COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4669-09

SECRETARY OF THE LABOR CABINET — COMPLAINANT

v

D. W. WILBURN, INC — RESPONDENT

* * * * * * * * * *

James R. Grider, Jr, Frankfort, for the secretary. Michael R. Eaves, Richmond, for D. W. Wilburn.

DECISION AND ORDER OF THE REVIEW COMMISSION

This case comes to us on Wilburn's petition for discretionary review. We granted review and asked for briefs. 803 KAR 50:010, sections 47 (3) and 48 (5) (ROP 47 (3) and 48 (5)). Labor, in a single citation, charged Wilburn, the controlling general contractor, with permitting subcontractor Clay Hoskins to expose its employees to a fifteen foot fall hazard. Subcontractor employees were finishing the concrete surface of a poured floor in a building under construction. The willful serious citation carried a proposed penalty of $21,000. According to the amended citation, the Clay Hoskins employees were not protected by either guardrails or fall protection harnesses.

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

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[1] In *Kentucky Labor Cabinet v Graham,* Ky, 43 SW3d 247, 253 (2001), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act.

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

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."

Prior to the hearing the secretary moved to amend the citation; our hearing officer granted the motion.

Here is the amended citation:

> 29 CFR 1926.501 (b) (1): "Unprotected sides and edges." Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet...or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.
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> > a. D. W. Wilburn, Inc's Site Superintendent and six employees of Clay Hoskins Construction, Inc, were not protected from falling from an unprotected edge 15 feet above the ground level of the first floor of the Somerset Community College site in London, Kentucky, during concrete pouring operations.
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> This violation is classified as Willful Serious. Factors that support this classification are as follows: 1) D. W. Wilburn, Inc's Site Superintendent stated that he was aware that no fall protection was being used at the concrete pour area; 2) The site superintendent stated that he was aware of KY OSH fall protection standards; 3) D. W. Wilburn, Inc's Site Superintendent was in charge of two other sites on which citations for fall protection violations were issued; 4) D. W. Wilburn, Inc's Site Superintendent was on the unprotected level with the subcontractor and his employees; and 5) The lack of fall protection was found to be voluntary in that the site superintendent stated conventional fall protection could not be used therefore the work continued without fall

protection.

Then the cited standard says:

> 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.

Compliance Officer Andrew Rapp is a certified safety professional; he has worked for the cabinet as an investigator for ten years. Transcript of the evidence, page 12 (TE 12). Mr. Rapp measured the height to be fifteen feet. TE 38. He took photographs showing Clay Hopkins employees finishing the poured concrete floor. Photographic exhibit 3a shows several employees standing near the unprotected edge and one employee operating a troweling machine. TE 20. We can see none of the employees depicted in 3a wore fall protection harnesses. One of the employees in 3a, according to CO Rapp, was Jeff Edwards, Wilburn's superintendent. TE 30. Two employees in 3a worked for Clay Hoskins, the concrete subcontractor. TE 30. While we can see the employees in 3a, from their waists up, standing near an unprotected edge which is fifteen above the ground below, from the perspective of the photograph it is impossible to determine how close the employees were to the edge. When CO Rapp was asked if he could tell how close the three workers in 3a were to the unprotected edge, he said "Only approximately." TE 50.

Photograph 3d shows the trowel machine operator, again without a fall protection harness, standing next to his machine to adjust it. We cannot see the operator from the knees down; here again, we cannot tell how close to the edge he

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

was standing. CO Rapp said the fall protection standard applied to the trowel machine operator while on the machine and off. TE 89 - 90. But CO Rapp said a standard rail would not be required to support more than 200 pounds of force – "So that's pretty much all we can enforce...I mean as far as I know, we would not require a barrier that could support a thousand pound...machine." TE 90.

Photographs 3a through 3g show employees working near the unprotected edge. But we cannot tell from the photographs how close they were.

Photographs 3e and 3f show two welders who were not Clay Hoskins employees; photo 3g depicts one of the welders. We infer these welders worked on site for another subcontractor. Compliance Officer Rapp said these two welders, also exposed to the fifteen foot fall, were properly tied off. TE 24. Mr. Rapp was asked if he had any concerns about the welders. He said "No. Actually they had full body harnesses tied off to the floor joist. TE 32. These welders, properly tied off, were the only employees working on site with the fifteen foot fall directly below them.

CO Rapp took photographs 3h through 3o; there are no employees in these photos. Mr. Rapp explained the workers had gone home because "it was later in the day." TE 44. Rapp said photographs 3m through 3o show the unprotected edge; but they are not proof of employee exposure because there were no employees present. TE 37. Photos 3h through 3o convey no information about how close employees were to the edge because they were taken after employees had departed from the work site.

Photographs 3e, 3j, 3o and 3p show standard rails erected on the work site at the fifteen foot level. Mr. Rapp said 3o and 3p are "basically the same photograph." TE 37. Rapp said two Clay Hoskins employees leaning on a wooden rail in 3p were protected from the hazard of falling by the guard rail. TE 37 – 38. He said "the concrete blocks serves [sic] as a midrail and provides some protection." TE 38.

We must first decide on review whether the secretary proved the four elements necessary to find a violation of the cited standard. In *Ormet Corporation*,[4] 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,[5] or with the exercise of reasonable diligence, could have known of the violative conditions.

Because Clay Hoskins employees and Mr. Edwards were exposed to the hazard of a fall of fifteen feet, the cited fall protection standard applies. 29 CFR 1926.501 (b) (1) **Unprotected sides and edges**. Because the Clay Hoskins employees and Mr. Edwards in photographs 3a, 3b, 3c, 3d, 3e, 3f and 3g were not wearing fall protection harnesses and standard guard rails were not erected for their protection, we find the terms of the standard were not met; employees worked some fifteen feet above the ground below. Photographs 3a through 3g prove employees had access to the cited fall hazard. But even though we find the Clay Hoskins employees had

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[4] *Ormet* says nothing about willfulness.

[5] 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.

access to the fifteen foot fall hazard, we do not know how close to the edge they were from the photographic evidence. Mr. Rapp on cross examination declined to state how close an employee would have to be to the edge to prove employee access to the fall hazard. CO Rapp said "There is no distance or number of how far you are from the edge whether its a violation...The only difference it makes from working on the edge to being 10 to 15 feet away is probability [of an injury we presume]." TE 48. On this very point, the second circuit court of appeals rejected an argument that when an employee was ten to fifteen feet from the edge of an unguarded floor there was no exposure to the hazard of a fall. *Brennan v OSHRC and Underhill Construction Corporation*, 513 F2d 1032, 1039 (CA2 1975), CCH OSHD 19,401, page 23,166, BNA 2 OSHC 1641, 1646.

Finally, Mr. Edwards, depicted in photo 3a, was standing with two Clay Hoskins employees. We find Mr. Edwards, Wilburn's site superintendent, had actual knowledge of the fall protection violation. Our hearing officer said Mr. Edwards "was aware of the violation." RO 6. We agree. In *N & N Contractors, Inc*, CCH OSHD 32,101, page 48,239, BNA 18 OSHC 2121, 2122 (2000), the federal commission said:

> To meet her burden of establishing employer knowledge, the Secretary must show that the cited employer either knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition.

Mr. Edwards in 3a stood in an area where he and Clay Hoskins employees were exposed to the hazard of falling fifteen feet to the surface below. Neither Mr.

Edwards nor the Clay Hoskins employees wore fall protection harnesses. There were no guard rails in photos 3a, 3b, 3c, 3d, 3f or 3g.

Hearing Officer Stuart Cobb[6] affirmed Wilburn's willful serious fall protection citation and the penalty of $21,000.[7] Recommended order, page 7 (RO 7). We agree with our hearing officer to the extent that we conclude Wilburn committed a serious violation of the fall protection standard. For reasons we shall explain, we conclude the violation was not willful. But first we must discuss several issues raised by Wilburn.

Is the Violation Serious?

Wilburn argues the violation was not serious. This is not a serious argument. Photographs 3a through 3e prove employee access to a serious fall hazard. CO Rapp said the subcontractor employees spent some two hours hand troweling the edges of the floor. TE 39. The floor height measured by the compliance officer was fifteen feet. TE 31. We find a fifteen foot fall can kill or cause very serious injuries. KRS 338.991 (11), the definition of a serious violation, says in part:

> ...a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition... unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

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[6] Mr. Head conducted a trial on the merits. After the trial, Mr. Cobb was assigned by his office to write the recommended order.

[7] CO Rapp said the penalty calculation started at $5,000 because there was a high probability of death or serious physical injury. TE 45. Rapp said the company got 40 % credit for size because it had fewer than 250 employees. Rapp said the company got no history credit because of a previous inspection which was a final order. TE 45 – 46. And the company got no good faith credit because the gravity based penalty was high serious/greater probability. TE 46. That produced a serious penalty of $3,000 which the CO multiplied by seven because it was a willful violation. TE 47 and RO 3 and 4.

(emphasis added)

See *Flintco, Inc*, CCH OSHD 30,227, page 41,611, BNA 16 OSHC 1404, 1405 (1993), where the federal commission said:

> the Secretary need not establish that an accident is likely to occur in order to prove that the violation is serious. Rather, he must show that 'an accident is possible and there is a substantial probability that death or serious physical harm could result from an accident.'

CO Rapp said "They were exposed to a fall, fall off the edge of 15 feet which could be a fatal injury or a serious injury such as paralysis or internal organ trauma." TE 38. We agree with Mr. Rapp.

May a Controlling Employer Be Issued a Willful Citation?

Mr. Rapp said he cited Wilburn as a controlling employer because the company was "in charge of the site, in charge of scheduling and...to some extent in charge of their contractor's safety." TE 39. Wilburn contends a controlling employer on a construction work site, a controlling employer with none of his employees exposed to the hazard, cannot be cited for a willful violation. The law says otherwise.

In *Bianchi Trison Corporation*, CCH OSHD 28,599, BNA 20 OSHC 1801 (2004), Administrative Law Judge Nancy Spies in her recommended order said a controlling employer on a multi employer work site may be cited for a willful violation.

Then in *Milo Construction Corporation*, CCH OSHD 31,521, BNA 18 OSHC 1373 (1998), the administrative law judge makes several useful distinctions. In this case the ALJ dismissed a willful citation for two reasons. First, the CO, discussing

employer knowledge, failed to distinguish between actual and constructive knowledge. An employer must have actual knowledge for the violation to be willful, must actually know of the willful conduct. And second the ALJ says:

> The mere fact that Milo had been cited before under the fall protection standards, is, in itself, insufficient to establish willfulness.
>
> CCH page 44,897, 18 OSHC 1375

In *Milo* the company president admitted his company was the prime contractor; the ALJ said "the exposure of Milo employees, and Milo's ability to control the work site were deemed admitted." At CCH page 44,894, 18 OSHC 1374. Milo had hired subcontractors to do all the work on the project; Milo, the general, had no exposed employees. In *Milo,*, we learn an employer must have actual knowledge of the violation to have formed the intent to violate the standard or to be indifferent to the standard. And we also learn that simply because a company had been cited before is not necessarily conclusive proof the employer was willfully violating the standard. Milo sheds light on our case because Edwards was aware of the concrete finishing work. Labor's only witness, Compliance Officer Rapp, principally relies on previous citations as proof of willfulness. TE 62.

We note the ALJ did not rule out the willful characterization even though Milo was a controlling employer with no exposed employees.

Does 29 CFR 1910.12 (a) Prohibit the Secretary from Issuing Multi Employer Citations?

In its brief to us, and before the hearing officer, Wilburn argues an obscure federal regulation bars the secretary of labor from issuing citations to controlling employers with no employees exposed to the hazards.

The eighth circuit court of appeals in *Solis v Summit Contractors, Inc*, 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 *Underhill Construction, supra*, at 513 F2d 1038, CCH OSHD 19,401, page 23,165, BNA 2 OSHC 1641, 1645, where the court, citing to 29 USC 654 (a) (2),[8] 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[9] *Underhill* decision predates the 1910.12 (a) dust-up by some 30 years.

Both *Summit Contractors, Inc, supra,* and *Morel*[10] *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). Several

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[8] KRS 338.031 (1) (b) is written the same as 29 USC 654 (a) (2).
[9] Professor Mark Rothstein in his *Occupational Safety and Health* 2010 edition, calls *Underhill* "an important decision." Section 7:6, page 267.
[10] *Morel, et al,* can be found at koshrc.ky.gov.

months ago, 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 14.

Was this Citation Willful?

We have already concluded Wilburn committed a serious, but not willful, violation of the fall protection standard. As one might expect, willfulness has been extensively litigated. In Kentucky our statute says "Any employer who willfully...violates the requirement of any section of this chapter, including any standard[11]...may be assessed a civil penalty of up to seventy thousand dollars..." KRS 338.991 (1).[12] Willfulness has been defined by the case law. Our commission has embraced the majority rule[13] which has been adopted by ten circuit courts of appeal.

As Professor Mark Rothstein put it in his 2010 *Occupational Safety and Health Law* text:

> A citation for [a] willful violation will be vacated if there is a

[11] We use the terms standard and regulation interchangeably.
[12] Kentucky's statute and the federal, 29 USC 666 (a), are identical.
[13] We reject the more restrictive minority rule set out in *Frank Irey, Jr, Inc v OSHRC*, 519 F2d 1200 (CA3 1974), CCH OSHD 19,878, BNA 2 OSHC 1283.

failure to show 'plain indifference' on the part of the employer. One of the best indications of a *lack* of plain indifference is if the employer made any attempt at compliance. Accordingly, willful violations have not been found where employers have made good faith efforts to protect employee safety and health.

At page 440

Intercounty Construction[14] *Co v OSHRC*,[15] 522 F2d 777 (CA4 1975), CCH OSHD 19,858, BNA 3 OSHC 1337, is perhaps the most important case defining willful conduct; in that case the court said:

> 'willful' means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision properly is described as willful, 'regardless of venial motive.' *F. X Messina Construction Corp v Occupational Safety and Health Review Commission*, 505 F2d 701, 702 (CA1 1974), BNA 2 OSHC 1325.
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> At 522 F2d 779 – 780, CCH page 23,640, 3 OSHC 1339 (emphasis added)

Then the court said:

> [W]e are persuaded that it [willfully] means purposely or obstinately and is designed to describe the attitude of a [person], who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. *United States v Illinois Central Railroad*, 303 US 239, 243 (1938).
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> At 522 F2d 780, CCH page 23,641, 3 OSHC 1340 (emphasis added)

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[14] *Intercounty* has been adopted by the federal commission and the first, second, fifth, sixth, seventh, eighth, ninth, tenth and eleventh circuits. Rothstein, page 439.

While the DC circuit has apparently not adopted *Intercounty*, it takes the majority view found in *Intercounty. Cedar Construction Company v OSHRC and Marshall*, 587 F2d 1303 (CADC 1978), CCH OSHD 23,082, BNA 6 OSHC 2010.

[15] Certiorari denied, 423 US 1072.

According to the US supreme court in *Illinois Central*, willful means intentional disregard of or plain indifference to the statute or for our case a regulation. A general contractor's superintendent could be on site and see his subcontractor violating a standard and without taking any action, for example telling the subcontractor to stop doing that, indicate his indifference to that conduct.

Putting it in slightly different language, here is a definition of a willful violation formulated by the federal review commission in *Williams Enterprises, Inc*, CCH OSHD 27,893, page 36,589, BNA 13 OSHC 1249, 1256 – 1257 (1987):

> ...It is obvious from the size of the penalty which can be imposed for a 'willful' infraction – ten times that of a 'serious' one – that Congress meant to deal with a more flagrant type of conduct than that of a 'serious' violation...A willful violation is differentiated by a heightened awareness – of the illegality of the conduct or conditions – and by a state of mind – conscious disregard or plain indifference.
>
> (emphasis added)

Despite all the hyphens found in this definition, we take from *Williams Enterprises* the idea that Congress meant a willful violation to be of more consequence than a serious violation. An employer, for a willful citation to stand, must be shown to have a heightened awareness of the illegality of the conditions and a state of conscious disregard or plain indifference to the conditions.

Then in *Fiore Construction, Inc*, a review commission decision, CCH OSHD 32,335, page 49,574, BNA 19 OSHC 1408, 1409 (2001), the federal commission said "A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference...a

supervisor's willful actions or omissions may be imputed to an employer." (emphasis added)

Wilburn's History
of Prior Violations

At the trial Compliance Officer Rapp[16] said the first thing he looked for to establish willfulness was "history. Now you do not have to have a previous inspection to receive a willful violation." He said Clay Hoskins did not receive a willful citation because they had no prior history. TE 60. Mr. Rapp said Clay Hoskins was aware of the fall protection hazard, he had harnesses available, and still put his employees to work on the fresh concrete slab. And yet the CO did not find Clay Hoskins's conduct to be willful. TE 60.

Mr. Rapp was asked how "Wilburn's history...influenced you that this was a willful violation..." TE 73. He said:

> We had learned that there was 2 on this site. There had been previous inspections where citations were issued...there was several inspections in the past several years where fall protection citations were issued. [page 74] And one, of course, we know one that we put in the case file or the inspection number of the less than 3 years ago of a fall protection violation that became a final order.
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> TE 73 – 74

Labor then directed the compliance officer's attention to the inspections not "put in the case file." First of all labor asked about the two other citations. Mr. Rapp says "The details of all of the cases, I don't know." TE 75. He thinks, but cannot be sure, they were scaffolding cases. But he says they were not final orders of the

[16] Wilburn called no witnesses.

commission. TE 76. Mr. Rapp says, about cases which are not final, "when a case is under contest, it is essentially put on hold." TE 76. We could not have put it better ourselves.

Again Mr. Rapp was asked whether he used those open cases to determine if Wilburn's present citation was willful. He says:

> So this would show, even though, again, they are open cases, it would show the knowledge and experience with this field of safety. And that's fall protection.
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> Question: The fact that they had been cited but not convicted, which is a bad word, the fact that they had been cited but not convicted is an element of knowledge?
> Answer: Yes...I mean that's not how it is worded in the field operations manual or the multiemployer citation policy I should say. But we look at their level of knowledge and expertise...that's how I would view that.
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> TE 78

What we do not learn from this exchange are details which would assist us in the evaluation of Wilburn's, and particularly Mr. Edwards's, actual fall protection experience. For example, we do not know if Jeff Edwards, Wilburn's on site superintendent for the instant matter, was the supervisor for the other inspections. This is vital because an employer must have actual knowledge for a willful violation to lie. *Milo Construction, supra*, at CCH 31,521, page 44,897, 18 OSHC 1375.

We have not been provided with any details of the open inspections. Given the facts of the case before us, we would be particularly impressed with previous inspections involving, at height, the finishing of wet concrete floors and the use of trowel machines. As we shall explain, Mr. Rapp testified he did not think harnesses

and lanyards could be used by the Clay Hoskins employees who were finishing the wet concrete surface; he did not believe the harnesses could prevent a fall to the ground below.

Labor in its brief to the commission urges us to find this violation to be willful because of "Wilburn's knowledge of the site," that is, "Wilburn's history of fall protection citations (open fall protection cases and one closed fall protection case)." Page 3. We have two problems with labor's position. One, we have not been given any specifics about the prior cases, active or closed. Let us cite to a case which illustrates the type of information we would find compelling. In *E. L. Davis Contracting Co*, a federal commission decision, CCH OSHD 30,580, BNA 16 OSHC 2046 (1994), the company received a willful trenching citation. On the day before the cave in, an inspector for the city of Atlanta had visited the site and suggested Davis try "some alternative means of shoring the hole" because hydraulic jacks had failed to provide protection. Then the next day, the day of the cave in, the same inspector again visited Davis's work site. He found "the excavation was not sloped, shored or sheeted, even though two employees were working in it. [Mr.] Davis testified that the employees were ordered into the trench because of '[t]he demand of the job to get that manhole out of there and clear that intersection.'" At page 42,341, 16 OSHC 2051.

Based on those facts as well as prior citations, Mr. Davis's rejection of trenching advice offered to him by a city of Atlanta inspector in 1987 and Mr. Davis's refusal to pay penalties for prior OSH trenching violations, "I didn't feel like I owed it," the

federal review commission found the violation to be willful. At page 42,342, 16 OSHC 2052. We agree with the federal review commission – Mr. Davis's conduct was indeed willful.

Two, in *General Motors Corp, Electro – Motive Division*, CCH OSHD 29,240, page 39,169, BNA 14 OSHC 2064, 2069 (1991), GM received a citation for an alleged willful refusal to release medical records.

> The Secretary contends that GM's willfulness is demonstrated by its failure to provide [employee] Havell access to all medical and exposure records, even when the WC [workers' compensation] claim was amended, a few months after GM contested the citation, to specify that the alleged injury was to the 'lower back'... We cannot base a finding of willfulness on the mere fact that GM did not abate a cited violation during the pendency of these proceedings. Employers are not required to abate alleged violations until their contest is finally decided by the Commission, where the contest is 'initiated by the employer in good faith and not solely for delay and avoidance of penalties.'
>
> (emphasis added)

Labor, in the case before us, has argued we should find the instant violation to be willful because of Wilburn's history of prior violations; labor, however, has not provided us with any details of the alleged violations or, just as importantly, cited any to authority that permits the use of citations still in litigation to be used in support of a charge of willfulness.

For us to accept open, prior citations as proof of willfulness, we will need to be cited to authority; we will want to know what the employer learned as a result of the inspection.

In an effort to avoid any confusion about this matter, we do understand charges of willful or repeated conduct, found in the same penalty statute, are not the same. KRS 338.991 (1). While a citation alleging a repeat violation cannot stand without proof the employer had violated the same standard in the past and the citation was a final order of the commission, the same is not true of a charge of willfulness. Quite the contrary. It is not even necessary to cite to prior history to support a charge of willful conduct. Prior history of violations is but one method for proving willful conduct. "A willful violation need not be one for which the employer has been previously cited." *George Hyman Construction Company v Occupational Safety and Health Review Commission*, 582 F2d 834, 839 (CA4 1978), CCH OSHD 22,963, page 27,765, BNA 6 OSHC 1855, 1858.

In short, we do not find labor's prior history argument persuasive, either legally or factually.

Was Wilburn's Conduct
On The Job Site Willful

As we have found, labor proved Wilburn committed a serious violation of the fall protection standard. But even though Wilburn put on no witnesses, which is its right, a number of facts, when taken together, have persuaded us to conclude Wilburn's violation was not willful. ROP 43. Everything we learn comes from the CO. According to Mr. Rapp, Jeff Edwards told him he did not think guard rails could work because the masonry wall was not yet complete. Actually, the CO said more than that. He said Edwards told him the "incomplete masonry walls...would not be suitable for an anchoring guardrail system." This indicates Mr. Edwards had

seriously considered the problem. Mr. Rapp did not disagree. TE 42. Edwards told the CO steel posts seen in photo 3a were not "suitable. They could be damaged." TE 42. Here again Mr. Rapp did not disagree.

Jeff Edwards told the CO he could not use harnesses and lanyards because of the wet concrete work. CO Rapp agreed. Mr. Rapp admitted full body harnesses could be "difficult when you are working in concrete." TE 42. Then Mr. Rapp presented another problem; he said "They [the employees some fifteen feet above the ground] may have been too close to the ground to anchor off at their feet...they may have, even with full body harness, they may have touched the ground." TE 42 – 43.

Photographs 3e, 3f and 3g show welders, presumably working for another subcontractor, exposed to the same fall hazard. These welders worked where Jeff Edwards could see them. Photographs 3a, 3f and 3g. CO Rapp said he had no concerns about the welders who had full body harnesses which were properly tied off. TE 32.

Rapp also said "other areas looked fine as far as fall protection." TE 83. (emphasis added) Photographs 3e, 3i, 3j, 3o and 3p show guard rails - the concrete block walls form the lower rail. TE 38. Several photos show the same guard rail; these guard rails are not at a point where they would protect against the cited fifteen foot fall.

Intercounty says a violation may be willful when an employer is indifferent to the standard – in our case that is indifference to fall protection. But was Wilburn indifferent? As general contractor with control of the work site, Wilburn was

properly cited for a violation. Superintendent Jeff Edwards in photograph 3a was standing where the Clay Hoskins employees worked without fall protection. But also right in front of Mr. Edwards were the two welders, both wearing harnesses to prevent them from falling the same fifteen feet as the Clay Hoskins concrete finishers. Photograph 3p shows two Clay Hoskins employees leaning on the standard rail which, the CO said, protects them from a fall. TE 37 – 38. Mr. Edward as superintendent is responsible for the rails and for the welders wearing harnesses with lanyards because he controlled the work site.

Wilburn, according to CO Rapp, had an acceptable safety program including, we must infer, fall protection or Mr. Rapp would have said otherwise. TE 71.

In *McKie Ford, Inc v Secretary of Labor and Occupational Safety and Health Review Commission*, 191 F3d 853 (CA8 1999), CCH OSHD 31,915, BNA 18 OSHC 1906, the court said:

> There is substantial evidence that McKie's conduct demonstrated plain indifference. It had no meaningful safety program. Another employee at McKie had been injured in a similar accident. The workers' compensation claim form, which was filed through the company, described the injury as follows: 'cut finger-six stitches on middle finger on right-hand *caught in freight elevator*... Despite this prior accident, which the ALJ permissibly found was known to the company, employees kept riding the freight elevator habitually for years. The company did nothing of substance to prevent this dangerous practice. We think characterizing this course of conduct as plain indifference is a permissible application of the law.
>
> At 191 F3d 857, CCH page 47,306, 18 OSHC 1908
> (emphasis added)

Wilburn had an acceptable safety program. On the Wilburn work site, employees were protected from falls by the use of standard rails. Welders working on the Wilburn work site used fall protection harnesses and lanyards. From these facts, we cannot say Wilburn was indifferent to fall protection. *Intercounty, Williams Enterprises* and *McKie Ford.*

Intercounty says a violation may be willful if the company, through Mr. Edwards as superintendent, was knowledgeable of the standard and the fall protection hazard and then formed the deliberate intent to violate the standard. Here labor cites to previous fall protection cases, which we have discounted, and Mr. Edwards's statements to the CO. He told the CO he could not use harnesses and lanyards because of the wet cement. He said he could not put up standard rails but he knew about rails and used them elsewhere on site. Edwards told the CO the masonry walls were not finished and could not support standard rails. Edwards also said the vertical steel rods seen in 3b, 3c, 3d, 3f, 3g, 3h, 3i, 3m, 3n, 3o and 3p, likely many of these vertical steel rods appear in more than one photograph, would be damaged if used to support a standard rail.

What did the CO say about that? He said he did not think harnesses and lanyards could be used because of the wet cement and because they might not arrest a fifteen foot fall. Rapp also said, except for the area cited, fall protection on the site "looked fine." TE 83.

We cannot find intent to violate the standard where Mr. Edwards legitimately did not think harnesses and lanyards could be used – neither did the CO. We cannot

find intent to violate the standard when Mr. Edwards thought the masonry walls and the vertical steel rods could not be used to build a standard rail but standard rails were found elsewhere on site. While this is proof Wilburn violated the fall protection standard because there was no fall protection for the concrete finishing workers, that is not the same thing as proving willful intent to violate the standard. *Intercounty, supra.*

Because of the compliance officer's persuasive doubts about wearing fall protection harnesses with lanyards while finishing a wet concrete surface and his admission the harnesses and lanyards would likely not prevent a fall to the ground fifteen feet below, for us to find a willful violation we would want to see proof that Jeff Edwards had been counseled about these very matters and, in this instance, ignored advice about how to abate.

Rapp said Clay Hoskins had very little experience with the work site but Wilburn as general "would know the site in and out. They know the scheduling. They know what's going on." TE 61. But then Mr. Rapp said he did not know if Wilburn knew the concrete trucks were going to be early that day, the day of the inspection. TE 62. Based on the compliance officer's concession, we find Wilburn's knowledge of the scheduling was not an indication of willful conduct.

Finally, in *L. R. Willson and Sons, Inc*, CCH OSHD 31,262, pages 43,890 - 43,891, BNA 17 OSHC 2059, 2063 - 2064 (1997), the federal commission refused to find willful conduct where the employer had an excellent safety program and the company made "a reasonable good faith effort to comply with the standard." CO

Rapp said during his inspection he and Jeff Edwards discussed possible abatement options but came to no final solution. But CO Rapp said Edwards "planned on doing" something. TE 44. *Willson* suggests Wilburn had not committed a willful violation because it has a safety program and was in good faith discussing abatement options with the compliance officer. Recall, an immediate solution to the fall protection hazard was not critical because the compliance officer testified the employees had, during his inspection, left the site for the day.

Our Hearing Officer's Recommended Order

Hearing Officer Cobb said the violation was willful because, one, Wilburn was aware of the condition, the lack of fall protection, and, two, Wilburn had been previously cited for failure to provide fall protection. RO 6.

We have reversed our hearing officer who found Wilburn's citation to be willful. Knowledge of a violation, by itself, is not proof of willfulness; otherwise all citations would be willful. Actual knowledge is of course required for a violation to be willful. *Milo Construction, supra.* And yet, there is more to willfulness than that. As we have stated elsewhere in our decision, willfulness means:

> purposely or obstinately and is designed to describe the attitude of a [person], who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. *United States v Illinois Central Railroad*, 303 US 239, 243 (1938).
>
> *Intercounty Construction*, at 522 F2d 780, CCH OSHD 19,858, page 23,641, BNA 3 OSHC 1340 (emphasis added)

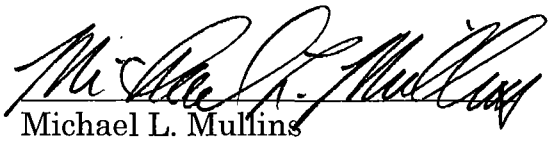
We have found labor failed to convince us Wilburn's history proved it engaged in willful conduct; we rejected labor's previous citation argument because it lacked detail and legal authority.

Hearing Officer Cobb said it was feasible to protect the employees with guard rails even though there is no such proof. RO 6. The only proof came from the compliance officer who said Edwards told him guard rails would not work. He then said Wilburn could have used scaffolding, aerial lifts or fork lift platforms even though they were only the CO's suggestions at the trial. Compliance Officer Rapp testified he and Mr. Edwards had discussed abatement solutions for the concrete finishers but the two of them had not resolved the matter because it was the end of the day and the workers had left the job site.

For the reasons we have stated, we characterize the citation as serious but not willful. We affirm the serious citation with a penalty of $3,000. We adopt our hearing officer's findings of fact to the extent they support our decision.

It is so ordered.[17]

December 6, 2011.



Michael L. Mullins
Commissioner

[17] Chair Faye S. Liebermann took no part in this decision.

Paul Cecil Green
Commissioner

Certificate of Service

A copy of this decision was served on the following in the manner indicated on December 6, 2011:

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