

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4594-08

COMMISSIONER,
DEPARTMENT OF LABOR

COMPLAINANT

v

K & P ROOFING, SIDING AND HOME
IMPROVEMENT, INC

RESPONDENT

* * * * *

Melissa Jan Williamson, Frankfort, for the commissioner. Stephen E. Smith, Louisville, for the respondent.

DECISION AND ORDER
OF THE REVIEW COMMISSION

This case is before the commission on K & P's petition for discretionary review (PDR) of the hearing officer's recommended order.

Labor's division of compliance received a report of unsafe work at the Frank Shoop car dealership in Georgetown; when the department's compliance officer (CO) arrived he found five¹ workers on a roof which was some 11 feet in the air. None were tied off to prevent a fall. This repeat serious violation carried a \$10,000 penalty because K & P had been previously cited for fall protection violations within the last three years. Our hearing officer sustained both the citation and the penalty.

At issue in this case is whether K & P employed the roofers working without fall protection or whether the roofers were employed by a

¹ K & P said five; labor said four. The difference is immaterial.

subcontractor. Our hearing officer, after a trial on the merits, "found that the Respondent was the employer of the roofers who were exposed to the hazard." Recommend order, page 5 (RO 5). When it issued the citation, labor did not allege K & P was a controlling employer. Exhibit 2, page 4, the citation. In its brief to us the labor department said K & P was the employer. K & P, on the other hand, at the trial and in its briefs to us argues the citation should be dismissed because labor did not prove it was the employer.

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 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*,² 487 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..."³

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."

When the compliance officer arrived on site, he found the employees, some wearing harnesses and some not but none tied off, working on a roof. Transcript of the evidence, page 17 (TE 17). He took photographs. Exhibit 1, A through J. He tried to get the workers to come down from the roof. TE 25

² 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.

³ See federal commission rule 92 (a), 29 CFR 2200.

and 48. None of the workers spoke English. TE 25. Then the CO went into the Frank Shoop car dealership which had hired K & P to do the roofing; he asked for and received permission to inspect. TE 26. He was told by Kevin May, Shoop's general sales manager, a K & P representative was on site. Mr. May, after he gave permission to the CO to conduct an occupational safety and health inspection, went outside to speak with Dan Olsen. TE 26.

Mr. Olsen, a commission salesman, had a business card with K & P printed on it; he told the CO he was a "sales rep for K & P Roofing." TE 27. Compliance Officer Chris Heady said Mr. Olsen's business card had K & P business phone numbers and an email address. Then CO Heady began an opening conference with Mr. Olsen. We find Mr. Olsen did not object to participating in the opening conference as K & P's representative. TE 28. At the end of the opening conference, Mr. Olsen told the CO the roofers worked for a subcontractor. Olsen, according to the CO, then said he should have "addressed their lack of fall protection when he first pulled up on-site." TE 29.

Mr. Olsen told the CO the roofers worked for Marvin; Mr. Olsen called Marvin on his cell phone and handed the phone to the CO. TE 29 - 30. Marvin, again according to the CO because K & P did not ask either Olsen or Marvin to testify, said he worked for K & P; Marvin said the roofers did not work for him. TE 30. Mr. Olsen then told the roofers to come down and they did. TE 30.

On cross examination Compliance Officer Heady said Marvin Rodriguez told him "he was not a business owner." TE 91. When the CO talked to one of the roofers, through the services of a labor department supplied translator, the employee said he "worked for an American boss..." TE 70.

CO Heady used a disto laser meter to measure the height of the roof from the ground to the eave where the roofers worked. He said it was 11 feet and 4 inches. TE 31 – 32. When asked which photograph depicted the point at which he measured, he said it was exhibit 1 H. TE 32. Photo 1 H shows a two story building with a peaked roof. Three roofers, kneeling or crouched down at the low point of the roof, are directly exposed to the hazard of falling.

Before he left the work site, the compliance officer held a closing conference⁴ with Mr. Olsen. TE 33 – 34.

Exhibit 2, introduced through the CO, is the citation which initiated this controversy. Mr. Heady said it was serious "Based on the height from which the employees were working, if they were to fall, the end result could result in death." TE 36. The repeat serious citation says:

29 CFR 1926.501 (b) (11): Each employee on a steep roof with unprotected sides and edges six (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. Five (5) employees were exposed to an unprotected fall from a second story roof to the first level, and 11 feet 4 inches from the first level to the ground below while doing roofing work at Frank Shoop car dealership..

⁴ Opening and closing conferences are prescribed by 803 KAR 2:070, section 4 (1) and (5).

This repeat serious citation carried a \$10,000 penalty. The cited standard, adopted in Kentucky by 803 KAR 2:412, section 2 (1) (a), says:

29 CFR 1926.501 (b) (11)

Each employee on a steep roof with unprotected sides and edges six (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.

Before the citation was introduced, labor asked the compliance officer if the company had a history of prior citations. He said yes. "Previous history had shown from the time of my inspection, they had received citations within a three-year period." He said the citations were "final" orders.⁵ TE 35.

Compliance Officer Heady then said he recommended the citation to be a "double repeat because of the past history." TE 35 and KRS 338.991 (1).

When labor relinquished control of its witness to permit cross examination, it had put nothing in the record about the calculation of the repeat serious penalty or described the steep roof.

On cross examination Compliance Officer Heady said because K & P was doing the roofing for an automobile dealership, he classified the work as commercial. He said for commercial work the roofing standard was enforceable at six feet; for residential roofing the standard would be enforced at ten feet. TE 43. He said the citation was issued to K & P because the roofers were their employees. TE 55.

⁵ This means the prior citations were no longer in litigation. They were enforceable.

On redirect labor introduced two prior citations charging the company with failing to provide fall protection for their employees; the cited standard, 1926.501 (b) (11), was the same as that found in the instant citation. These exhibits came into the record without objection. Exhibits 4 and 5.

Labor again turned over its witness to K & P for cross examination. After a few K & P questions, our hearing officer began to examine the witness as is her right according to our rules.⁶ 803 KAR 50:010, section 36 (9) (ROP 36 (9)). She wanted to know how the compliance officer determined "a \$10,000 fine?" TE 81. What followed was a disjointed account of the penalty calculation.

When the CO was asked to consider the seriousness of the violation, he said "the end result could have been death." TE 81. Given the statutory definition of a serious violation⁷ and our administratively acquired familiarity with the penalty calculation formula, we assume he meant the seriousness of the violation was high – high, medium and low being the choices. Then he said "we take the severity and the probability, and then the previous history is what played into the double repeat." TE 81. He did not define probability. He said K & P would get "the full 60 %" reduction for size of the company which is measured by the number of employees; he said K & P had ten employees at the time of the inspection. TE 82. Section 1 (2) of 803 KAR 2:115 says the secretary when determining a penalty shall give

⁶ We know they are not rules but use the term for convenience.

⁷ A "serious violation shall be deemed to exist...if there is a substantial probability that death or serious physical harm could result..." KRS 338.991 (11).

consideration to the size of the company, the gravity of the violation, the employer's good faith and the employer's history of previous violations.

Our hearing officer rhetorically asked Compliance Officer Heady if the fine was larger because it was a repeat; the CO did not disagree with her. He said two prior violations of a standard "would have made it a double repeat." TE 83 and exhibits 4 and 5.

CO Heady next said the penalty would start at \$5,000 for a serious violation with the sixty percent credit taken into consideration; he said "since this was a...double repeat so it was multiplied by five." TE 84. This prompted our hearing officer, we presume doing the math in her head,⁸ to ask "So it was \$2,000? Is that correct? \$2,000 to begin with?" The CO said it was. Compliance Officer Heady said the basic fine, the \$2,000, was multiplied by five because it was a double repeat. TE 84. Two thousand dollars times five is ten thousand dollars, the proposed penalty. Exhibit 2, page 4. Our hearing officer found the penalty to be reasonable. RO 6. Because K & P in its petition for discretionary review and in its briefs to us has not made the penalty an issue, it is not before us; we simply wanted our decision to reflect how the \$10,000 penalty came to be and how it was proved by the compliance officer.

Hearing Officer Durant asked about the pitch of the roof. She wanted to know if Mr. Olsen knew the pitch of the roof; the CO said he did. According to

⁸ A \$5,000 penalty adjusted for the size credit of 60 % is \$2,000 (5,000 times .6 equals 3,000; then 5,000 minus 3,000 is \$2,000).

the compliance officer, Mr. Olsen said the pitch of the roof was "seven and twelve." TE 86 - 87. Section 1926.500 (b), definitions, says a steep roof has "a slope greater than 4 in 12 (vertical to horizontal)." This confirms the cited roof was steep.

For every case which comes before us, *Ormet Corporation*,⁹ a federal review commission decision, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), spells out the four elements labor must prove for each citation:

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,¹⁰ or with the exercise of reasonable diligence, could have known of the violative conditions.

Compliance Officer Heady found the employees working on a roof which labor proved to be steep; because the work was commercial and not residential, the standard applies. Our hearing officer found K & P violated the standard; we agree with her analysis. RO 6. Section 29 CFR 1926.501 (b) (11) says employees on a steep roof more than six feet above the ground below must be protected from falling. The roofers depicted in exhibit 1 H worked right at the edge of the roof some eleven feet above the "lower levels." CO Heady said the roofers were not tied off, even those wearing harnesses.

⁹ All the federal commission decisions we have cited can be found at oshrc.gov.

¹⁰ 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.

What remains for us to decide on discretionary review is whether complainant proved K & P was the employer and whether respondent had knowledge of the violation. CO Heady said K & P employed the workers; our hearing officer agreed. TE 55

Hearing Officer Durant said she found the "documentation offered to demonstrate that Marvin Rodriguez was an independent contractor was, as a whole, unconvincing." RO 6. These documents are, one, the independent contractor agreement, exhibit 6, and, two, the OSHA general standards statement, exhibit 7. Both exhibits have what purport to be Marvin Rodriguez's signatures.

She said President Ron Cogburn testified the Frank Shoop auto dealership was Marvin Rodriguez's first job with K & P while James Reynolds, K & P's general manager, said Rodriguez had done "a couple of jobs." RO 6. She said the contract the company introduced indicated Rodriguez had had a four month association with K & P. RO 6. Hearing Officer Durant said the contract, exhibit 6, had two different Rodriguez signatures, "both of which vary from that on the OSHA General Standards," exhibit 7. She said the exhibit 6 documents, the contract, "have two different Texas addresses and one Kentucky address for Rodriguez." RO 6. We agree the two signatures do not resemble one another. Exhibit 7, the OSHA general standards "will abide by" form, has a signature which resembles neither the cursive signature nor the printed name on exhibit 6. We would add the

contract has a workers' compensation certificate for Ohio but none for Kentucky, even though the contract on page 2 of exhibit 6 says Rodriguez will have workers' compensation insurance for Kentucky.

Page 1 of the contract says Rodriguez will comply with the general standards even though K & P was cited for a fall protection violation under the construction standards. Exhibit 7 also says Rodriguez will "abide" by the general standards. If Rodriguez were a subcontractor, he would be subject to the construction standards. 29 CFR 1926 and 1910.12. This anomaly seriously detracts from K & P's argument the contract proves Rodriguez was their subcontractor.

Mr. Rodriguez's signature appears in two places on the contract but the signatures are very different. One signature is signed with first and last name but no middle initial. A second signature is printed, not signed, and has a middle initial.

Despite the fact K & P's General Manager James Reynolds said his company had written contracts for each of its salesmen, the company produced no contract verifying Mr. Olsen's status as an independent contractor. TE 146. This omission would not be particularly significant except that K & P's case hinges on its assertion Mr. Olsen was not a company employee, manager or representative and therefore could neither speak for nor act for it. Mr. Olsen, however, participated in the compliance officer's opening and closing conferences for K & P. He ordered the men off the roof

and they came down; Mr. Olsen, as the CO reported, said he should have done something about the lack of fall protection when he drove up to the Frank Shoop work site and saw the situation for himself. Mr. Olsen had a K & P business card. Frank Shoop's manager understood Mr. Olsen was a K & P representative. We agree with our hearing officer who said Mr. Olsen "had the apparent authority to represent K & P." RO 5. Indeed, Mr. Olsen did represent K & P during the compliance officer's inspection and we so find. K & P has not argued it was prejudiced because it was not able to participate in the opening and closing conferences or the inspection itself. KRS 338.111, 803 KAR 2:070, section 4 (1) and (5), and *Kast Metals Corporation*, a federal review commission decision, CCH OSHD 22,165, BNA 5 OSHC 1861 (1977).

While these facts are not individually dispositive, collectively they demonstrate Mr. Olsen at the time of the inspection was more than just an outside sales representative. If Mr. Olsen could only sell K & P roofing jobs, then he would have no authority to order the men off the roof when they were not using fall protection or to take part in the inspection and the opening and closing conferences.

As we said, the issue here is whether K & P is the employer. K& P's citation is written to say: "Each employee on a steep roof...was not protected from falling." The citation and complaint said nothing about multi employer issues and K & P's answer denied the employees were theirs. Labor by our estimation is committed to its view K & P was the employer. This leaves us in

the position of either affirming the citation because K & P was the employer or dismissing it because K & P was not the employer.

K & P in its two briefs to us makes a strong argument it did not employ the roofers. We are not persuaded. First of all, K & P had the roofing contract for the Frank Shoop job. James Reynolds, K & P's general manager, bid on the job. TE 145. He went out to the Frank Shoop work site to get things started. TE 161. In its briefs K & P, accurately, says the issue in this case is whether the roofers worked directly for Marvin Rodriguez or K & P. If the roofers worked for Rodriguez as a subcontractor, then we must dismiss the citation because it incorrectly alleges the company is the employer. Labor insists K & P was the employer.

For the purposes of resolving this case, we have two options: either the roofers worked for K & P or for a subcontractor. We find, for reasons we have already given, Marvin Rodriguez was not a subcontractor. That leaves K & P as the employer; there are no other options according to the facts of our case. What facts in this case, if any, support our finding K & P was the employer?

Often times an employer - employee relationship is found by determining who paid the employees, who could modify their working conditions and who controlled the employees. *MLB Industries, Inc*, a federal review commission decision, CCH OSHD 27,408, page 35,509, BNA 12 OSHC 1525, 1527 (1985). In *MLB* the commission noted the ALJ considered who an employee "believed" to be his employer. Taking this last indication of employment as

our starting point, one of the roofers, through a department of labor translator, said he worked for an "American boss." TE 70.

While we have no pay stubs with employee names which would be understandable if the roofers worked for Mr. Rodriguez who did not testify, neither do we have any paperwork about cash draws K & P said it paid to Rodriguez. The amounts of these cash draws, according to Mr. Reynolds, would depend on the percentage completion of Mr. Rodriguez's subcontracting work at the time of payment. Mr. Reynolds could recall one time when he advanced Rodriguez "maybe \$4,000." Reynolds said for this job there would have been a couple of weekly draws. TE 167. A documented history of cash draws payable from K & P to Mr. Rodriguez for his subcontracting work would have been very convincing proof Rodriguez was indeed a subcontractor; receipts for cash draws would be in K & P's possession.

With no convincing testimony about payments, either to the roofers or to Mr. Rodriguez, what remains is control of the workers. And even here, we have precious little to work with. According to the compliance officer's understanding which he gained from his translator's conversations with the workers, there was no foreman on the roof. TE 85. From this we must infer the employees on the roof, at the time the compliance officer appeared, worked without supervision except for Mr. Olsen who told the compliance officer he should have done something about the employees working without

fall protection when he drove up and saw them on the roof. "He [Olsen] made a statement to me that he should have gotten them off the roof..." TE 78.

After that, Mr. Olsen ordered them to come down, and they came down. This to us is an indication of control over the workers – the only proof of worker control in this case.

We have examined the record; we can find no proof Mr. Rodriguez exercised any control over the roofers at the time of the inspection. K & P has failed to make a convincing argument Rodriguez was the subcontractor. We agree with our hearing officer; K & P was the employer of the unprotected workers on the roof.

Now that we have found K & P was the employer, we turn to the issue of employer knowledge - whether K & P had actual knowledge or constructive knowledge of the violation. K & P had been previously cited for fall protection violations and yet the roofers were working without supervision, at the site, when the compliance officer made his appearance. Mr. Olsen, who had just arrived, volunteered to the CO he should have done something about the fall protection problem and then called the men off the roof. Mr. Olsen demonstrated, we have found, his control of the work site for K & P.

According to *Ormet, supra*, the labor department must prove employer knowledge of the violation, the fourth element. K & P has denied knowledge. Knowledge "may be actual or constructive." Mark A. Rothstein, *Occupational Safety and Health Law*, 2011 edition, section 5:15, page 191. Constructive

means something has come to be by operation of law. *Black's Law Dictionary*, revised fourth edition, page 386. Constructive knowledge is found in KRS 338.991 (11)¹¹ where 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... unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(emphasis added)

Then in *Occupational Safety and Health Law*, Randy Rabinowitz puts it thusly:

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.

Second edition, page 85.

The affirmative defense of employee misconduct is a good example of reasonable diligence in operation, even though K & P did not raise the defense at trial and cannot now raise it on review. *Jensen Construction Co*, CCH OSHD 23,664, page 28,695, BNA 7 OSHC 1477, 1479 (1979), sets out the four elements an employer must prove to establish the defense of employee misconduct. If an employer works through all four elements, and proves them at trial, then he will have discharged his duty to be reasonably diligent and to enforce the standards. KRS 338.991 (11) and KRS 338.031 (1)

¹¹ KRS 338.991 (11) is identical to 29 USC 666 (k).

(b). Where an employer proves the four elements of the employee misconduct defense, we will dismiss the citation.

An employer according to *Jensen*, a federal review commission decision we have adopted here in Kentucky,¹² must prove:

it has established work rules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered.

In the case at bar several K & P roofers wore fall protection harnesses and yet the compliance officer said none were tied off to prevent falls. See photographic exhibits 1 B, 1 E, 1 F and I J. K & P made no attempt to prove it had a system for detecting violations or a history of disciplining its employees for safety violations.

Labor in the case at bar proved constructive knowledge of the violation when it introduced the prior fall protection citations. In *Hackensack Steel Corp*, a federal review commission decision, CCH OSHD 32,690, BNA 20 OSHC 1387 (2003), the company had a "lengthy history of OSHA citations." In its decision, the federal commission said because of its heightened awareness of fall protection, attributable to the prior citations labor introduced into evidence, "Hackensack should have perceived a need for increased monitoring based on the six final orders..." *Hackensack* at CCH page 51,556, 20 OSHC 1390. Based on these facts, the commission found

¹² *Morel Construction*, KOSHRC 4147-04, 4151-04, 4149-04, page 37, which can be found at koshrc.ky.gov.

Hackensack had "constructive knowledge of the violative conditions." CCH page 51,557, 20 OSHC 1391.


The fall protection hazard at the Frank Shoop dealership was in plain sight according to the compliance officer who witnessed the employees working on the roof without fall protection; this can be seen in the photographs he took during his inspection. Exhibit 1, A through H. In *Kokosing Construction Co*, a federal review commission decision, CCH OSHD 31,207, BNA 17 OSHC 1869 (1996), the compliance officer "testified that he observed the unguarded rebar in plain view." Based on his testimony, the commission said "We also find that, with the exercise of reasonable diligence, Kokosing could have known of the violative conditions." CCH page 43,723, 17 OSHC 1871. In other words, a Kokosing supervisor could have looked up and seen the violation; the same is true for K & P.

Labor's introduction of the two prior fall protection citations, used to prove the repeat status of the serious citation, also proves the company should have been more careful about detecting violations of the fall protection standard; thus labor proved constructive knowledge even though, apparently, K & P was not aware of labor's need to do so. *Ormet*, *Hackensack* and *Kokosing*, *supra*.

We affirm our hearing officer's recommended order and adopt it as our own. We sustain the repeat serious citation with the penalty of \$10,000. KRS 338.081 (3).

It is so ordered.

July 5, 2011.


Faye S. Liebermann
Chair


Michael L. Mullins
Commissioner


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:

By messenger mail:

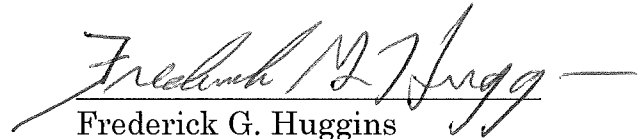
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A handwritten signature in cursive script, reading "Frederick G. Huggins", with a horizontal line extending to the right from the end of the signature.

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