COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4652-09

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

GARY WILLIAMS CONTRACTING, INC — RESPONDENT

* * * * * * * * * *

DECISION AND ORDER OF THIS REVIEW COMMISSION

Mark F. Bizzell and Ellen A. Yonts, Frankfort, for the secretary. Thomas L. Osborne, Paducah, for Gary Williams Contracting.

This case comes to us on the secretary's petition for discretionary review of the hearing officer's recommended order. Section 48, 803 KAR 50:010 (ROP 48). We granted review and asked for briefs. Our hearing officer, after a trial on the merits, had dismissed the one serious citation issued to respondent Williams.

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. ROP 47 (3). 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

[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.

such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another."

Gary Williams Contracting periodically does carpentry work for CC Metals and Alloys (CCMA), a company located in Calvert City which makes chrome for car parts. The manufacturing process requires large amounts of water which must be cooled. CCMA has a wooden cooling tower which is six stories, levels, high. Williams every three to five years comes to refurbish the tower. Wooden pieces are cut to size at the bottom of the tower, the first level.

Eddie King, the injured employee, fell from the fifth level. At the time of the accident, one employee, David Hatfield, worked on the first level cutting wood. Two employees, including Mr. King, worked at height in the tower installing the wood.

CCMA's cooling tower is 36 feet tall. Each level is 6 feet high. Eddie King fell from the fifth level which was 24 feet from the ground below; essentially Mr. King when he fell was standing on top of the fourth level which is the bottom of the fifth. Employees working in the tower are required by the cited occupational safety and health standard to be protected from falls, starting at six feet; according to the standard, employers may use a standard railing, a harness and lanyard or safety nets.

Here is the cited standard:

> 1926.501 (b) (1)[3] **Unprotected sides and edges**. Each employee on a walking/working 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.

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

Compliance Officer Dickerson said the two foot by eight foot plywood rectangles, placed where employees needed them to do the work, were walking/working surfaces. Transcript of the evidence, page 64 (TE 64). In fact the tower itself was a walking and working surface because that is where the employees worked, replacing the wood. In *Davy Songer, Inc*, CCH OSHC 30,957, BNA 17 OSHC 1643, 1644 (1996), ALJ Nancy Spies held that any place employees work is a working surface. Davy Songer employees were standing on top of a wooden crate, some ten feet in the air, to open it.

Because Mr. King was working at a height of 24 feet on a walking, working surface, the fall protection standard applies. Ormet Corporation, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991).

The serious citation carried a $1,500[4] penalty; the citation said:

> Each employee on a walking/working 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.[5]
>
> a. ...Eddie King fell 24 to 30 feet while attempting to tie off due to the absence of a guardrail system being in place at the Maylar tower...in Calvert City...

Williams employees had two ways to get to the level where they worked, a man lift and ladders. Fall protection is not required when an employee is on a ladder. As

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[4] Compliance Officer Dickerson said the alleged violation was high serious an greater probability for a gravity based penalty of $5,000 TE 84. He said "the penalty started out at $5,000." TE 79. Williams got 60 percent for size because they had 25 employees. TE 83. Dickerson gave them 10 percent for history because the company had not been cited within the prior three years. TE 83 – 84. Because of the high serious, greater probability gravity based penalty, Williams got no good faith credit. TE 83. $5,000 with 70 % credit yields a penalty of $1,500.

[5] A body harness capable of being attached to an anchor point is a personal fall arrest system. TE 69.

the compliance officer explained, an employee on a ladder has three points of contact, two hands and a foot. But employees are required to be tied off when riding the man lift, when traversing the tower and when working. TE 72 and 76.

Once an employee reached a level, he moved by foot along wooden structural members to reach a plywood platform where he did his work. Mr. Dickerson said he saw a ladder which was twenty to twenty-five feet from a platform. TE 85 – 86. These platforms are temporarily nailed to the wooden structure. When work at that point was completed, employees removed the nails from the plywood which was moved to the next work site in the tower.

As is so often the case, the compliance officer testified he did not go up into the tower; he stayed on the ground. During his inspection he photographed what he said was one guard rail at the point where Mr. King was working when he fell. Compliance Officer Dickerson said this lone rail was not in compliance because a guard rail system must have both a mid rail and a top rail. According to Dickerson, he saw only a top rail. On cross examination, however, the compliance officer quickly admitted what he though was a wooden rail was actually part of the wooden structure. Nets were not used on the job and only briefly discussed at the trial. TE 69 and 77.

That left a harness and lanyard which the standard refers to as a personal fall arrest system. Dickerson's concession gave Williams the opportunity to argue it was incorrectly charged because the citation alleged the injured employee failed to tie off due to the absence of a guard rail.

When Mr. King fell he was wearing a harness which had a single lanyard and we so find. TE 111 and 192. Exhibit 8, pages 2 and 3, are photographs of Mr. King's harness; they show a single lanyard. A lanyard is attached to the wearer's back as required by the standard on harnesses. But the other end of Mr. King's harness was attached to a D ring on King's chest. TE 350 - 352. This meant Mr. King was not tied off to anything when he fell. At the direction of emergency medical responders, EMS, King's superintendent cut the harness off of him before he was put in the ambulance.

Compliance Officer Dickerson tried six times to speak with Mr. King. TE 98. Dickerson said he was told Mr. King was not able to speak and that the physician at the rehabilitation facility did not want him to speak to the investigator. TE 98 and 99. Gary Williams Contracting did not try to prove why King fell or was not tied off; Williams did not call Mr. King as a witness. Because the CO was never able to speak with Mr. King and because there were no witnesses to Mr. King's fall, we will never know why his lanyard was not secured to an anchor point.

Our Hearing Officer's
Recommended Order

Hearing Officer Durant dismissed the citation. Recommended order, page 8 (RO 8). She said Williams "made no attempt to use a guardrail system." RO 7 and TE 88 - 89. Then she said "there was no testimony establishing that King was trying to tie off when he fell." RO 7. Both statements are supported by the testimony. Williams Contracting says these facts raise the issue of fair notice, that is whether the citation gave Williams fair notice of the charges.

fair notice

To succeed with a fair notice argument, respondent must be able to demonstrate the alleged lack of notice prejudiced his ability to put on a credible defense. Williams cannot do that; in fact the company's defense focused on its use of harnesses and lanyards while at work.

In *Louisiana-Pacific Corporation,* a federal review commission decision, CCH OSHD 22,261, BNA 5 OSHC 1994 (1977), the company said the case against it should be dismissed because the citation in a noise case did not include the sound levels the compliance officer recorded during his inspection. Rejecting this defense, Chairman Cleary said "prejudice must be shown before the extreme action of vacation is taken." CCH page 26,801, 5 OSHC 1998. In *Louisiana-Pacific* the commission said an employer may move for a more definite statement or respondent may seek more information at an informal conference. Then the commission, quoting from *National Realty and Construction Co v OSHRC and Secretary of Labor,* 489 F2d 1257, 1264, BNA 1 OSHC 1422, 1425 said:

> So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though formal pleadings did not squarely raise the issue...citations under the 1970 act are drafted by non-legal personnel acting with necessary dispatch...
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> At CCH page 26,801, 5 OSHC 1998

At the trial *Louisiana-Pacific* put on proof about its previous attempts to reduce sound levels which to the commission "indicates that it was aware of the level of sound to which chipper operators are exposed." At CCH page 26,801, 5 OSHC 1998.

Then in *Allis-Chalmers Corporation*, CCH OSHD 20,065, BNA 3 OSHC 1629 (1975), the federal review commission cited to *Conley v Gibson*, 255 US 41, 47 (1957), where Justice Black for the US supreme court said in part:

> ...all the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's *claim* is and the grounds upon which it rests...

At CCH page 23,872, 3 OSHC 1632

In *Allis-Chalmers* the commission said "The citation notified respondent as to the nature of the violation, the standard with which it allegedly failed to comply and the location of the alleged violation." At CCH page 23,872, 3 OSHC 1632.

In the case at bar, the citation alleged Williams violated 29 CFR 1926.501 (b) (1) while at work in the Maylar cooling tower; the citation referred to an attempt to "tie off" which is a claim respondent failed to provide a personal fall arrest system, otherwise known in the trade as a harness and lanyard. A lanyard is used to tie the employee off to an anchor point to prevent a fall from height.

At the trial Williams witnesses discussed a model of the tower one of its witnesses, Tabatha Morin, had put together. Williams did not introduce the model as an exhibit; the model featured straps and lanyards hanging on the structure to indicate Williams employees at work in the cooling tower made, or perhaps could make, use of fall protection lanyards. Ms. Morin, however, stated she did not know where straps might have been placed in the tower on the day of Mr. King's fall. TE 277. We find the straps and lanyards placed in the model did not reflect the state of the tower on the day Mr. King fell.

Williams witnesses were prepared to and did discuss the use of harnesses with various types of lanyards: single lanyards, double lanyards, Miller BackBiter lanyards and nylon chokers.

A single lanyard attaches to an anchor point. A Miller BackBiter lanyard is a variation of a single lanyard; it is designed to wrap around a supporting beam and attach to itself so an employee can walk along a horizontal beam, pulling the BackBiter with him. TE 136 – 137. Two lanyards or a double lanyard permits an employee to approach an obstruction with one lanyard attached. Then the employee attaches the second lanyard past the obstruction and unclips the first.[6] TE 77 – 78 and 129. With a double lanyard, an employee can move past obstructions and stay in compliance with the fall protection standard. Compliance Officer Dickerson said no Williams employee had a double lanyard the day he inspected; he was told they used only single lanyards, as did Eddie King, on the day of the accident. TE 78. A nylon choker, according to the company, is attached to itself. TE 297. A cross beam strap, apparently like the choker, clips to itself and hangs off the beam. TE 295. An employee with a single lanyard can use a strategically placed choker to maneuver around an obstruction in the same manner as he would with a double lanyard. TE 333. Compliance Officer Dickerson, however, said he did not hear any mention, from Williams managers or employees, about double lanyards, cross beam straps or chokers during his inspection. TE 111 – 112, 133 and 366. We find Williams did not discuss double lanyards, back biters, cross beam straps or nylon chokers with Compliance Officer Dickerson during his inspection. We find that despite Williams's

[6] The CO said the use of two separate lanyards to move around an obstacle is called leapfrogging.

discussion of double lanyards, cross beam straps and chokers at the trial, Williams employees on the day of Mr. King's fall used only single lanyards.

Williams ability at trial to put on testimony about the fall protection its employees allegedly used while working in the tower is persuasive evidence Williams understood the charges against it and was prepared to and did defend itself. In any event Williams in its brief to us made no claim it was prejudiced by the citation, was prevented from putting on a defense to the charges. We find Williams had fair notice of the charges against it. *Louisiana-Pacific* and *Allis-Chalmers.*

Whether Labor Proved
Williams Violated the
Cited Standard

After a case has been tried and it is time to make a decision, the hearing officer must decide, as must we on review, if labor proved its case, that is proved the four elements necessary to find a violation. In *Ormet Corporation, supra,* 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, or with the exercise of reasonable diligence, could have known of the violative conditions.

If the secretary of labor fails to prove one or more elements of the violation, then the citation must be dismissed because labor carries the burden of proof. ROP 43

(1). We have already found the fall protection standard applies to the cited condition.

Mr. King was injured when he fell some 24 feet from his working place in the cooling tower to the concrete below. When fellow workers came to his aid, they discovered that while he wore a fall protection harness, his lanyard was attached to a D ring on his chest. This meant Eddie King was not tied off when he fell. These facts, we find, prove the terms of the standard were not met. 29 CFR 1926.501 (b) (1) says when working from height employees must be protected by a standard guard rail system or a personal fall arrest system. Compliance Officer Dickerson on cross examination admitted there was no standard rail in place. TE 89. But Mr. King's harness was not tied off to an anchor point on the structure; instead it was attached to his D ring which proved the violation.

For a personal fall arrest system to work, the employee wears a harness which straps around all four limbs. Then one end of a lanyard is attached to the employee's back while the other end of the lanyard is attached to an anchor point strong enough to prevent a fall, measured by the length of the lanyard. Mr. King's harness had a six foot lanyard attached to it – both ends. TE 111.

Eddie King worked for Gary Williams Contracting and when he fell, Mr. King was 24 feet above the first floor of the tower. This proves Mr. King was a Williams employee and he had access to the hazard of falling without the benefit of a personal fall arrest system – he was not tied off.

Then the only question remaining under *Ormet* analysis was whether Williams Contracting had knowledge[7] of the violation. Despite the fact our hearing officer in her recommended order says 'Neither Foreman Jones nor Superintendent Cope knew or had reason to know that King was not tied off when he fell," Gary Williams in its brief made no attempt to expand on the hearing officer's lead. RO 8. While Williams had no duty to discuss employer knowledge or the hearing officer's finding because it is labor's burden to prove knowledge, it remains our duty on review to resolve the issue. KRS 338.071 (4). Perhaps Williams knew the men in the tower were on their own, perhaps not. We must look to see what the facts say and how those facts can be interpreted according to the case law on employer knowledge.

Employer knowledge of a violation may be actual or constructive. *Ames Crane and Rental Services, Inc,*[8] a federal review commission decision, CCH OSHD 19,724, page 23,532, BNA 3 OSHC 1279, 1283 (1975). Williams's Superintendent David Cope was called to the fall by radio. TE 355. Mr. Cope cut off King's harness at the behest of EMS workers who had been summoned to the scene. Mr. Cope said King's lanyard was clipped to his harness. TE 351. This meant Mr. King was not tied off when he fell, a violation of the cited fall protection standard.

Luke Jones was Williams's foreman for the cooling tower work. TE 314. Mr. Jones testified he was the first to reach Mr. King's side; Jones said he was on the

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[7] KRS 338.991 (11) says in part "...a serious violation shall be deemed to exist in a place of employment...unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

[8] Affirmed, *Ames Crane and Rental Service, Inc,* 532 F2d 123 (CA8 1976), CCH OSHD 20,578, BNA 4 OSHC 1060.

ground when the accident happened and rode to the scene on a golf cart type vehicle. TE 319.

Mr. David Hatfield was the third Gary Williams employee working in the area; Mr. King and Tyler Coursey were aloft in the tower. When King fell, Hatfield worked on the first level cutting wood which would be installed in the tower on the fifth level. TE 174 and 299. He said he was a lead man "So if the foreman wasn't on the job, I was kind of in charge."

Labor's compliance officer, standing on the concrete at the first level where Mr. Hatfield worked, could not distinguish between a part of the wooden structure and a standard railing. When confronted on cross examination, the CO conceded the wood he saw was not a standard rail. Photographic exhibit 3, pages 9, 10 and 11, illustrate our point. These photographs were taken by the compliance officer during his inspection. When he took these photographs, the CO was standing on the first level of the tower; from the CO's perspective, the photos depict what he could see directly overhead. Photographs 9, 10 and 11 show the wooden frame of the tower and plywood platforms upon which Williams employees stood to work. Our hearing officer said the CO's "visual perspective was through the dense trestle-like network of vertical and horizontal 2x4 and 4x4 beams and supports. Plywood sheets cut into 2'x8' strips were laid out as working/walking platforms further interfering with the visual perspective." RO 3. We agree. We find someone, the compliance officer or Williams managers for example, on the first level could not see whether employees

standing on the plywood platforms to work were tied off in conformance with the fall protection standard.

No witness for Williams Contracting testified he could see, from the ground below or beside the tower, whether employees in the tower were tied off as the regulation[9] requires. We find Williams supervisors could not, from the ground, determine if their employees working aloft in the tower had their lanyards connected to anchor points which would arrest a fall. Foreman Jones said he "had not been up in the tower that morning..." TE 331. Superintendent Cope said he did not go up in the tower on the day of Mr. King's accident either. TE 358. Because the two supervisors had not gone up into the tower that day and because Williams employees could not see up into the tower from the first level, we find labor did not prove respondent had actual knowledge of the violation.

This, then, leads us to a consideration whether labor proved Williams Contracting had constructive knowledge of the violation. While an employer may be found to have constructive knowledge of a violation if it was in plain sight, that was not the situation on the day of Mr. King's accident. No one was looking. *Kokosing Construction Co,* a federal review commission decision, CCH OSHD 31,207, page 43,723, BNA 17 OSHC 1869 (1995). Constructive knowledge of a violation can be found, for example, where an employer fails to inspect, where the safety instructions are inadequate, where there are previous instances of noncompliance and where an employer failed to exercise reasonable diligence. Mark Rothstein, *Occupational Safety and Health Law*, 2010 edition, pages 191 – 192.

[9] We use the terms regulation and standard interchangeably.

In *Del-Cook Lumber Company*, CCH OSHD 22,544, page 27,207, BNA 6 OSHC 1362, 1366 (1978), the federal commission said "Respondent is...chargeable with constructive knowledge of the violation through its failure to adequately enforce its rule that the power be turned off during maintenance."

Exhibit 12, Williams's safety rules about fall protection, says "FALL PROTECTION, Required when working at 6'0" or more above a lower surface." When Mr. Gary Williams testified, he said his employees had to be "100 percent tied off at all times....If they don't hook up and they get caught, they're gone." TE 167. But the proof in our case says something else. According to witnesses produced by the company, the 100 percent tie off rule was not enforced, proving constructive knowledge. *Del-Cook*. We will now quote a passage from the secretary's brief; we find this recitation of the testimony to be a persuasive accounting of the constructive knowledge issue:

> [CO] Dickerson's inspection revealed employees used a harness with a single lanyard that ties back into itself to act as its own anchor. TE 73 and 78. This method of fall protection was not effective to ensure absolute protection to GWC [Williams] employees due to its limitations. TE 74.[10] In contrast, GWC alleges 'the uncontradicted proof at the hearing was Mr. King had a crossbeam strap at the time of the fall.' Respondent's Brief at 3. This statement is inconsistent with testimony provided at the hearing. Gary Williams, owner of GWC, testified he did not know whether King has a crossbeam strap at the time of the fall. Specifically, he stated 'I don't know whether he had it on him. I don't know whether it was hanging up. I can't say.' TE 186. David P. Hatfield [carpenter working on the ground] testified that he did not know whether King had a

[10] Employees working in the tower had to stop and tie off "every time you ran into a timber..." TE 74. When an employee stops to tie off on the other side of the timber, he is not tied off for that period of time it takes to unhook, place his lanyard around the timber and tie again.

> crossbeam strap with him or not. TE 302. Luke Jones [foreman] indicated King was using a Miller harness with a BackBiter lanyard and the D ring. TE 329. However, he also said he did not know whether King had the cross beam strap that day. TE 331. Finally, David Cope testified that he did not see King with a crossbeam strap on the date of the accident. TE 359.
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> labor's brief at 8

David Hatfield said employees had to unhook to go from one side of a vertical beam to another. TE 298. This meant a Williams employee had to walk his lanyard looped around a horizontal beam up to the vertical beam, unhook and rehook on the other side. In other words, according to Mr. Hatfield, for the unhooked period the employees were not protected from falling. Mr. Hatfield said an employee without a double lanyard[11] had to briefly untie. Recall Mr. King was found on the ground with a single lanyard which was clipped to nothing but his own harness. The compliance officer testified that employees on the day of the accident all worked with single lanyards. TE 78.

This testimony proves four things: one, the Williams employees regularly worked for periods of time in the tower without being tied off. Two, this violates Mr. Williams's 100 percent tie off rule which in turn violates the fall protection standard. Three, Williams Contracting was not enforcing its 100 percent tie off rule which, four, proves constructive knowledge of the violation. Williams was not enforcing its tie off rule. *Del-Cook Lumber.*

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[11] A double lanyard is basically one strap where it attaches to the employee's back and two straps on the other end. An employee can use the one strap to tie off; when he is moving and must unhook, he attaches the second strap beyond the barrier, the vertical beam, and then unhooks the first and keeps moving.

Labor, then, has proved all four elements of the violation: the fall protection standard applies; the terms of the fall protection standard were not met; Williams Contracting employees were exposed to the hazard of falling; and Williams had constructive knowledge of the violation because they were not enforcing the 100 percent tie off rule as they had alleged. *Ormet, supra.*

At the trial Williams produced witnesses who said they could use single lanyards if they wanted or double lanyards. But these employees said they were using single lanyards on the day of the fall. When asked what type of lanyards the employees were using that day, the compliance officer said "Just a single lanyard is all that was found." TE 78.

Labor's compliance officer said he spoke confidentially with several Williams employees during his inspection. KRS 338.101 (1) (a) says the investigator, the CO, may during his inspection speak privately with employees and even employer representatives. Then KRE 508 says the labor cabinet has a privilege to keep this employee's identity confidential. CO Dickerson said "I was told that they [Williams employees] did not tie off immediately upon exiting the ladder." TE 72. Dickerson, at the time, got this information into the record without triggering an objection from Williams's lawyer. This is critical because Williams in its brief to us has objected to information from unnamed informants. Regardless of Williams's objections, this information, that employees moved about the tower structure, at height and without tying off, was received into evidence without objection. TE 72.

Employee use of single lanyards while working in the tower provide additional proof that Williams Contracting had constructive knowledge of the fall protection violation. In *N & N Contractors, Inc*, 255 F3d 122, 127 (CA4 2001), CCH OSHD 32,360, page 49,665, BNA 19 OSHC 1401, 1403, the fourth circuit court of appeals explained the relationship between reasonable diligence and constructive knowledge:

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

Every employer, and Williams Contracting is no exception, has a duty to comply with the occupational safety and health standards. KRS 338.031 (1) (b). From *N & N Contractors* we learn an employer, as a part of his duty to enforce the standards, must "inspect the work area and anticipate hazards." If Williams Contracting has complied with the law's duty to enforce the standards, and to inspect the work area to anticipate hazards, then it has been reasonably diligent. If Williams has been reasonably diligent, then labor cannot prove constructive knowledge of the violation. If Williams employees worked in the tower without being tied off when they maneuvered past a vertical support beam, and we find this is so, then Williams has failed to inspect the work area and to anticipate the hazard of falling when employees were not tied off. At the time of the fall, the foreman and superintendent were elsewhere and had to be summoned to the scene. Mr. Hatfield, a lead man,

worked on the ground level where he could not see the two Williams employees negotiating past vertical beams.

Our Hearing Officer's
Recommended Order To
Dismiss and the Employee
Misconduct Defense

In her recommended order our hearing officer said:

> Neither Foreman Jones nor Superintendent Cope knew or had reason to know that King was not tied off when he fell. Their testimony indicated that they were both surprised that King still had his lanyard hooked to the breast strap. The evidence was clear that King was acting against company policy and procedure by not being 100% tied off. The burden of proof was on the Complainant and that burden was not convincingly met.
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> RO 8 (emphasis added)

We have found Gary Williams Contracting had constructive knowledge its employees were not tied off while at work in the tower. In the four sentences quoted above, our hearing officer has conflated employer knowledge and employee misconduct; they are two different issues with different burdens of proof. She says Foreman Jones and Superintendent Cope had no reason to know Mr. King was not tied off when he fell. We have disagreed with our hearing officer and reversed her on this point. We found labor proved Williams had constructive knowledge of the violation because the company was not enforcing its rules on fall protection and was not inspecting the work area to anticipate hazards. *Del-Cook Lumber* and *N & N Contractors*, *supra*.

Then our hearing officer says Mr. King was violating the company rules about being tied off while working in the tower. In her next sentence our hearing officer says labor had the burden of proof. We are not sure if our hearing officer was saying labor has the burden to prove the four elements of the violation, *Ormet, supra*, which is correct or whether labor had the burden to prove the employee misconduct defense which is not.

Out of an abundance of caution, prompted by our hearing officers's comments that Mr. King was acting against Williams 100 % tie off policy and labor's argument the company failed to prove the employee misconduct defense, we will address the elements of the defense. In *Jensen Construction Co*, CCH OSHD 23,664, page 28,695, BNA, 7 OSHC 1477, 1479, (1979), the federal commission spelled out the four elements which an employer must prove to have the citation dismissed on the grounds of employee misconduct. It is difficult to prove all four, deliberately so. They are:

> 1. the employer has safety and health rules designed to prevent the violation,
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> 2. the employer has adequately communicated these rules to its employees,
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> 3. the employer has taken steps to discover violations and
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> 4. the employer has effectively enforced the rules when violations have been discovered.

Labor in its brief urges us to find Williams did not prove the employee misconduct defense, citing to testimony and authority. Brief, pages 4 – 6. But King

acting against company policy does not by itself prove the affirmative defense of employee misconduct. *Jensen Construction.*

Mr. Gary Williams said he terminated employees for drug and alcohol use; but he produced no documentation. Williams had safety rules, at least it had a rudimentary tie off rule. Exhibit 12. As labor observed in its brief to us, Williams, however, submitted no information about what fall protection training employees received or at what intervals it trained its employees, Labor's brief at 5. We find no written proof in the record that Mr. King received such training.

In its petition for discretionary review (PDR), labor says the hearing officer failed to discuss two elements necessary for the affirmative defense of employee misconduct: number three, whether the employer had a system for discovering violations, and, four, whether the employer had a system of disciplining employees for violations of the safety rules. We find Williams had no system for detecting violations, at least we were not presented with one, and we find Williams had no system for disciplining for violations of its fall protection rules.

In addition, where the proof shows employees were regularly violating Williams's tie off rule while working in the tower, the employee misconduct defense will not lie. *Elgin Roofing Co*, a federal ALJ decision, CCH OSHD 32,300, page 49,353, BNA 19 OSHC 1394, 1396 (2001).

Gary Williams's Brief
to the Commission

Williams's larger problem is it did not plead employee misconduct in its answer to labor's complaint. Tab 7, the record of proceedings. And in its brief to the

commission Williams did not raise, did not discuss, the employee misconduct defense or its elements.

While Williams during the trial elicited proof the employees were trained in fall protection, especially Mr. King, and a foreman testified employees had been terminated for failing drug and alcohol tests, that is not the same thing as formally raising the defense or proving all four, necessary elements. *Jensen, supra.* Because Williams did not raise the defense to this commission, we find Williams has abandoned that defense.

Hearsay Statements
Of Employees
Related By
Compliance Officer

Gary Williams's lawyer Thomas Osborne moved to strike the CO's testimony about what employees told him; according to the CO these employees said when they got off the ladder used to gain access to the fifth level, they walked across the tower to the point where their work was to take place and only then tied off. When Osborne tried to find out their names, labor objected. This triggered Williams's objection and motion to strike the testimony. TE 108 - 109.

Our hearing officer properly denied Williams's motion to strike the testimony. TE 109. GW preserved this objection on page 4 of its brief to our commission where the company said *Davis v Mobil Oil*, a case cited by labor in its brief to us, did not apply. Then GW said there was no authority to withhold the names of the employees which is incorrect.

Kentucky rule of evidence (KRE) 801A (b) (4) is an exception to the rule against hearsay testimony; this rule says the compliance officer may while testifying relate what he has learned during his private conversations with company employees. KRE 801A (b) (4) applies so long as labor, usually through its compliance officer, proves the person with whom the CO spoke qualified as an employee of the respondent party (Williams), the employee was speaking about something involving his job duties or responsibilities and the employee was still an employee of respondent at the time he spoke to the compliance officer.

KRE 801A (b) (4) at our OSH trials works in concert with KRE 508 (a) and (b) which unfortunately is called the informer's privilege.[12] This rule says the state, for our purposes the labor cabinet, has a "privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer..."

KRE 508 (a) is not limited to non management personnel. KRE 508 (b) says a public entity may claim the privilege, may rely on the privilege, which labor has done. TE 108 – 110. Of course, where an employee's identity is revealed at trial, the privilege no longer applies. But for those employees with whom the CO spoke whose identities are not revealed, the privilege applies.

In *Davis v Mobil Oil Exploration and Producing Southeast, Inc*, 864 F2d 1171 (CA5 1989), a witness at the trial related what a Mobil Oil employee said about the

[12] Our commission has long held that the identity of these employees shall remain confidential; our position is supported by KRE 508 and KRS 338.101 (1) (a) which says compliance officers may speak privately with employees during the inspection. State and federal courts have long recognized the wealth of information employees possess about safety issues.

presence of drilling mud on the rig platform. This unnamed Mobil oil employee was wearing a Mobil hard hat and had the apparent authority to issue orders on behalf of Mobil Oil to the oil rig operator. At the trial Mobil Oil objected to this testimony; the trial judge denied the objection and permitted the testimony.

On review, and upholding the decision of the trial judge to permit the testimony, the fifth circuit court of appeals said:

> while a name is not in all cases required, a district court should be presented with sufficient evidence to conclude that the person who is alleged to have made the damaging statement is in fact a party or an agent of that party for purposes of making an admission within the context of Rule 801 (d) (2) (D).[13]
>
> At 864 F2d 1174

This statement by the court in *Davis v Mobil Oil*[14] is correct; but there is more to the rule, both FRE 801 (d) (2) (D) and KRE 801A (b) (4) which says:

> Admissions of parties...A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a part and is:
> A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship...
>
> KRE 801A (b) (4) (emphasis added)

KRE 801A (b) (4) is actually two rules: one for agents of a party and a second for servants of a party. Professor Robert Lawson in his *Kentucky Evidence Law*

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[13] Federal rule of evidence 801 (d) (2) (D) reads the same as KRE 801A (b) (4). Both say "A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is (4) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.
The rule permits the statements from agents and employees. The Mobil Oil man was an agent; the employees working for Williams are also covered by the rule.

[14] Professor Lawson cites to *Davis v Mobil Oil* on page 93 of his 2010 pocket part to his fourth edition.

Handbook, fourth edition, says "KRE 801A (b) (4) was borrowed from an identical provision in the Federal Rules....use of the exception does not require a showing of speaking authority by the agent or servant." At page 604.

Our case presents a KRE 801A (b) (4) issue. Labor's compliance officer talked with employees of Gary Williams who told him they walked from the ladder they used to gain access to the level to the platform where the work was taking place. During this walk from the ladder to the platform, the employees said they were not tied off. This testimony is admissible by virtue of KRE 801A (b) (4). It tends to prove Williams Contracting was in violation of the fall protection standard. KRE 508 and KRS 338.101 (1) (a) say the labor cabinet has a privilege to keep the identity of the informant confidential. In *Davis v Mobil Oil* the court permitted the hearsay testimony even though the identity of the Mobil Oil man was not known.

Compliance Officer Dickerson spoke with workers who identified themselves as Williams employees. TE 40. Here labor has proved the declarants were Williams employees who were so employed when the CO spoke to them - they were working on the tower. What the employees told the CO about walking on the tower structure without being tied off was specifically about the work they were doing on the tower. Thus, labor has proved the elements necessary for the hearsay testimony to be admitted

Our hearing officer did not err when she denied Williams's objection and permitted the testimony. KRE 801A (b) (4), KRE 508 and *Davis v Mobil Oil.* We deny Williams's objection to the hearsay testimony.

In Its Brief to the Commission
Williams Alleges Mr. King's
Use of Amphetamines
Caused His Fall

Gary Williams at the trial introduced Eddie King's medical records. Exhibit 9. These records indicate Mr. King, at the time of his hospital admission, was under the influence of amphetamines. In its brief to us Williams says:

> the only clear evidence of causation in this case is indicated by the hospital records in Exhibit 9 showing a positive reading for Amphetamine in Mr. King's system at a mega dose level of 3900ng/dL.[15]
>
> brief at page 9

This conclusory statement is the very last sentence of Williams's brief. It is the only statement about King's amphetamine use. There is no proof in this case about how Mr. King fell because there were no witnesses. Similarly, there is no proof in this record that Mr. King's apparent drug intoxication led to his fall or to clip his lanyard to the D ring on his chest. We do not know, will never know, why Mr. King fell. While we know King's lanyard failed to prevent his fall because it was clipped to his chest, that tells us nothing about why he fell. Superintendent David Cope said his employees, all of them, regularly clipped their lanyards to their D rings to keep them "from dragging the ground." TE 351.

When we researched this issue, we were not surprised to find an employer has a statutory duty to enforce the occupational safety and health standards (KRS 338.031 (1) (b)) whether or not his employees are intoxicated while on the job. In

[15] There is nothing in the trial record to indicate what 3900ng/dL means or its significance. We doubt mega dose is a medical term.

fact, no injury need be proven to establish a violation of the standards. As a famous old case puts it, "[o]ne purpose of the Act is to prevent the first accident." *Lee Way Motor Freight, Inc v Secretary of Labor*, 511 F2d 864, 870 (CA10 1975), CCH OSHD 19,320, BNA 2 OSHC 1609. This case, and many others, makes it clear the act is designed to prevent industrial accidents rather than to punish an employer for an injury.

In *Murray Roofing Company, Inc*, CCH OSHD 31,910, page 47,283, BNA 18 OSHC 1956, 1958 – 1959 (1999), an employee misconduct defense was rejected, and the citation upheld, even though there was evidence the injured employee was working while under the influence of alcohol. In *Murray* the administrative law judge (ALJ) said the employer failed "show it had established work [rules] designed to prevent the violation; it had adequately communicated the rules to its employees; it had taken steps to discover the violations of the rules; and it had effectively enforced the rules when the violations had been discovered."

In the case at bar, Gary Williams did not raise and did not attempt to prove the four elements of the employee misconduct defense. *Jensen Construction, supra.*

An employer must enforce the standards regardless of the circumstances. In the case at bar, Williams Contracting had constructive knowledge of the violation because it had failed to inspect for violations, to look to see if employees were moving about the tower without being tied off, and to enforce the fall protection tie off rule. These violations, Williams employees moving about the tower without fall protection, were not dependent on Mr. King's alleged intoxication.

In *Mayflower Vehicle System, Inc v Chao*, 68 Fed Appx 688, WL 21540983 (CA6 2003), BNA 20 OSHC 1161, an unpublished decision of the US court of appeals for the sixth circuit which nevertheless found its way into BNA, Mayflower was in the truck parts business; it used a mechanical power press in its factory. This press was operated with two hand buttons which must be pushed simultaneously for the machine to cycle. These buttons were designed to keep the operator's hands on the buttons when the press cycles and away from the point of operation where the work was done and where an employee could be injured if he put his hands into the machine.

At trial it came to light the machine was regularly operated with the stand which held the two buttons jammed up against a table for the truck parts. This put the buttons in a position which permitted an operator to cycle the press with a hand on one button and his knee on the other. That was what the operator was doing when his hand was severely injured.

A machine guarding standard said the buttons had to be a prescribed distance from one another and in a fixed position so they could not be moved; a formula took into account the speed of the machine and the machine stopping time if the buttons were released.

Mayflower wanted to defend by proving the employee's accident happened because he was high on cocaine. Denying the request, the judge said the cocaine use was irrelevant because the stand containing the buttons could be moved by anyone which was a violation of the standard even if there had been no injury.

In our case at bar, the compliance officer testified that employees told him they regularly walked, with no fall protection, from the ladder or the man lift to their work where a plywood platform was placed. Only then did they tie off.

Mr. Williams said "I don't know whether he had it [the cross beam strap] on him. I don't know whether it was hanging up. I can't say.' TE 186. David P. Hatfield, a carpenter working on the ground, testified that he did not know whether King had a crossbeam strap with him or not. TE 302. Luke Jones [foreman] indicated King was using a Miller harness with a BackBiter lanyard and the D ring. TE 329. However, he also said he did not know whether King had the cross beam strap that day. TE 331. Finally, David Cope testified that he did not see King with a crossbeam strap on the date of the accident. TE 359. We find Mr. King did not have a cross beam strap on his person when he fell.

This testimony about cross beam straps and perhaps their absence was in reference to testimony Williams employees used straps hanging up at critical places in the tower so they could use them to maneuver around vertical support beams without having to unclip, work around the vertical beam and then tie off again.

Despite the testimony from company witnesses they were always tied off when working in the tower, they could not say whether Eddie King had tied off while he was working and before he fell or was even properly equipped to work while tied off.

Our hearing officer, in support of her recommended order to dismiss, said the company had a one-hundred percent tie off policy. RO 7. This conflicts with David Hatfield's credible and compelling testimony. He was asked if it was "permissible to

unhook for any reason once you were tied off?" He said "Only when you was going from one side of a beam to the other, that was the only – you know, there's no other way of doing it, you know." TE 298. He reiterates this testimony several questions later: "Not without briefly removing." TE 299. At this point on direct examination, Mr. Hatfield confuses the use of fall protection harnesses and lanyards, required by the standard, with three points of contact. TE 299. Apparently, Mr. Hatfield believed three points of contact could substitute for use of the harness and lanyard when maneuvering around a vertical beam.

On rebuttal, CO Dickerson said three points of contact applied to those situations when an employee was climbing a ladder. TE 362. Dickerson, again on rebuttal, said during his inspection no one mentioned double lanyards, cross beam straps or chokers to him. TE 366.

We find Mr. Hatfield's testimony to be more credible than our hearing officer's acceptance of Williams's proffered one-hundred percent tie off policy. First of all Williams called Mr. Hatfield as its witness; Hatfield was employed by Williams. Two, Compliance Officer Dickerson said Williams employees used only single lanyards. TE 78. This is confirmed by Hatfield's testimony about employees unhooking to maneuver past a vertical beam. Three, Dickerson said Williams employees told him they would get off the ladder, walk to the point where they were working and then tie off. TE 78. Four, Mr. King when he fell wore a harness with a single lanyard hooked to his D ring which confirms what the CO learned during his investigation: Mr. King's harness had no cross beam strap, only the single lanyard.

Five, Superintendent Cope said Williams employees regularly walked around with their lanyards hooked to D rings on their harnesses to keep them "from dragging the ground." TE 351.

Williams either had no one-hundred percent tie off policy or they failed to enforce it as we have found.

Conclusion

Williams had constructive knowledge of the violation. Williams made no effort to raise an employee misconduct defense. Compliance Officer Dickerson's testimony relating what unnamed Williams employees told him about walking from the man lift or ladder to their work without being tied off and only tying off at that point was properly admitted because the CO's testimony complied with the KRE 801A (b) (4) exception to the rule against hearsay. See KRE 508. Williams made no attempt to prove Eddie King's amphetamine use contributed to his accident. Regardless whether Mr. King was impaired, Williams's duty was to comply with the fall protection standard. Labor has proved Williams failed to enforce the standard. *Del-Cook Lumber*, *supra*.

We reverse our hearing officer's recommended order. We affirm the serious citation and the penalty of $1,500. We adopt our hearing officer's findings of fact to the extent they support our decision.

It is so ordered.

November 1, 2011.

Faye S. Liebermann
Chair

Michael L. Mullins
Commissioner

Paul Cecil Green
Commissioner

Certificate of Service

I certify a copy of this decision was this November 1, 2011 mailed to the following in the manner indicated:

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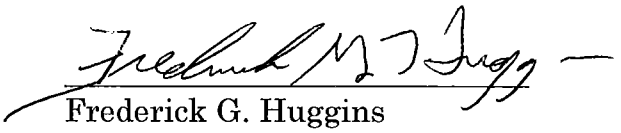

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