

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4660-09

SECRETARY OF THE LABOR CABINET
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v

D. W. WILBURN, INC

RESPONDENT

* * * * *

James R. Grider, Jr, Frankfort, for the Secretary. Michael R. Eaves, Richmond,
for Wilburn.

DECISION AND ORDER OF THIS
REVIEW COMMISSION

This case comes to us on labor's petition for discretionary review (PDR); we granted review and asked for briefs. 803 KAR 50:010, sections 47 (3) and 48 (5). Our hearing officer in her recommended order dismissed the single, serious citation issued to Wilburn.

Labor's citation alleged a violation of the scaffolding standard which says employees must be protected from falls of more than ten feet. Exhibit 1. Labor alleged three Burton Masonry employees working on scaffolds some eleven feet above the concrete below were exposed to a hazard because either the scaffolds had no guardrails or the employees had no personal fall protection - harnesses and lanyards.

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 (2000), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act.

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."

Our hearing officer found Wilburn was the general contractor with supervisory authority over Burton Masonry, its masonry subcontractor. Recommended order, page 8³ (RO 8). At issue is whether Burton employees working on the scaffold were exposed to the hazard of a fall to a concrete floor below. Our hearing officer found Wilburn as general contractor⁴ was subject to the scaffolding fall protection

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

³ For the convenience of the parties and reviewing courts, should our decision be appealed, we have numbered the recommended order's pages. Page 1 is the notice of receipt of recommended order and page 9 concludes with the hearing officer's signature.

⁴ 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.

standard even though none of its own employees were exposed to the hazard of working on the scaffold without fall protection. RO 9.

In its defense to the citation, Wilburn said it could not be cited as a controlling employer on a multi employer work site, citing to a little noticed federal regulation. 29 CFR 1910.12 (a). Wilburn in its brief cited to the now overturned federal review commission's *Summit Contractors* decision. On appeal, the eighth circuit reversed the federal commission and held a contractor in control of the work site, but with no employees exposed to a hazard, could be cited for a violation of the occupational safety and health standards. *Solis v Summit Contractors, Inc*, 558 F3d 815, 827 (CA8 2009), CCH OSHD 32,990, BNA 22 OSHC 1496.

The eighth circuit court of appeals in *Summit Contractors* has persuasively rejected this 1910.12 (a) argument as have we. 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 for a violation even though none of his own employees is exposed to the hazard. See *Brennan v OSHRC and Underhill Construction Corporation*, 513 F2d 1032 (CA2 1975), CCH OSHD 19,401, page 23,165, BNA 2 OSHC 1641, 1645, where the court, citing to 29 USC 654 (a) (2),⁵ said all employers on a construction site must enforce the safety and health standards for the benefit of all employees working at the site.

⁵ KRS 338.031 (1) (b) contains the same language as 29 USC 654 (a) (2).

Both *Solis v Summit Contractors, Inc, supra*, and *Morel⁶ Construction Co, Inc, East Iowa Deck Support, Inc and Midwest Steel, Inc*, KOSHRC docket 4147-04, 4151-04, 4149-04, cited to *Underhill*.

Our hearing officer in her decision cited to *Summit Contractors⁷* and to one of our cases, *Hayes Drilling*, which upholds the multi employer work site doctrine. *River City Development Corporation, Hayes Drilling, Inc, and D. W. Wilburn, Inc*, KOSHRC 4251-05, 4248-05, 4253-05. On September 2, 2011 the court of appeals of Kentucky issued a decision affirming our *Hayes* decision; the court designated the decision to be published. *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.

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).

In this case only the compliance officer (CO) testified; after direct examination Wilburn cross examined the witness. Labor always has the burden of proving the citation. ROP 43 (1).⁸ If at the hearing the respondent employer does not believe labor has met that burden, it does not have to put on any evidence and that is what Wilburn did.

⁶ Our decisions can be found at koshrc.ky.gov.

⁷ The hearing officer, quoting from the eighth circuit's *Summit* decision, said "We find that the plain language of section 1910.12 (a) does not preclude the Secretary's controlling employer policy."

⁸ 803 KAR 50:010, section 43 (1). We know our regulations are not rules but refer to them as such for convenience.

The serious citation

29 CFR 1926.451 (g) (1)⁹...three employees of Burton Masonry, a subcontractor of D. W. Wilburn, were engaged in masonry activities...on a tubular scaffold that was approximately 11 feet above the level below without the proper use of guardrails or personal fall arrest systems.

This citation carried a \$3,000¹⁰ proposed penalty. Exhibit 1.

The cited standard

The standard says in part:

1926.451 (g) **Fall protection.** (1) Each employee on a scaffold more than 10 feet...above a lower level shall be protected from falling to that lower level. Paragraphs (g) (1) (I) through (vii)¹¹ of this section establish the types of fall protection to be provided to employees on each type of scaffold...

According to the terms of the cited standard, if labor cannot prove Burton Masonry employees were exposed to the hazard of falling more than ten feet to a lower level, then we must dismiss the citation. KRS 338.071 (4).

Throughout his testimony, the compliance officer discussed photographs he had taken during his inspection. Exhibits 2 through 11. Photographic exhibit 8 shows

⁹ Adopted in Kentucky by 803 KAR 2:411, section 2 (1).

¹⁰ When first questioned about the \$3,000 proposed penalty, CO Davis said "It started out at five thousand dollars..." Transcript of the evidence, page 30 (TE 30). That was not accurate; a discussion of the penalty always begins with a consideration of the seriousness of a penalty and the likelihood of an injury, given the hazard. A penalty calculation never starts out at five thousand dollars. Several pages later in the transcript, the CO said the hazard was high serious because a fall 11 feet to concrete could cause death. TE 30 and 32. He found greater probability of an injury because employees had been working on the scaffold, without fall protection, since 7:00 AM and the inspection was around noon. He observed the employees on the scaffold for 30 minutes. TE 32. He awarded 40 % for size, Wilburn had 100 employees. TE 31. He gave no history credit because of a 2006 repeat which was a final order, TE 31 and 58. He awarded no good faith because the violation was high serious and greater probability. TE 32. \$5,000 times .4 = 2, 000. \$5,000 – 2,000 = \$3,000. 803 KAR 2:115, section 1 (2).

¹¹ 1926.451 (g) (1) (vii) requires the use of guardrails or personal fall arrest systems.

the construction site from a distance. We can see a scaffold on the second floor of a building; the scaffold is two bucks high or around eleven feet off the concrete floor below. From this photograph we can see one employee standing on top of the second buck of the scaffold. Below him and to his front, toward us, is a fall to a one buck high scaffold. In other words, the photograph shows two scaffolds, one in front of the other. This fall would be five and one half feet and so it is not a violation of the standard which requires an unprotected fall of ten feet for the standard to take effect. Compliance Officer Gary Davis testified there was a gap between the two scaffold sets and this employee could have fallen eleven feet between the gaps to the concrete floor below. TE 54. To facilitate our discussion of the photographic evidence, we will refer to this Burton employee, whose name we do not know because of our law on employee confidentiality, as Mr. Tan – he wore tan overalls. But our hearing officer did not believe Compliance Officer Davis knew that much about the two scaffold sets because, as he said, he had not been on the scaffold or even very near it. TE 44. Photograph 2 shows Mr. Tan on an outrigger attached to the scaffold. He could not fall in one direction because the concrete block wall would have stopped him. If he fell the other way, a work table was directly behind him; and if he fell over that, exhibit 2 shows a scaffold platform beneath him. This lower platform is five and one half feet below Mr. Tan's position and so does not present a violation of the ten foot scaffold fall protection standard. TE 44.

From exhibit 8 we can see the heads of two other employees standing on the top of the two buck high scaffold. But from 8 we cannot see their situation, only that

they are working from the top of a two buck high scaffold. Then the CO took photographs of the same scaffold from closer up, photographs 9 and 10. Again, we can see only the heads of these two men, the men the CO said were exposed to the fall.

Labor's compliance officer was not able to supply critical details according to our hearing officer. RO 6. We find his inability to climb onto the scaffold prevented him from fully understanding the arrangement of the two scaffold sets placed next to one another. TE 38 and 40.

According to the recommended order, three Burton employees stood on the two buck high scaffold; they were protected from falling off the scaffold to the rear from the perspective of a viewer of exhibit 8 because of the concrete block wall which was placed next to the scaffold where the masons could reach it to do their work. RO 5. The hearing officer said the compliance officer did not know "how tightly the first tier scaffolds were against each other. He had no credible evidence as to how fully planked the first tier scaffolds were. Davis never got sufficiently close to the hazard to accurately determine its nature." RO 6. Hearing Officer Durant found there was no substantial evidence to determine a violation occurred. RO 6. We agree.

Photograph 10 shows the scaffold from the front. Labor in its PDR quoted some testimony where the CO said, in response to a question from the hearing officer, employees could fall from the two buck high scaffold to the concrete floor below. TE 50-51. But we cannot see, and apparently neither could our hearing officer, an

eleven foot fall because the right hand view, from our perspective, is hidden by the concrete block wall.

Photograph 7 is not well focused; but it does show, on the right side, the same two men who are seen in pictures 9 and 10. These two men, only partially visible in pictures 9 and 10, supposedly could walk out toward us and fall off the top end of the scaffold closest to the camera and to our right as we look at the photograph. But fall to what below? The compliance officer said they would fall between the two scaffold sets to the concrete floor below, an eleven foot fall. But we cannot see that from the photographs and neither apparently could our hearing officer. Instead, we see in picture 2 a fall from the top scaffold platform to the platform below which is five and one half feet down from the one above. TE 50.

Labor's compliance officer said he took one hundred photos but we only have ten in evidence. TE 62. If the compliance officer was not going to go onto the scaffold, to support the citation, he needed to position himself where he could see and photograph what he described as a violation.

Mr. Tan is shown at the top left of photographs 9 and 10; if he stepped forward toward the camera, he would fall one buck below to where the cement mixing trough and the employee in jeans, dark blue shirt and white hard hat stood; we will refer to this gentlemen as Mr. Blue. That left side of the scaffolding, from the camera's perspective, does not present a fall hazard according to the cited standard which takes effect at ten feet.

But the right side of photos 9 and 10 depict an area where the CO said an employee could walk out to the end above the red or orange water cooler and fall eleven feet to the concrete floor of the second story of the new building. That is the point labor makes in its PDR. We cannot, however, see a ten foot fall hazard in the photographs and we so find.

Our Hearing Officer's
Recommended Order

As we said, our hearing officer dismissed the citation; she said labor's compliance officer, the only witness in this case, produced "no substantial evidence" of a violation. RO 6. She said Wilburn as the general contractor had control of the work site and so could be cited under the multi employer work site doctrine. *Summit Contractors, supra*.

Photograph 8 was taken from the rear of the building under construction, according to the compliance officer. TE 66. This photograph, the left side from the viewer's perspective, shows employees standing on top of two levels of scaffolding. These employees worked for Burton Masonry. TE 57.

From photograph 8 we can confirm the scaffolding was two bucks high and we so find. Because each buck is five and one half feet tall, only the employees working on the top scaffold are allegedly exposed to the hazard of an eleven foot fall. TE 50. Employees working on the concrete floor upon which the scaffolding sits, are protected from falls by a wooden guard rail. Exhibit 8. Employees working on top of

the first scaffold tier, exhibit 8, are confronted with the possibility of a fall of five and one half feet and so the cited scaffolding standard does not apply to them.

From the perspective of exhibit 8, there is a concrete block wall behind the employee standing on top of the second tier; this is Mr. Tan. To his left, from our perspective, is another brick wall at a right angle to the wall behind him; these two brick walls form an L shape. We do not know what is to Mr. Tan's right because our view is blocked and because the compliance officer did not get up on the scaffold or the concrete floor of the building to take a look. TE 44.

Compliance Officer "Davis conceded that his concern was that a mason [Mr. Tan] would fall from the second tier of the scaffolding toward the front of the room to the concrete below." RO 5. Our hearing officer said Burton had two tiers of scaffolds, one in front of the other from the perspective of photograph 8. RO 5.

Our hearing officer said:

Davis's testimony provided an insufficiently precise description of the layout of the scaffolding to determine whether a fall from the top tier would be 5 1/2 feet on to the first tier or would be 11 feet onto the concrete floor. He had no credible evidence as to how tightly the first tier scaffolds were against each other. He had no substantial evidence as to how fully planked the first tier scaffolds were. Davis never got sufficiently close to the hazard to accurately determine its nature. The perspective of the photographs makes it difficult to assess the situation without more help from [CO] Davis.

RO 6

We agree with the hearing officer's reasoning. Exhibit 2 is a side view of the scaffolding which can be seen through a window opening in the concrete block

structure. In the photograph, Mr. Tan stands on an outrigger attached to the second tier of the scaffold next to the wall. Behind him is a mason's work table perhaps a foot and one half in width. Then there is a fall to the first tier scaffold below. This first tier platform supports some buckets and a concrete block. From this photograph, it appears Mr. Tan would fall, if one were to occur, five and one half feet to this first tier platform; this supports our hearing officer's analysis. Our hearing officer said she "was unable to meld Ex. 2-6 together with Ex. 7-10 and the Compliance Officer was unable to provide the unifying perspective...There was no satisfactory testimony to determine the perspective of Ex. 11." RO 6.

Labor's Brief to the
Commission on
Discretionary Review

When we called this case for review and asked for briefs, we posed several questions to the parties as our rules permit. ROP 48 (5). Labor agrees Mr. Tan is standing on top of the second tier scaffold, the one allegedly in violation of the fall protection standard. Labor said the photographs depicted no hand rails for photos 7, 9 and 10. We agree, but 8 does show a wooden hand rail for employees working beneath the scaffolds and on the concrete floor. Labor's brief does not, however, take issue with the hearing officer's analysis of the compliance officer's testimony and his photographs or the hearing officer's conclusion to dismiss the citation.

Wilburn's Brief to the
Commission

Wilburn of course agrees with the hearing officer's analysis. Its brief says Mr. Tan is only exposed to a five and one half foot fall; Wilburn says photograph 9 shows Mr. Blue standing on the lower scaffold platform. If Mr. Tan were to fall from where he is standing, says Wilburn, he will fall onto the lower scaffold.

Photographic exhibit 2 shows the juxtaposition of the second tier scaffold and outrigger to the first tier scaffolding platform. Mr. Tan according to photo 2 would fall five and one half feet to the first tier scaffold platform which is not a violation of the cited standard. As Wilburn observes, the photographs do not depict any gaps in the scaffolding planking on the first tier where Mr. Blue works, right below Mr. Tan, even though the compliance officer said he saw gaps through which Mr. Tan would fall to the concrete. TE 54.

Wilburn said *Summit Contractors*, the eighth circuit's decision, is not controlling. We do not agree. *Summit Contractors* convincingly demonstrates the labor department may cite a controlling general contractor even though he has no employees exposed to the hazard. We reached the same conclusion in our *Morel* decision which has been upheld by our Kentucky court of appeals.¹² See also *Hargis v Baize, supra*.

Labor 's Reply
Brief

¹² *Morel Construction Co, Inc, et al*, KOSHRC 4147-04, 4151-04 and 4149-04. Our court of appeals upheld the *Morel* decision in *Department of Labor v Morel Construction Co, Inc; Midwest Steel Deck Support, Inc; and Kentucky Occupational Safety and Health Review Commission*, 2010-CA-000193, rendered January 28, 2011 and ordered to be published on March 24, 2011. Midwest has filed a motion for discretionary review with the Kentucky supreme court which has not ruled on the motion.

Labor quotes testimony from its compliance officer to the effect that Burton employees seen in exhibit 10 on the right side of the photograph are exposed to an eleven foot fall. TE 50 - 51. In photograph 10 the concrete block wall obscures our view of any fall hazard to the right side of the photo. Because the compliance officer testified he did not get up on the scaffold, and so avoid exposing himself to any hazards, he was unable to document a fall hazard.

Discussion

We find the lack of photograph documentation of an eleven foot fall hazard telling. Our hearing officer found the photographs do not show an eleven foot fall. We adopt her reasoning and conclusions.

In *New England Synthetic Systems, Inc*, CCH OSHD 31,818, BNA 18 OSHC 1818, 1820 – 1821 (1999), a federal administrative law judge upheld a scaffold citation where the employer had provided neither guard rails nor fall protection harnesses to employees exposed to a ten foot fall from a scaffold. New England witnesses said the scaffold was being dismantled and was not a violation; but a little old lady who lived in the apartment complex where the work took place testified the scaffold had been up and in that condition, without fall protection, for five days. We infer the little old lady directly observed the violation and so testified. In our case the compliance officer's photographs do not document a violation.

In *Ormet Corporation*, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), the federal review commission set out the four elements labor must prove for the commission to sustain a citation;

In order to prove that an employer violated a standard, the Secretary must show that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew,¹³ or with the exercise of reasonable diligence, could have known of the violative conditions.

The standard is about scaffolds and so it applies. Three Burton employees worked on the scaffold and so labor proved employee exposure to a hazard; Wilburn is subject to the multi employer work site doctrine. *Summit Contractors, supra*. Wilburn had knowledge, and constructive knowledge, because Jeff Edwards, the company's on site superintendent, could have seen the alleged hazard if he had inspected the scaffold; for example, the CO took photo 6 showing Mr. Edwards up in the building. Mr. Edwards had "the duty to inspect the work area and anticipate hazards" as well as the opportunity. See *N & N Contractors, Inc v Occupational Safety and Health Review Commission*, 255 F3d 122, 127 (CA4 2001), CCH OSHD 32,360, page 49,665, BNA 19 OSHC 1401, 1403, on reasonable diligence and constructive knowledge. See also KRS 338.991 (11).

The only controversial element for the case at bar is whether Wilburn violated the terms of the standard – that is whether Mr. Tan and the other two Burton employees were exposed to a fall of eleven feet. Our hearing officer said labor did not prove that to her satisfaction and so she dismissed the citation. No photographs show an eleven foot fall for Mr. Tan or the other two employees. But photo 3 shows

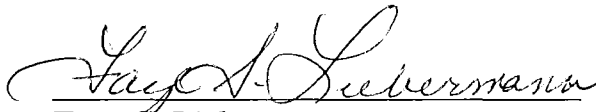
¹³ The comma should come after the word "or," not before it. Nevertheless this is how it is punctuated by OSHRC on line as well as CCH and BNA.


perhaps a five and one half foot fall. Photographs 2 and 3 show the top tier of the scaffold where Mr. Tan stood was not fully planked. That was an apparent violation which was not cited. Perhaps if the CO had gotten a closer look at the scaffold, or climbed it, he would have cited for the failure to fully plank the scaffold.

We affirm our hearing officer's recommended order to dismiss the citation for lack of proof about the nature of the fall. We adopt our hearing officer's order.

It is so ordered.

October 4, 2011.


Faye S. Liebermann
Chair


Michael L. Mullins
Commissioner


Paul Cecil Green
Commissioner

Certificate of Service

I certify a copy of this decision and order of the review commission was served on the parties this October 4, 2011 in the manner indicated:

By messenger mail:

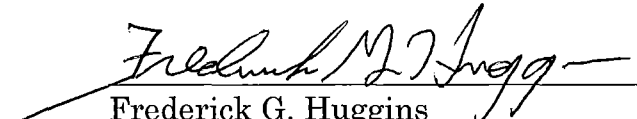
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