COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4557-08

COMMISSIONER, DEPARTMENT OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

T.S.P., INC — RESPONDENT

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James R. Grider, Jr, Frankfort for the commissioner. Brennen C. Ragone, Lexington, for TSP.

**DECISION AND ORDER OF THIS REVIEW COMMISSION**

This case comes to us on TSP's petition for discretionary review. Section 47 (3), 803 KAR 50:010 (ROP 47 (3)). After a trial on the merits, our hearing officer sustained one serious citation and a penalty of $3,000. Labor had charged the company with not protecting its employees from the hazards presented by a 30 foot fall. Recommended order, page 2 (RO 2).

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]

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

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

During an inspection at a construction site, labor's compliance officer saw three TSP workers standing on and walking on a permanent awning or canopy which was 30 feet above the ground below. Transcript of the evidence, pages 18 and 19 (TE 18-19). TSP had constructed a brick wall and was removing construction materials from the awning in preparation for washing the brick which is apparently the last stage of the construction of the wall. These workers had no fall protection, that is no harnesses or guardrails.

The CO said the employees had been using the canopy, a permanently installed awning, to walk to and from a scaffold; actually there were two of them at the 30 foot height, one scaffold to the left of the canopy and another scaffold to the right of the canopy. Each scaffold had standard guardrails and did not present a falling hazard. But when the employees climbed off the scaffolds and walked on the canopy, they had no fall protection. Photographic exhibit 1 shows one employee standing on the gray metal awning and two employees standing on the red scaffold with hand rails. This scaffold is to the right side of the awning from the perspective of the photographer. None of the employees in exhibit 1 are wearing harnesses. Photographic exhibit 2 shows an employee standing on the awning next to the red scaffold at the left side of the awning. This employee is not wearing a fall protection harness.

According to the compliance officer, TSP workers had been walking on the canopy for two days without fall protection; the CO got this information from TSP employees he interviewed during his inspection. TE 19.

Mr. Parrish, the company foreman, testified the canopy had a wire strung up as fall protection; he said the wire was stretched from one scaffold to the other. TE 61-62.

He said his company could not remove the bricks and other construction materials with a wire in place. Parrish said he had completed the bricklaying but needed to wash the brick. TE 71.

On rebuttal, the CO said he was never told about a wire or rail. TE 91. The compliance officer said he observed TSP's employees for about 15 minutes, moving back and forth on the canopy but without fall protection. TE 47. The CO said an employer does not have to use fall protection when dismantling a scaffold. TE 91. But, the CO said, the company was not cited for a scaffolding violation; rather the company was cited for a lack of fall protection when the employees stepped off the scaffold and onto the canopy.

Labor must prove the standard applies, the terms of the standard were violated, employees were exposed to the hazard or had reasonable access to the hazard and the employer had knowledge of the violation or could have with the exercise of reasonable diligence. Ormet Corporation, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), and KRS 338.991 (11). Because labor proved the elements of the violation, the hearing officer affirmed the citation. RO 5. We agree.

Labor's citation alleges a violation of 1926.501 (b) (1), a fall protection standard which applies to a construction site. During the inspection the compliance officer observed TSP employees exposed to the fall hazard, proving employee exposure. Because of the presence of TSP's Foreman Parrish who was on site, labor proved the employer's knowledge of the fall hazard. TE 59. In any event, the violation was in plain sight, proving constructive knowledge of the hazard. See exhibits 1 and 2. Kokosing

Construction, Co, Inc, a federal review commission decision, CCH OSHD 31,207, page 43,723, BNA 17 OSHC 1869, 1871 (1996).

The citation:

> ...1926.501 (b) (1): Employees on a walking/working surface with an unprotected side or edge six feet or more above the lower level were not protected from falling
>
> a. Four employees working from a canopy on the East side of the building, 30 feet above the adjacent ground were not protected from falling.
>
> Exhibit 6

Although the citation carried a proposed penalty of $5,600, the compliance officer at the trial computed the proposed penalty to be $3,000 which is the amount sustained by the hearing officer. KRS 338.081 (3). TSP did not object to the reduction. The CO said the gravity based penalty was $5,000 because of a potential 30 foot fall which led to a high serious/greater probability[3] hazard - employees worked right at the edge for two days without any protection. TE 22-23. TSP got 40 % penalty credit for size (80 employees). TE 22. TSP got no good faith or history credit because the violation was rated high serious/greater probability and the company had received a serious citation within three years of the inspection. That is a proposed penalty of $3,000.

The cited standard says "Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet...or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems or personal fall arrest systems." 1926.501 (b) (1). (emphasis added) Personal fall arrest means harnesses with lanyards which are attached to a point so as to prevent a

[3] At the trial the compliance officer testified about a high serious hazard (high, medium and low being the choices) and greater probability of a fall rather than lesser because employees when walking on the canopy were near the edge.

fall. The CO said there was no fall protection in place and no indication of any having been installed and then removed. TE 40-41. Photographs 1 and 2 show no safety rails on the gray metal awning.

In its PDR, TSP likens removing the brick from the canopy, without fall protection, to putting up a ladder and tying it off: TSP said an employee would have to go up the ladder to tie the ladder to the structure and then after work was completed climb down after untying the ladder. But this analogy does not conform to the facts developed at the trial. The compliance officer said workers had been walking on the canopy, unprotected from falls, for two days before the compliance officer showed up for the inspection.

The employer had also said he was in the process of removing the scaffolding at the time of the inspection. But here again, the CO said he drove by the site the next day, on his way to somewhere else, and saw the scaffolding still in place. TE 39.

In support of its ladder argument, TSP cites to H.S. Holtze Construction v Marshall,[4] 627 F2d 149, 151-152 (CA8 1980), CCH OSHD 24,702, BNA 8 OSHC 1785:

> [W]e are of the opinion that some modicum of reasonableness and common sense is implied. There is a point at which the impracticality of the requirement voids its effectiveness and that point has been reached when to erect an entire wall, a project said to take approximately two hours, petitioner must begin an endless spiral of tasks consisting of abatement activities which necessitate further protective devices, i.e., guardrail to erect wall, scaffold to erect guardrail, safety devices to erect

[4] The ALJ dismissed the citation; he said guard rails posed a greater hazard than erecting the walls of the building. Rails would go up at the same place as would the wall structures. CCH OSHD 21,303. The commission reversed the ALJ; it said the employer failed to prove a greater hazard (erecting guard rails). It said the employer did not prove erecting the rails would be less safe than working without them. The commission, citing to an early case, said belts were not the equivalent to guard rails (today guard rails and harnesses are found in the same standard and are now equivalent to one another). In a dissent, Commissioner Barnako said it would take less time to build the walls than the guard rails. The eighth circuit found guidance from Barnako for its opinion reversing the commission. In 2010, anchors for life lines can be quickly installed.

scaffold, etc.

Holtze was written in 1980 before personal fall arrest systems, a harness and lanyard, were added to the standard. Today the technology is such that an employee can, from the safety of the scaffold seen in the photographs admitted in this case, quickly bolt up or nail an anchor on the roof and then clip on his lanyard. A lanyard is designed to be short enough to stop a fall before the employee hits the ground below. Or, at the employer's option according to the cited standard, two cables could be rigged at the outer edge of the canopy which would serve as a guard rail. Either option provides fall protection. The employer said he had a cable but that is not what the CO saw; the CO testified the workers had used the canopy for two days without fall protection. TE 20. The CO saw employees using the canopy as a walkway during his inspection; he saw no fall protection. TE 47. Photographs 1 and 2 confirm his testimony.

In Holtze Construction, the eighth circuit said putting up walls on the side of a building would take less time than erecting guard rails. But that is not our case. TSP was not trying to erect anything at the edge of the canopy. And so TSP could have used harnesses and lanyards or two cables which performed the same function as would a set of guardrails.

Holtze was written at a time before harnesses and lanyards with anchors came into use as fall protection devices.[5] Nowadays belts cinched around an employee's waist are not used because they are dangerous. In its decision the federal commission said safety belts are not the equivalent to guard rails.[6] Today, however, both guardrails and

[5] The court said safety belts would require "scaffolds or stanchions." Anchors are now available; these anchors need only be nailed to the structure to provide a place to attach a lanyard which is connected to the worker's harness at its other end.

[6] CCH OSHD 23,925, page 29,008, BNA 7 OSHC 1753, 1758.

full body harnesses are found in the cited standard. It is the employer's decision which to deploy to eliminate a fall hazard.

There is no exception to the fall protection standard when a contractor removes material from the job – here a masonry contractor taking unused brick from the roof and walking across the canopy to place it on the scaffold which can then be lowered to the ground. See photograph 5 which depicts a scaffold which can be raised and lowered.

TSP, in its petition for discretionary review, says the canopy was not at the time the materials were being removed a walking/working surface and so the fall protection standard does not apply. That is not the law.

In Davy Songer, an administrative law judge decision, CCH OSHD 30,957, the ALJ said a walking/working surface exists where employees are found to be working – in our case that is the canopy when employees walk on it. The CO saw the employees walking and working while standing on top of the canopy. When TSP workers walk on the awning, whether to gain access to the brick wall shown in exhibits 1 and 2 or to remove bricks, they are working; and so the surface fits the definition of a walking/working surface.

Because the commissioner proved the elements of the violation and because we have rejected TSP's defenses raised to us on review, we affirm the hearing officer's recommended order. Ormet, supra.

It is so ordered.[7]

January 4, 2011.

[7] Commissioner Michael L. Mullins took no part in this decision.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

**Certificate of Service**

I certify a copy of this decision for TSP, KOSHRC 4557-08, was served on the parties in the following manner on this January 4, 2011:

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