published by CCH and BNA. We find its logic persuasive.

In other words, the company could not simply defer to its independent experts. Instead, the court of appeals rejected the company's reasonable diligence defense because it did not confirm that the expert advice complied with "the regulatory requirements." At 26 Fed Appx 7, CCH page 50,501, 19 OSHC 1736.

Similarly, in *Tierdael Construction Company v Occupational Safety and Health Review Commission*, 340 F3d 1110 (CA10 2003), BNA 20 OSHC 1281, the court rejected the company's reliance on the air monitoring performed by Western Environmental and Ecology, Inc, because the court could not "agree with Tierdael's suggestion, as presented by their expert, that the activity of breaking and removing the pipe even one inch outside of a building would not require compliance with the OSHA Asbestos Standard..." At 340 F3d 1116, 20 OSHC 1284.

From these three asbestos cases, including *Rockwell International* cited by our hearing officer, we learn an employer when confronted by a complex safety and health issue cannot simply hire an expert, or agent, and claim he has exercised reasonable diligence. Rockwell knew it had a potential asbestos problem before it hired the independent laboratory. Citations issued to *Odyssey Capital* and *Tierdael Construction* were upheld by the reviewing courts because the companies did not take any steps to evaluate the advice they had received from their experts.

Gilbane's Mr. Johnson had no demonstrable knowledge about gaps in the Mason-Jax scaffold. He deferred to Mason to inspect the work site and anticipate hazards, incorrectly it turned out. Gilbane was not able to ascertain whether Mason's understanding of the planking gaps, and the necessity for them, was correct.

We take exception to our hearing officer's conclusions of law where he said general contractors may use subcontractors to identify hazards for them and so discharge their statutory duty to be reasonably diligent; we disagree with our hearing officer on this point and set aside his conclusion. Our hearing officer based his conclusion on Mason's assurances to Gilbane the gaps complied with the standard; he said Gilbane was not familiar with crank up scaffolds.

(b)

Discussion

Our hearing officer's definition of reasonable diligence does not square with the persuasive restatement of the duty set out by Mark Rothstein in his *Occupational Safety and Health Law* text. Citing to a fourth circuit court of appeals decision, Mr. Rothstein said:

> 'Reasonable diligence' has been defined as 'such *watchfulness, caution,* and *foresight* as, under all circumstances of the particular service, a corporation controlled by careful prudent officers ought to exercise. Reasonable diligence is a question of fact that will vary in each case...Factors relevant to the reasonable diligence inquiry include the duty to inspect the work area and anticipate hazards,

the duty to adequately supervise employees'[14]...

Reasonable diligence requires an employer to inspect the work area and to anticipate hazards. When a general contractor relies on his subcontractor's assurances the gaps in the scaffold are in compliance, he is not discharging his duty to inspect the work area and anticipate hazards. KRS 338.991 (11) and *N & N Contractors.*

Gilbane called four witnesses; but only one Gilbane witness worked at the job site in Lexington. That was James Johnson, a general superintendent for Gilbane. Mr. Johnson had eleven years with the company. TE 97. Mr. Johnson testified he regularly inspected the work site, the UK parking garage. Here is some of his testimony which reveals the extent to which he did or did not exercise reasonable diligence, the extent to which he inspected "the work area" to "anticipate hazards." For us the question is whether asking Mason's competent person for scaffolds if the Mason-Jax scaffold is in compliance with the standards is the same thing as Gilbane itself inspecting the work area to anticipate hazards?

Mr. Johnson said Jerry Yeakey was Mason Structure's competent person for scaffolds. TE 99. According to Johnson, Mason's "competent person checks the scaffold daily and signed off on it." Mr. Yeakey was to see "that all of them [the scaffolds][15] were up to snuff." This meant Yeakey was to determine

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[14] *Occupational Safety and Health Law*, 2010 edition, section 5:15, pages 191-192. Professor Rothstein cited to *N & N Contractors, Incorporated*, 255 F3d 122, 127 (CA4 2001), CCH OSHD 32,360, page 49,665, BNA 19 OSHC 1401, 1403.

[15] On this job Mason had several types of scaffolds in use. TE 100. .

if the scaffolds were up to snuff, not Gilbane. Yeakey 's inspections were logged into Gilbane's system for recording inspections. TE 100.

Here is Mr. Johnson discussing photograph 2c and a 2 by 4 piece of planking:

> A. ...I questioned about that [2 by 4] because they are the competent person on the site and that is their scaffold and it was for me to ask and through our regional safety guide...Let's let them explain it to us and we move on. They are the competent people and if this thing needs to be there, okay, we are good. So that was the questioning with Jerry.
> Q. So did you...write them up or tell them that they were violating their safety protocols because they had this 2 by 4 in there?
> A. No I did not.
> Q. Is that because you were satisfied with their explanation?
> A. Yes, because they are the competent people and I don't build scaffolds and I don't work on them and that is how come they are the competent people that tell me what is right and I take it from there.
> Q. Did you see any gaps in your inspection of the scaffolding that you thought violated any OSHA standards or did you ever write them up or cite them, cite Mason Structure for gaps that in your opinion were too large?
> A. No because what I got from them. I thought it was in compliance with what was made there.
>
> TE 105-106 (emphasis added)

After the inspection, Mason decided to place plywood over the existing planking as an abatement measure. TE 111. Mr. Johnson was questioned about Mason's decision:

> Q. So you were relying on Mason Structure to solve the problem with OSHA?
> A. That is correct because like I said, they are the

competent people and it is their scaffold and like I said, I can't make any changes to the scaffold.

TE 110 - 111

Then here is Mr. Johnson responding to questions about Gilbane's record of periodic safety inspections of the scaffold, exhibit 3, page 6:

Q. ...did you ever personally inspect this particular scaffold?
A. Yes, I did.
Q. Then how many times did you check it?
A. Numerous times.
Q. How many?
A. Numerous. I mean over and over I checked the scaffold because it was on site, yes.
Q. Well, did you notice when you checked it, were there any gaps in it that might have looked like the photo in 2c there?
A. As I said, prior to this when I questioned that – what you are referring to as the gap, that with Mason Structure, a competent person is telling me that this is what is used on that **and I took that as gospel** that this was the way...

TE 116-117 (emphasis added)

Mr. Johnson was asked about gaps, he said he deferred to Mason's competent person – and he took his response "as gospel."

Mr. Johnson is asked about photograph 2h which shows a wide space with a brace sticking up through it and a wall tie bracket used to connect the scaffold with the wall – to prevent the scaffold from falling over.

Q. Photo 2h, if you would take a look at it. There has been testimony in general that scaffold – you have to be able to clear those cross braces. Is that your understanding of how this thing works?
A. That is correct, yeah.
Q. Now do you have an opinion as far as how much space is needed to clear those cross braces?

A. No I do not. I do not know.
Q. You don't know?
A. No.

TE 125

Here the hearing officer begins to question the witness, Mr. Johnson:

Q. ...does Gilbane perform any separate kind of inspection about whether the scaffold meets regulations or does it rely upon the expertise of the subcontractor and any reports about that to ascertain whether the scaffold meets safe standards or is it a combination of both?
A. We rely on the contractor to make sure that the competent person knows that scaffold is safe. Gilbane does a visual. That is like we are walking out there to see if something – when you told me and you tagged that thing saying I [Mason] checked this, that that is so, that you didn't change it or alter it or anything. So we do a visual look at it. We do not climb on the scaffold and check the braces or the planks or anything like that. We do a visual because that competent person [Mason] has checked it and signed off on that scaffold...
Q. How did Gilbane, if you know, how did Gilbane ascertain on those two occasions that there were unsafe conditions?
A. When a person...is going out walking the field he is holding this dbo2[16] which is a hand held and he is visually looking over the site or he is looking at specifically a scaffold if we just say...looking at that. And he visually looks up or down...and he sees something, that is where he gets that - looks like a pin is missing there or something and that is where he puts in that dbo2 observation and then makes the call to the contractor to get it fixed. We do a visual walk through of the entire job and everything that is involved with safety is visually looked at or we are getting somebody to say hey, it looks like there is something wrong with that. You need to check it...
Q. So with respect to this category, your testimony is that the Gilbane inspector would be looking for an indication that a bracing or a pin is missing just based on what – a

[16] This dbo2 is Gilbane's inspection chart which prompts its superintendents and other managers to walk the construction site and look for specific instances of problems or matters under its ontrol.

> comparison with other parts of the scaffold that have braces and pins?
> A. Yes, it is a visual observation, if you know there is a brace that is suppose to be there and it is suppose to be fully braced, you are going to call that to the contractor's attention.
> Q. Let's look then under Sills, Plats, Jax installed. [on the dbo2]
> Do you know what that category refers to?
> A. Yes.
> Q. What are sills?
> A. When the scaffold is built, whether it is built on solid ground or on unsolid ground, we like to have a sill plate underneath the scaffold leg so it doesn't sink down into the soft soil or level it up so the scaffold is on solid ground. So it is a sill plate that is put on and the scaffold will set on top of it.
> Q. So sills and plates refer to something put under the legs of the scaffold?
> A. That is correct.
>
> TE 126-128

Mr. Johnson, as we said, had 11 years experience with Gilbane. TE 97. While he was incapable of inspecting the scaffold to anticipate hazards created by gaps, and we so find, but instead deferred to Mason's competent person, he understood how the pins that kept braces in place worked and he could look at a scaffold sill and determine whether it was placed properly or was a hazard to employees.

Anthony O'Dea, Gilbane's safety director, testified. TE 193. He compared Gilbane on the UK project to a conductor of an orchestra. He said:

> we don't know that the piccolo player is playing the exact note but we do know that people are on tempo and that individually they are working together properly and that they are playing the music...

Then he said Gilbane had to:

> check the checkers and you'll see observations made to insure that the contractors are performing their work in accordance with their commitments...
>
> TE 215 (emphasis added)

This is an incomplete understanding of a controlling general contractor's job on a construction site. The general under the law must do more than simply coordinate subcontractors and their relationships with one another or check the checkers. Under the occupational safety and health law, a controlling general contractor must inspect the work area and anticipate hazards; this is the exercise of reasonable diligence. KRS 338.991 (11) and *N & N, supra.* Gilbane has a duty to comply with the scaffolding standard. KRS 338.031 (1) (b) and 29 CFR 1926.451.

We find when it came to inspecting the scaffold to anticipate planking gap hazards, Gilbane did not exercise reasonable diligence, did not inspect the work area and anticipate hazards. Rather, Gilbane over and over deferred to Mason's assurances the scaffold was in compliance. We find labor proved Gilbane had constructive knowledge of the planking hazard. *N & N, supra*, at 255 F3d 127, CCH page 49,665, 19 OSHC 1403. We find the secretary proved[17] all four of the elements set out in *Ormet, supra.*

What alternatives did Gilbane have?

In *Blount International Ltd,* an occupational safety and health review commission decision, CCH OSHD 29,854, BNA 15 OSHC 1897 (1992), Blount

[17] We reverse our hearing officer who dismissed the citation.

was a general contractor working on a government contract to build a hangar for C5A aircraft in Massachusetts; following an inspection federal OSHA cited Blount for not equipping an electrical panel distribution box with ground fault circuit interrupters (GFCI), a requirement of the construction standards.

After a trial the ALJ affirmed the citation; Blount to the commission argued Turner Electric had installed the system and should be held responsible. Blount said it was entitled to rely on its subcontractor "and that expecting a general contractor to have detected and abated this hazard is unreasonable." CCH page 40,748, 15 OSHC 1899. Blount's argument raised the issue of reasonable diligence because, labor said, Blount was a "general contractor with supervisory authority." CCH page 40,749, 15 OSHC 1899.

In *Blount,* the commission acknowledged the lack of GFCI protection was "hidden from view...A tester would be required to indentify any particular unprotected outlets" At CCH page 40,750, 15 OSHC 1899-1900. To determine whether Blount was familiar with the electrical power supply at its work site, a job function the CO found to be essential for a general contractor, the compliance officer "turned to the Blount engineer" who "was unable to answer even the most elementary questions about the electrical panel box." From this negative response the CO "inferred...that Blount had neither performed its own tests *nor consulted with its electrical subcontractor* to assure itself

that the system was in working order before requiring employees to use it." CCH page 40,750, 15 OSHC 1900. (emphasis added)

The facts of the case indicated Blount was unaware of the hazard presented by the electrical outlets not protected by a GFCI; from this the "CO gathered that Blount had failed to fulfill its fundamental responsibilities as a general contractor charged with overseeing jobsite safety."

Based on this evidence before it, the federal review commission concluded "Blount's reliance on Turner was unreasonable and that Blount could have known of the GFCI problem with the exercise of reasonable diligence." CCH page 40,750, 15 OSHC 1900.

Except for the inspection reports Gilbane regularly received from Mason Structure where Mason assured Gilbane the scaffold was in compliance, the facts of *Blount International* and the case before us are remarkably similar on the issue of a general contractor's statutory duty to exercise reasonable diligence. KRS 338.991 (11). Neither Blount nor Gilbane ever consulted with its subcontractor about the hazards – Blount electrical hazards, Gilbane planking gap hazards. While Gilbane's Mr. Johnson knew about scaffold sills and braces, he did not understand whether Mason was in compliance with the cited planking standard. During the compliance officer's inspection, Compliance Officer Kappel asked Mr. Johnson about the Mason-Jax scaffold; here is the exchange:

> Q. What did he [the CO] tell you about the scaffold?
> A. We met and we walked the site and we got to one

> section of the scaffold and [the COs]...were looking at this and they asked a question. I said hey, let me get the [Mason] superintendent over here who knows all about this thing and I called Jerry to come over to meet with Tim and Anthony so he could explain how this scaffold worked.
>
> TE 107 (emphasis added)

Gilbane's Mr. Johnson inspected the scaffold from the ground or while standing on a parking lot floor adjacent to the scaffold. No Gilbane employees worked from the scaffold. TE 83. From this we infer no Gilbane employee ever set foot on the scaffold even though it was on site for months.

Gilbane said it regularly asked for and received reassurances all was right with the Mason-Jax scaffold. When the Kentucky secretary's inspecting compliance officer asked Gilbane's Mr. Johnson about the Mason-Jax scaffold, he said the CO needed to speak with Mason's competent person.

While it is true Mason, at Gilbane's behest, regularly inspected the scaffold, Mr. Johnson, the only on-site Gilbane manager who testified at the trial, said "a competent person is telling me that this is what is used on that *and I took that as gospel* that this was the way that scaffold has to be made in order for it to work." TE 116-117. (emphasis added) This is not evidence of a meaningful consultation with the subcontractor of the type which would equip Gilbane with the ability to inspect the work area and anticipate hazards. *Blount* and *N & N, supra*. Gilbane's Mr. Johnson freely

acknowledged he knew nothing about the need for planking gaps on the Mason-Jax scaffold and turned the CO over to Mason's competent person.

Had the CO instead asked Mr. Johnson about the scaffold's sills, we surmise the two men would have had an informative and useful conversation.

As did the federal commission in *Blount*, we find Gilbane's reliance on Mason to be unreasonable; the company did not consult with Mason but simply deferred, without understanding, to Mason's assurances the visible planking gaps were in compliance. We find Gilbane with the exercise of reasonable diligence could have known of the violation depicted in photograph 2g. KRS 338.991 (11) and *Ormet, supra.* Gilbane did not at the trial offer any proof the 2g gap was necessary according to the language of the standard. We infer Mason, if asked, would have had to abate the gap or explain to Gilbane, if it could, why the gap was necessary; at that point Gilbane would have discharged its responsibility to be reasonably diligent.

Multi employer work site issues.

In its brief to the commission, Gilbane said the multi employer work site doctrine, the understanding that a controlling general contractor may be cited even though his own employees are not exposed to the hazard, should be rejected as an improper extension of OSHA's authority. For this proposition, Gilbane cited to 1910.12 (a) which says in part:

> ...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 by this [construction] paragraph.

The eighth circuit court of appeals in *Summit Contractors* has persuasively rejected this 1910.12 (a) argument as has our commission. The multi employer work site doctrine remains the federal law and that of Kentucky in our *Morel* decision: a supervising general contractor in charge of a construction site may be cited even though none of his own employees is exposed to the hazard. See *Brennan v OSHRC and Underhill Construction Corporation*, 513 F2d 1032 (CA2 1975), CCH OSHD 19,401, page 23,165, BNA 2 OSHC 1641, 1645, where the court, citing to 29 USC 654 (a) (2),[18] said all employers on a construction site must enforce the safety and health standards for the benefit of all employees working at the site.

Both *Solis v Summit Contractors, Inc*, 558 F3d 815 (CA8 2009), CCH OSHD 32,990, BNA 22 OSHC 1496, and *Morel*[19] *Construction Co, Inc, East Iowa Deck Support, Inc and Midwest Steel, Inc*, KOSHRC docket 4147-04, 4151-04, 4149-04, cited to *Underhill.*

Did the secretary prove the gap depicted in photo 2g was a serious violation?

Because we have found only the space visible in photograph 2g was a violation of the standard, our review of the serious penalty is confined to the same location.

KRS 338.991 (11) says in part:

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[18] KRS 338.031 (1) (b) contains the same language as 29 USC 654 (a) (2).
[19] *Morel, et al*, can be found at koshrc.ky.gov.

> ...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... unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.
>
> (emphasis added)

Labor by statute must prove that should an accident occur, for a serious violation there must be a substantial probability the employee would suffer serious physical harm or death. Compliance Officer Kappel said the citation was rated as low serious because of a tripping hazard presented by planking gaps. TE 48. He said an employee could fall on a cinder block and break a bone; he said he did not find a fall hazard. TE 49. Mr. Kappel said an employee could also trip and fall on a cross brace. TE 50.

When Compliance Officer Kappel was asked about the tripping hazard, he was not required to match up his estimation of the seriousness with any specific location. He could have culled out from his photographs those which exhibited the hazards about which he spoke; but he did not. He did not say the concrete blocks in photograph 2i are an example of the serious tripping hazard presented to Mason employees. Neither did he say 2j is a photograph of a gap with concrete blocks and cross braces nearby, both of which present a probability of serious physical harm. Instead he spoke in general terms.

In photographic exhibits 2g and 2h we can see tools placed on the planking. And yet the compliance officer did not identify them as tripping hazards. We are not willing to add tools to his list as a source of potential

injuries since he conducted the inspection and had the photographs before him when he testified. There is no way for us to tell whether the CO considered and then rejected the tools as a potential hazard.

Exhibit 2g, the photograph of the six to eight inch gap, has no cross braces running through it; there are no concrete blocks. Because the citation did not allege instances of the alleged violation and because he did not refer to photo 2g during his testimony about his calculation of the penalty, we do not know if Mr. Kappel had even considered 2g when he found a serious violation.

Given that the work area depicted in 2g does not contain any of the low serious hazards to which the CO addressed himself, and especially because we do not know if 2g played any part in his seriousness determination, we sustain[20] the citation and reduce it to nonserious with no penalty.

It is so ordered.

July 5, 2011.

Faye S. Liebermann
Chair

Michael L. Mullins
Commissioner

[20] To they extent they support our decision, we adopt our hearing officer's findings of fact.

Paul Cecil Green
Commissioner

Certificate of Service

I certify this decision and order of the review commission was served this July 5, 2011 on the following in the manner indicated:

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