COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4612-08 and 4636-08

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

D. W. WILBURN, INC

and

DENZIL BELCHER dba MASONRY MEN — RESPONDENTS

* * * * * * * * * *

James R. Grider, Jr, Frankfort, for the secretary. Michael R. Eaves, Richmond, for D. W. Wilburn. Jeffrey E. Hiatt, Louisville, for Denzil Belcher.

DECISION AND ORDER OF THIS REVIEW COMMISSION

These two cases were consolidated for a trial. After the hearing officer issued her recommended order, Wilburn, the labor cabinet and Denzil Belcher all filed timely petitions for discretionary review (PDR). We granted review and asked for briefs. 803 KAR 50:010, sections 47 (3) and 48 (5) (ROP 47 (3) and 48 (5)).

Wilburn, the general contractor, and Belcher, the masonry subcontractor, worked on a construction project in Irvine, Kentucky at the Estill County High School. Wilburn had no employees exposed to alleged hazards. Belcher, the subcontractor with exposed employees, had erected a scaffold. This scaffold had no fall protection on the top platform which was 12 feet from the ground below. Transcript of the evidence, pages 22 and 51 (TE 22 and 51). Labor's compliance

officer took photographs during his inspection; these photographs were introduced as exhibits during the CO's testimony.

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

[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.

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."

Labor's Compliance Officer David Dickerson testified his office received "early that morning" a call complaining of unsafe work practices at this construction site. TE 19. He went out to investigate and found a scaffold three bucks high. When the CO arrived, he found no one working; employees sat under a tree, eating lunch. TE 20. CO Dickerson said he waited at a spot away from the work site until the employees went back to work; during that time he took 8 or 9 photographs of the scaffold. TE 78. Photographs, here, taken before the opening conference are admissible as evidence because the site was in plain view from the street. *Ackerman Enterprises, Inc*, CCH OSHD 26,090, BNA 10 OSHC 1709 (1982).

When employees returned to work, Dickerson took several photographs of employees on the scaffold; the CO said he saw employees climbing the scaffold without a ladder, a violation, and working without fall protection, also a violation.

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[2] See federal commission rule 92 (a), 29 CFR 2200.

Then the CO entered the work site, contacted Wilburn's superintendent, a Mr. Jones, and held an opening conference.

Because the two cases were consolidated for trial and because the two parties received citations for the same alleged violations and yet the citations do not match up, either numerically or in the amount of the proposed penalties, we will now briefly outline the citations and penalties received by Wilburn and Belcher.

Wilburn's citations were all serious:

Item	Penalty	
item 1, employees used cross braces to climb scaffold	$2,500	
item 2, employees used cross braces to climb when dismantling scaffold	2,500	
item 3, no fall protection on scaffold	2,500	
item 4, no competent person present when dismantling scaffolds	2,500	(citation withdrawn)
item 5, no hard hat and no protection from construction materials falling off the scaffold	2,500	
item 6, area below scaffold not barricaded to prevent materials from falling on employees	2,500	(citation withdrawn)
total proposed penalty	15,000	

Prior to the hearing, labor dismissed items 4 and 6 for Wilburn. The secretary of labor is statutorily authorized to write citations and correspondingly possesses the ability to withdrawn them. *Cuyahoga Valley Railway Co v United Transportation Union*, 474 US 3, 106 SCt 286, CCH OSHD 27,413, BNA 12 OSHC 1521 (1985).

Our hearing officer dismissed serious items 1 and 2 for Wilburn because she found employees did not use cross braces to climb. Recommended order, page 11 (RO 11). She cited to photographic exhibits 5 and 15 which show, she said, an employee using the ladder built into the scaffolding frame to climb the scaffold. For Wilburn, that left serious item 3, the fall protection citation, with a $2,500 penalty and serious item 5, no hard hats or toe boards, $2,500. Hearing Officer Susan Durant affirmed items 3 and 5 for a total penalty of $5,000. RO 12.

Belcher received three repeat serious citations and one characterized as serious:

item 1, repeat serious, no fall protection	$15,000
item 2, repeat serious, employees using cross braces to climb when dismantling scaffold	6,000
item 3, repeat serious, no hard hat and no protection from construction materials falling off the scaffold	6,000
serious item 1, employees using cross braces to climb scaffold	3,000
total	30,000

Haring Officer Durant dismissed repeat serious item 2 and serious item 1 for Belcher because she found the employees did not use the cross bracing to climb. RO 11. She cited to photographic exhibits 5 and 15 which she said showed a Belcher employee using the built in ladder to climb the scaffold. That left repeat serious item 1, fall protection, with a proposed penalty of $15,000, and repeat serious item

3, no hard hats or toe boards, $6,000; our hearing officer affirmed both citations with a total penalty of $21,000. RO 12.

Wilburn Serious Item 1 and
Denzil Belcher Serious Item 1
Both Allege a Belcher Employee
Climbed the Scaffold
Using Cross Braces

CO Dickerson said he saw only Belcher employees at work on the scaffold. TE 47. Here is what the citation says in part; the instance descriptions for both companies read the same:

> Four employees of Denzil Belcher, dba Masonry Men, were accessing the scaffold...by using the cross bracing and no ladder was provided as a means of access.

This is an alleged violation of 29 CFR 1926.451 (e) (1)[3] which says:

> When scaffold platforms are more than 2 feet...above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access or direct access from another scaffold...shall be used. Crossbraces shall not be used as a means of access.
>
> (Emphasis added)

Labor called Compliance Officer David Dickerson as its only witness; Wilburn and Belcher called no witnesses. Mr. Dickerson said he "watched one employee climbing up the scaffold using the cross bracing..." TE 21. Referring to photographic exhibit 5, the CO said "I...saw them climbing up the scaffold. As you can see he has both feet on the cross bracing..." TE 27 – 28. He said climbing on the cross braces presents a hazard of "a potential scaffold collapse." TE 38 and 44.

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

Our hearing officer dismissed these citations for Wilburn and Belcher because "The employee in Exhibit 5 and Exhibit 15 does not appear to be using crossbracing for access. The employee appears to be using a fabricated end frame as mentioned in 29 CFR 1926.450 (b) under *fabricated frame scaffold (tubular frame scaffold)* and as dealt with under 1926.451 (d) (i)-(vi) [sic][4] and under 1926.451 (e) (9) (iii). However, whether or not the mason is properly or improperly using the end frame, he does not seem to be using the crossbraces." RO 11.

Before analyzing the testimonial and photographic evidence before us, we note neither the scaffolding access standard nor the case law nor the citations define what constitutes climbing on cross bracing. For example, we do not know if climbing the cross bracing means using them as the exclusive method for climbing or perhaps using the cross bracing in concert with other portions of the scaffold; without more, we will not hazard a guess. *Martin v Occupational Safety and Health Review Commission and C. F. and I. Steel Corp,* 499 US 144 (1991), CCH OSHD 29,257, BNA 14 OSHC 2097.

In photograph 5, the employee is not standing on a scaffold platform; rather, the platform appears to us to be at the employee's knee level. This employee is positioned at the left end of the scaffold frame, to our perspective, where he is either climbing up or climbing down what appears to be a ladder built into the structure of the tubular scaffold, what our hearing officer refers to as "a fabricated end frame." We find his hands, from the position of his arms since he faces away from us, are grasping the sides of the built in ladder.

[4] Perhaps this should have been 1926.451 (e) (6) (i) through (vi), Integral prefabricated scaffold access frames.

We agree with our hearing officer and adopt her findings on the scaffold climbing citations. We find the employee depicted in photo number 5 is using the fabricated end frame, what we have described as a built in ladder, to climb the scaffold.

Our colleague Chair Faye Liebermann, in dissent, says she can see, in photo 5, the climbing employee's feet on the cross bracing and so would affirm the citation. We disagree. First of all, we do not know if hands on the ladder but perhaps feet on the cross bracing fits the prohibition found in the cited standard. Second, even though photo 5 is poorly focused, we can see the employee's hands are on the built in ladder which he is facing. We can see the employee's feet are on the ladder rungs, not the cross bracing. We find the employee was not using the cross bracing to climb. Third, the employee in photograph 15, also relied upon by our hearing officer to dismiss the citation, has his hands on the built in ladder and may or may not be beginning to climb. In any event, his feet are on the wooden planking.

For the reasons given, we affirm our hearing officer's decision to dismiss Wilburn's serious item 1[5] and Belcher's serious item 1[6] and the proposed penalties. KRS 338.081 (3). We affirm our hearing officer's dismissal because the secretary failed to prove Wilburn and Belcher violated the cited standard. In *Ormet*

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[5] For Wilburn the CO said "The unadjusted penalty for Wilburn, in this case, again, starts off at $5,000." He said Wilburn got a 40 % adjustment for size (100 employees) but no good faith adjustment because he rated the gravity based penalty as high serious and greater probability. He then said Wilburn got a history credit of 10 %. $5,000 with a fifty percent credit produces a proposed penalty of $2,500. TE 42 – 43.

[6] For Belcher, when asked about the unadjusted penalty, the CO said it "always – starts out at $5,000." TE 40. Belcher got 40 % for size but did not get a good faith adjustment because the gravity based penalty was high serious and greater probability. Belcher did not receive any history credit because they received a citation, a final order, within the last three years. TE 40. $5,000 with the 40 % credit produces a proposed penalty of $3,000. TE 41.

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,[7] or with the exercise of reasonable diligence, could have known of the violative conditions.

Because the Belcher employees worked on a scaffold, the standard applies and labor proved employee exposure as well. Because the scaffold was in plain view as the photographic evidence reveals, the secretary proved constructive knowledge of the alleged violation; CO Dickerson said the scaffold had been on site for three days. TE 39. *Kokosing Construction Co, Inc,* a federal review commission decision, CCH OSHD 31,207, page 43,723, BNA 17 OSHC 1869, 1871 (1996). Labor, however, failed to prove Wilburn and Belcher violated the terms of the standard. We dismiss Wilburn and Belcher's cross brace climbing citations based on 1926.451 (e) (1).

Wilburn Serious Item 2 and
Denzil Belcher Repeat Serious[8]
Item 2;
Both Allege a Belcher Employee
Climbed the Scaffold
Using Cross Braces
While Dismantling the Scaffold

This then brings us to the second set of scaffold citations; both are written to say "An employee...was observed using the cross bracing...to gain access..." to the

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[7] 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.

[8] Belcher's repeat serious citation alleged it had one previous citation for a violation of the same standard

scaffold platform. Then the cited standard, 1926.451 (e) (9) (iv), says "Cross braces on tubular welded frame scaffolds shall not be used as a means of access or egress." Labor's compliance officer said Belcher had been on site for three and one half days and there was never a free standing ladder on the premises. TE 39.

Although the two different sets of scaffold climbing citations involve the same alleged conduct, climbing the cross braces, they are not written in the alternative although perhaps that was labor's intent. Cited standard 1926.451 (e) (9) (iv) is found in the section about erecting or dismantling scaffolds. 1926.451 (e) (9). Either the scaffold was being dismantled or it was not. If dismantling were taking place, 1926.451 (e) (9) (iv) would apply; if not then 1926.451 (e) (1) would. Labor's CO said employees were not dismantling the scaffold during his inspection. TE 75. Neither Wilburn nor Belcher called any witnesses. We find the scaffold was not being dismantled during the compliance officer's inspection. Because the scaffold dismantling standard does not apply to the facts, we dismiss the citations and penalties based on 1926.451 (e) (9) (iv). *Ormet, supra.* In any event, we have already found Belcher employees were not climbing the cross braces but were instead using the integral prefabricated scaffold access frames, the built in frames, to climb. Sections 1926.451 (e) (6) (i) and (ii) and exhibit 5. Labor failed to prove Wilburn and Belcher violated the terms of the standard as well. *Ormet.*

Wilburn Serious Item 3 and
Denzil Belcher Repeat Serious
Item 1;
Both Allege Belcher Employees
Worked on a Scaffold
With no Fall Protection in Place

Our hearing officer sustained these two citations with a serious $2,500 penalty for Wilburn and a repeat serious penalty of $15,000 for Belcher. Once again the instance descriptions are identical, with one exception. Here is the Belcher description:

> Four employees of Denzil Belcher dba Masonry Men were working on a three-buck high 12 feet [Wilburn's says more than 10 feet] above a lower level at the Estill County High School construction site located on 2675 Winchester Road in Irving, Kentucky with no fall protection in place.

The cited standard, 1926.451 (g) **Fall Protection** says in part:

> **(1)** Each employee on a scaffold more than 10 feet...above a lower level shall be protected from falling to that lower level.

Belcher's citation, to justify the repeat serious characterization, says it had previously been cited three times for the same violation. KRS 338.991 (1) and exhibit 22.

Although 1926.451 (g) (1) subsections (i) through (vii) prescribe specific types of fall protection for particular scaffolds, labor's citations do not provide us with any useful guidance about what this scaffold needed. On direct Compliance Officer Dickerson said 1926.451 (g) (1) "requires that anytime you have employees working on a scaffold more than ten feet high, you have to have fall protection of some type. That can be a personal fall arrest system, it can be a guardrail, it can be a net system, either one." TE 50 – 51. Because subsections (i) through (vii) do not mention nets, we will exclude them from our consideration.

CO Dickerson said Mr. Jones and Mr. Belcher told him the scaffold was twelve feet tall; he also measured, we infer, to confirm its height. TE 51. When asked about how the two employers could comply with the standard, he said "all they would need to do would be assemble a guardrail system of some type would be the easiest thing for them to do to correct it." TE 51 – 52. (emphasis added) "To correct it" means, we infer, the employers were not in compliance during the inspection.

Our examination of the photographic evidence reveals the Belcher employees were not provided with any fall protection. We find there were no guard rails on the scaffold. Exhibits 1 through 11. We find no employees were wearing fall protection harnesses. Exhibits 5 through 11, 15 and 16. Photo 6 shows a Belcher employee in a white T shirt standing on the "upper level" of the scaffold which the CO determined to be twelve feet in height, a violation of the standard. Mr. Dickerson said "there is no guard – no fall – he has no fall arrest system and that's no guardrail system in place." TE 28 and 51.

The scaffolding standard applies. Belcher employees were exposed to the hazard of falling. Labor proved the employees worked without fall protection and so Wilburn and Belcher failed to comply with the cited standard. Since the scaffold was in plain view on the construction site, labor proved constructive knowledge. *Ormet* and *Kokosing, supra* and the photographic evidence. We agree with our hearing officer who sustained the fall protection citations and affirm them. RO 10.

When asked about Wilburn's fall protection penalty, the CO said "Again, the unadjusted penalty starts at $5,000." TE 52. This is almost precisely what he said

about the proposed penalty for Wilburn's alleged violation of the scaffold climbing citation: "The unadjusted penalty for Wilburn, in this case, again, starts off at $5,000." TE 42. This raises two concerns. One, the penalty calculation system used by the compliance officers does not begin at any predetermined amount. Instead, the COs begin with a consideration of the seriousness of a violation which might be high, medium or low serious given the hazard. For example, a fall from a great height would be high serious because death is a likely outcome. Contrast that with a tripping hazard which might produce a bruise with no broken skin; this could be determined to be low serious. Then if the employee works at a location somewhat removed from the tripping hazard, the compliance officer might conclude the likelihood of an injury was lesser, greater or lesser being his choices. KRS 338.991 (11).

A low serious, lesser probability of an injury violation would produce a gravity based penalty of $1,500 which we found in the compliance manual used by compliance officers at the time of the instant inspection.[9] We chose this example to demonstrate a gravity based penalty does not 'always begin at $5,000.'

Two, the compliance officer's 'starts at $5,000' remark, used throughout his testimony, seems rehearsed and studied as we shall demonstrate.

At this point it would be useful to set out in more detail the compliance officer's reasoning behind the $2,500 for Wilburn's fall protection citation. When asked for the unadjusted penalty, he said "Again, the unadjusted penalty starts at $5,000."

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[9] We are administratively very familiar with the compliance manual used at the time. A table used to find gravity based penalties, based on whether they are high, medium or low serious and greater or lesser probability, is found at section VI, page 6 of our manual.

He said Wilburn received a forty percent reduction for size of the company. He said no good faith was awarded "due to the high – again, the high greater probability on the severity." While that made no sense, the CO clarified his remarks. He said it was high severity "because...a fall from that height could potentially kill an employee." TE 52. He said "The probability in the – the fact that there were no – there was no fall protection in place" when asked about the probability of an injury. He said Wilburn received ten percent credit for history. This, the compliance officer said, reduced the $5,000 unadjusted or gravity based penalty to $2,500 (5,000 less a 50 % credit = 2,500). TE 53.

On cross examination Mr. Eaves, Wilburn's counsel, said "did you ask Mr. Jones whether or not Wilburn had a safety policy in place on this project?" He said "no, I did not." TE 96. When asked whether it would be relevant to inquire if a general contractor had a "total disregard for safety or alternatively, whether...he has an active safety program," the CO said "It would be relevant, yes." Then Mr. Eaves reminded Compliance Officer Dickerson he had attended a previous hearing where Wilburn introduced a "big safety policy manual." The CO said "I believe it was there." TE 97.

We see the same pattern for the CO's calculation of Belcher's $15,000 repeat serious fall protection penalty. For Mr. Belcher, "the initial penalty start – again, they all started at $5,000." Then Mr. Dickerson said he resorted to the FOM, the field operations manual which is often referred to as the compliance manual, to figure a "triple repeat" violation; recall Belcher's citation said the company had

received three citations for the same violation. Exhibit 20, page 4 of 7. He said "according to the FOM, we use a multiplier of five to arrive at the unadjusted penalty before we do any reduction. And in this case the five multiplied by the 5,000 would be – give you an amount of $25,000 to start with." TE 53. This repeat serious gravity based penalty would then be subject to "reduction factors." Dickerson said Belcher gets forty percent for size of the company but 'No reduction for good faith, due to the high greater probability. And also no reduction for history, due to the previous citations that have become [a] final order." The company's reduction credit of forty percent for size produced a proposed penalty of $15,000 (25,000 – (25,000 times .4) = $15,000). TE 54. KRS 338.991 (1) sets the maximum penalty for a repeat citation at $70,000.

Today we also issued a decision for another Wilburn case, KOSHRC 4660-09. In that case we dismissed a single serious citation alleging a fall protection violation involving a scaffold. When asked how the serious proposed penalty was figured, Compliance Officer Gary Davis said "It started out at five thousand dollars..." Transcript of the evidence, page 30 (4660 - TE 30). Mr. Davis said he awarded no good faith because the violation was high serious and greater probability. 4660 - TE 32. At this point we quote from footnote 4 of our 4660 decision, page 3:

> Our hearing officer observed, twice, this was Wilburn's nineteenth inspection. RO 6 and 7. On direct examination, the compliance officer said "I was walking around that way, and he [Wilburn's Mr. Edwards] said, 'You're the nineteenth inspection this year for D. W. Wilburn.' I was shocked. I didn't know what was going on." TE 14. Then during cross examination by Wilburn's lawyer, the CO said the inspection was a referral. CO Davis said "Some guy with the Labor Union sent it in." Mr. Davis said the same union employee

> had called in a number of other referrals. TE 35. Compliance Officer Davis's statements about the referral inspections were not challenged.

We take administrative notice of *D. W. Wilburn, Inc*, KOSHRC 4660-09, which we issued today, October 4, 2011. Because according to our rules of procedure we are subject to the Kentucky rules of evidence, KRE 201, judicial notice, applies to our proceedings. ROP 42. In *Collins v Combs*, Ky, 320 SW3d 669, 678 (2010), our Kentucky Supreme Court said:

> The rule also provides that a court may take judicial notice *sua sponte*, at any time during the proceedings. KRE 201 (c) and (f). We recognize that earlier decisional law limited judicial notice of court records to those in the same court, involving the same parties and issues... *Thomas v Judicial Conduct Commission*, 77 SW3d 578 (Ky. 2002), is also instructive. In *Thomas*, this Court approved of the Judicial Conduct Commission's decision to take judicial notice of its own prior rulings concerning Thomas's disciplinary history in evaluating the appropriate sanction...

For our purposes, the instant matter and *Wilburn*, KOSHRC 4660, share many common factors. Wilburn and the secretary are parties to both cases; Wilburn is represented in both by Michael Eaves. The same hearing officer tried both cases. Both are about scaffolds and alleged fall protection violations at a construction site. For both cases, the inspection began with a referral telephone call to the cabinet from a person who was not an employee of Wilburn; this is permitted by case law. *Adams Steel Erection, Inc*, a federal review commission decision, CCH OSHD 27,815, page 36,403, BNA 13 OSHC 1073, 1078 (1987).

Compliance Officer David Dickerson was the inspector for the instant Wilburn-Belcher case. TE 18. Compliance Officer Gary Davis performed the inspection for

Wilburn, 4660, the case about which we take judicial notice. For convenience and clarity, we have referred to the transcript pages for *Wilburn*, 4660, as 4660-TE 10. For example, Mr. Davis was the CO for 4660. 4660-TE 10.

Mr. Dickerson and Mr. Davis testified about how they determined their proposed penalties. Both officers said it "always starts out at $5,000" or words to that effect. Neither officer, during their inspections at the respective work sites, made any inquiries about whether Wilburn, or Belcher for the instant matter, would qualify for good faith credit even though 803 KAR 2:115, section 1 (2), directs them to do so. To us this indicates the compliance officers had, at the outset of their inspections, made the decision to write high serious/greater probability citations before they held on site closing conferences where the officers must list any potential violations they have found and where employers are permitted to provide supplementary information to the CO. 803 KAR 2:070, section 4 (5).

Footnote 4 of our 4660 decision, page 3, which we have already quoted refers to nineteen previous Wilburn inspections. This fact, referenced in her recommended order by our hearing officer, comes directly from the compliance officer; for this reason, its reliability cannot reasonably be questioned. KRE 201 (b) (2).

Because we issued Wilburn – Belcher and Wilburn 4660 on this October 4, 2011, they may be simultaneously appealed to Franklin circuit court. KRS 338.091 (1).

We have before us today these two D. W. Wilburn cases where two compliance officers said the serious gravity based penalty starts out at $5,000. For Wilburn 4660 our hearing officer found, based on Compliance Officer Davis's unrebutted

testimony, that Wilburn has been the subject of nineteen referral inspections which were phoned in to the labor cabinet.

In the case at bar, Compliance Officer Dickerson, when asked how the Wilburn – Belcher inspection came to be, said "This particular inspection was initiated due to a referral that was called into our office. We received it early that morning...like I say, it was due to a phone call that we received into – in the office." TE 19.

Section 1 (2) of 803 KAR 2:115 says when determining an appropriate penalty, the secretary shall consider "the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." Despite this regulatory instruction, the compliance officers for the two cases, the one at bar and 4660, made no inquiries about any indication of Wilburn's good faith. While we understand the compliance manual says good faith, evidence of the employer's efforts to promote safety on the job site, will not be granted when the gravity based violation is high serious and greater probability of an injury, the compliance officers's lack of curiosity about Wilburn's good faith efforts limits our ability to review cases we have called before us. KRS 338.071 (4) and ROP 47 (3). KRS 338.081 (3) says the commission, for cases on review, "may sustain, modify or dismiss a citation or penalty." See also KRS 338.991 (6).

Because of the striking similarity of the two compliance officers's collective insistence the gravity based penalty 'starts at $5,000,' because of the compliance officers's disinterest in obtaining information about Wilburn's good faith efforts, if any, and because of the nineteen inspections to date, we will add a fifteen percent

credit for Wilburn's good faith, and for Belcher's as well because the instant case was consolidated for trial. We recognize that labor's compliance manual (FOM) gives it the option of awarding an employer zero, fifteen or twenty-five percent credit for good faith. KRS 338.081 (3).

We understand where labor has been apprised of potential safety or health violations, it has a duty to inspect and to cite where it discovers violations. After all, the labor cabinet enforces Kentucky's occupational safety and health act. KRS 338.101 and 338.141 (1). And the courts as well as this review commission will uphold the citations where labor proves its case. *Trinity Industries, Inc v Occupational Safety and Health Review Commission*, 16 F3d 1455, 1461 – 1462 (CA6 1994), CCH OSHD 30,369, page 41,896, BNA 16 OSHC 1609, 1613. But where compliance officers come to assume gravity based penalties 'always start at $5,000' and during the walk around inspection decide it is not necessary to inquire about a company's efforts at good faith, labor would be well advised to proceed with caution. This is especially so where a company has in the recent past been inspected nineteen times as a result of telephoned referral complaints. *Wilburn* 4660 and *Adams Steel, supra.*

With a credit of fifteen percent for good faith for both Wilburn and Belcher, their penalties for the fall protection citations are computed as follows:

Wilburn: a gravity based penalty of $5,000 with credits of 50 % plus 15 % good faith for a serious penalty of $1,750.

Belcher: a gravity based penalty of $25,000 with credits of 40 % plus 15 % for good faith for a repeat serious penalty of $11,250.

Wilburn Serious Item 5 and Denzil Belcher Repeat Serious Item 3; Both Allege Belcher Employees Worked on a Scaffold Without the Protection of Hard Hats or Toe Boards

These citations charge Belcher and Wilburn with not providing hard hats and toeboards to the Belcher employees working on the scaffold; the compliance officer said they were needed "to provide protection from falling objects such as hand tools, bricks, blocks, any kind of construction materials." TE 54. For Wilburn the proposed penalty was $2,500; for Belcher the repeat serious penalty was $6,000 because, as the citation alleged, Belcher had been previously cited for the same standard. See exhibit 20, Belcher's citations. 29 CFR 1926.451 (h) **Falling object protection**. (1) says in part:

> In addition to wearing hardhats, each employee on a scaffold shall be protected with additional protection from falling hand tools, debris, and other small objects through the installation of toeboards, screens, or guardrail systems...

It is evident from the photographs the Belcher employees on the depicted scaffold were not wearing hard hats. Exhibits 5, 7, 8, 9, 11 and 15. On the top tier of the scaffold, we can see bricks, cinder blocks and tools resting on its surface. We see no toeboards. Exhibits 1, 2, 6, 8, 10, 11,15 and 16 among others. On photo 16, an employee works on the second tier with another employee working on the tier above

him. The higher tier has brick, cinder blocks and tools resting on the boards. Exhibits 1, 2 and others.

As Compliance Officer Dickerson explained, this violation contains no elevation requirement because "If somebody was on the ground walking near an area where there's a hazard from a falling object, then they would be required to have a hard hat." TE 55 - 56. We would add the same rationale applies to toe boards when employees are working below.

Our hearing officer affirmed both citations as shall we. RO 12.

Belcher and Wilburn, in their briefs to us, both contend the citations should be dismissed because they could not have had knowledge of the violations. Wilburn argues the compliance officer observed the scaffold without employees and then when the employees returned from lunch and climbed the scaffold, he began taking photographs of them at work. These photographs, we find, prove employee exposure to the hazards of not wearing hard hats and working beneath scaffold tiers unprotected by toe boards. Here we have in mind the bricks, cinder blocks and tools resting on the scaffold planks. Photographic exhibit 1 shows these objects on the third tier of the scaffold while exhibits 16 and 19 show an employee working on the second tier which is just below the third.

This violation, as were the others, is in plain sight and so Wilburn and Belcher had constructive knowledge of the violation. *Kokosing, supra.* This proves element four of the violation according to *Ormet, supra.* The cited standard is found in the scaffolding section of 1926 and so it applies. Because the employees depicted wore

no hard hats and the scaffold had no toeboards, the employers violated the terms of the standard. *Ormet.*

As he had before, the compliance officer said "Wilburn was, again, started with an unadjusted penalty of $5,000, applied the reduction – the same reduction factors as we have before, the forty percent for the size of the company and the ten percent reduction for the history." TE 56.

"Mr. Belcher was given – again, his penalty started at $5,000. In this case it was a second repeat for Mr. Belcher...which gave a multiplier of two for the initial unadjusted penalty, which $5,000 times two took it to $10,000." TE 56 – 57. Then the CO applied the reduction of 40 % for size but no reduction for good faith due to the "high greater probability." TE 57.

As we have for the other citations, we will apply the additional fifteen percent for good faith because the gravity based penalties always start at $5,000 according to the CO who made no inquiry about good faith efforts for either company; that, and Wilburn has been inspected at least 19 times. We will for the purpose of our penalty determinations treat Belcher no differently. KRS 338.081 (3).

For Wilburn: a gravity based penalty of $5.000 with credits of 50 % plus 15 % good faith for a serious penalty of $1,750.

For Belcher a gravity based penalty of $10,000 with credits of 40 % plus 15 % good faith for a serious penalty of $4,500.

Wilburn Says 1910.12 (a)
Prohibits the Secretary from
Issuing Citations to Controlling
General Contractors with No
Employees Exposed to the Hazard

In its brief to us, Wilburn said 29 CFR 1910.12 (a) prohibits the secretary from issuing citations to controlling general contractors with no employees exposed to the hazard. This is what the standard 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 *Solis v Summit Contractors*, 558 F3d 815 (CA8 2009), CCH OSHD 32,990, BNA 22 OSHC 1496, 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 are exposed to the hazard. See *Brennan v OSHRC and Underhill Construction Corporation*, 513 F2d 1032, 1038 (CA2 1975), CCH OSHD 19,401, page 23,165, BNA 2 OSHC 1641, 1645, where the court, citing to 29 USC 654 (a) (2),[10] said all employers on a construction site must enforce the safety and health standards for the benefit of all employees working at the site. This much cited[11] *Underhill* decision predates the 1910.12 (a) dust-up by some 30 years.

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[10] KRS 338.031 (1) (b) contains the same language as 29 USC 654 (a) (2).
[11] Professor Mark Rothstein in his *Occupational Safety and Health* 2010 text, calls *Underhill* "an important decision." Section 7:6, page 267.

Both *Summit Contractors, Inc*, and *Morel*[12] *Construction Co, Inc, East Iowa Deck Support, Inc and Midwest Steel, Inc*, KOSHRC docket 4147-04, 4151-04, 4149-04, cited to *Underhill*.

Our Kentucky Supreme Court has said "once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works at its workplace." *Hargis v Baize*, Ky, 168 SW3d 36, 44 (2005). Just last month, the Kentucky Court of Appeals issued a published decision upholding the multi employer work site doctrine for occupational safety and health cases. *Department of Labor, now J. R. Gray as Secretary of Labor Cabinet v Hayes Drilling, Inc, and Commonwealth of Kentucky, Occupational Safety and Health Review Commission*, 2010-CA-000021-MR, September 2, 2011. Citing to *Underhill*, *supra*, and other cases from the federal circuits, the *Hayes* court said "The multi-employer work site doctrine is applicable to a construction sites where there are numerous contractors." At page 13.

Our Review Commission
Rejects the Argument That
Nationwide v Darden
Can Be Used in an OSHA
Case to Define an Employer

Wilburn cited to a US supreme court case called *Nationwide Mutual Insurance v Darden*, 503 US 318, 322-25. *Darden* is an ERISA[13] case. In *Darden* the court said ERISA cases must use what it called the common law definition of an employee –

[12] *Morel, et al*, can be found at koshrc.ky.gov.
[13] Employee Retirement Income Security Act.

who hires and fires, directs the work, provides or does not provide tools, when to work, that sort of thing.

Several years ago Commissioners Scott Railton and Thomasina Rogers in *AAA Delivery*, BNA 21 OSHC 1219, 1220 (2005), said the federal review commission would follow the definition set out by the US supreme court in *Nationwide Mutual Insurance Co v Darden*, 503 US 318, 322-25, and dismissed the case; AAA was a newspaper distributor who sold papers to street vendors. *Darden* is a very narrow reading of who is an employee according to occupational safety and health law.

Despite the fact the federal commission said it would rely on the Darden case, two US courts of appeals have said because *Darden* was an ERISA case, and not an OSHA case, they would not use the *Darden* common law requirement to decide OSHA cases. In the *Secretary of Labor v Trinity Industries, Inc*, 504 F3d 397, 402 (CA3 2007), CCH OSHD 32,915, page 53,520, BNA 21 OSHC 2161, 2163, the third circuit said the ERISA case did not apply to OSH law.

The third circuit in the *Trinity* case said the occupational safety and health law has a much broader definition of an employee. For example, the multi employer work site doctrine says an employer on a construction site must enforce the safety and health standards for the benefit of all employees on the work site regardless of for whom they work. The *Darden* definition of an employee would not permit the use of the multi employer doctrine.

In the *Summit Contractors* case, *supra*, on the same multi employer issue as our *Morel* decision, the eighth circuit court of appeals said the US secretary of labor

could issue multi employer citations. The eighth circuit in the Summit case said it would not for an OSHA case follow *Darden* either.

We have two circuit courts which said they would not apply the *Darden* common law definition of an employee to OSHA cases compared with the now questionable federal commission decision which said it would rely on *Darden*. We have concluded the two federal circuit courts have the better argument, not to rely on *Darden*. *Darden* would result in a very narrow reading of the OSH statute which we reject as have the federal circuits.

Our review commission in *Boland-Maloney Lumber*, KOSHRC 4332-06, pages 21 – 25, has similarly decided not to apply the *Darden* definition of an employer to a Kentucky occupational safety and health case. In *Boland* we said "because the act is directed to employees and also to their places of employment and because of the complexities found in the working environment, especially on construction sites, *Darden*...does not apply to occupational safety and health cases." *Boland* at page 24. This commission decision can be found on our website.[14]

We reject Wilburn's *Darden* argument.

Belcher Says the Citations
Were Not Serious

This is not a serious argument. The scaffold was three bucks high or 12 feet. That meant each buck was approximately 4 feet high (3 times 4 = 12). The photographs show Belcher employees on the second and third levels. There is no fall protection; the standard kicks in at 10 feet for scaffolds. TE 51. The employee on the

[14] koshrc.ky.gov.

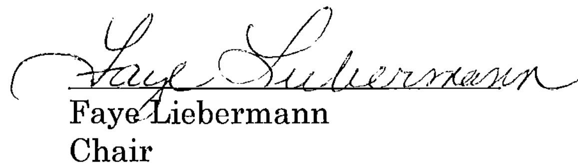
second level should have worn a hard hat because of the bricks, tools and cinder blocks on the level above his head. A fall of 12 feet would, we find, cause serious injury.

Chair Faye S. Liebermann, dissenting in part. I concur with the majority's decisions to affirm the fall protection and hard hat citations and their penalty calculations, including their decision to take judicial notice of *Wilburn*, 4660, and to add fifteen percent good faith credit for each party. I concur with the majority's decision to dismiss the cross brace climbing citations founded on the dismantling standard.

I respectfully dissent from my colleagues' decision to dismiss the 1926.451 (e) (1) cross brace climbing citations. I too have examined the photographic evidence – specifically exhibit 5. I would affirm the citations for each party because I see the employee's feet in photo 5 on the cross brace which in my view is a violation.

It is so ordered.

October 4, 2011.



Faye Liebermann
Chair

Michael Lee Mullins
Commissioner

Paul Cecil Green
Commissioner

Certificate of Service

This is to certify a copy of the order of the commission calling D. W. Wilburn and Denzil Belcher, KOSHRC 4612-08 and 4636-08, for discretionary review was served on the parties on this October 4, 2011 in the manner indicated:

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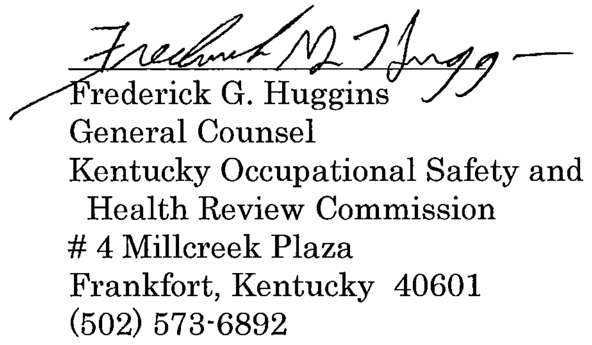

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