COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4733-10

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

INTERNATIONAL PAPER COMPANY — RESPONDENT

* * * * * * * * *

David N. Shattuck, Frankfort, for the secretary. George J. Miller and Courtney Ross Samford, Lexington, for International Paper.

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes to us on petition for discretionary review filed by Respondent International Paper ("IP"). We granted review and asked for briefs. By agreement of all parties, this case was tried with *Konecranes, Inc, dba Cranes Pro Services*, KOSHRC 4735-10. These two cases were not consolidated and so our Hearing Officer issued separate recommended orders. We have followed her example and have issued separate decisions on the merits. Although Konecranes and International Paper Company were represented by their own counsel at the trial, Mr. Shattuck prosecuted both cases on behalf of the Labor Cabinet (the "Labor Cabinet" or "Cabinet").

KRS 336.015(1) charges the Secretary of Labor with 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 ("Commission") "shall afford an opportunity for a hearing." KRS 338.141(3).

The Kentucky General Assembly created the 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 Commission, and the Commission may grant the PDR, deny the PDR, or elect to call the case for review on its own motion. 803 KAR 50:010 § 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 (8th Cir. 1973), the U.S. Court of Appeals for the 8th Circuit held that when the federal Occupational Safety and Health Review Commission ("federal Commission") hears a case it does so "de novo." See also *Accu-Namics, Inc v. OSHRC*, 515 F2d 828, 834 (5th Cir. 1975), where the Court stated "the Commission is the fact-finder, and the judge is an arm of the commission..."[2]

The Kentucky Supreme Court, in *Secretary, Labor Cabinet v. Boston Gear, Inc*, Ky., 25 SW3d 130, 133 (2000), held: "The review commission is the ultimate

[1] In *Kentucky Labor Cabinet v. Graham*, Ky, 43 SW3d 247, 253 (2001), our Supreme Court said because Kentucky's Occupational Safety and Health Law is patterned after the federal act, it should be interpreted consistently with the federal act.

[2] See federal Commission Rule 92 (a), 29 CFR 2200.

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 held as follows: "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."

Introduction

IP manufactures containerboard (cardboard), at its Henderson plant. IP uses an overhead, sixty ton crane which runs on rails the full length of the mill. This crane moves large rolls of cardboard, and the empty spools, about the mill. Konecranes, Inc. ("Konecranes") built this crane and has maintained it since that time. IP employees ordinarily use handheld controllers to operate the crane from the mill floor and the employees seldom use the crane bridge. Konecranes makes, sells, and services cranes all over the world.

IP operates its Henderson factory twenty four hours a day, 359 days a year. For the remaining six days, the plant is shut down so that its employees, as well as contractors, including Konecranes, may perform maintenance work and make capital improvements. Transcript of the evidence ("TE"), page 527.

On the day of the fatal accident, two Konecranes employees were performing maintenance on the crane. The deceased, Mr. Stephen Dohoney, a licensed electrician and a Konecranes employee, was working by himself on the crane bridge. Mr. Dohoney was replacing wire by substituting new wire for old wire. The various

witnesses generally agreed that the electricity to the crane could be de-energized (turned off) on the mill floor. Expert witnesses testified that the crane's power could also be turned off from the bridge where Mr. Dohoney worked at the time of his death.

At the time of his death, between 11:00 a.m. and Noon, Mr. Dohoney wore a full body harness used to negotiate an 18 inch gap between a walkway and the bridge of the crane which was some 70 feet in the air above the factory floor. (TE 661 and 650). Brent Jones, a Weyerhaeuser Designated Representative[3] ("WDR") testified that he was first notified that Steven Dohoney fell, suspended from his harness, and only later learned that Mr. Dohoney had been electrocuted. (TE 615 and the Hearing Officer's International Paper Recommended Order ("IPRO"), p. 11).

At the time of the fatality, the crane's electric power had not been turned off. Electricity in an industrial setting can be turned off, or de-energized, and the switch can be secured with a padlock so that it cannot be turned back on. Typically, the lock is then tagged. This procedure is called lockout/tagout or LOTO. The employee who hangs the padlock is then instructed to put the key in his pocket so no one else can unlock the padlock to activate the machinery or electricity.

Although no one was on the crane bridge except for Mr. Dohoney at the time of his death, it was stipulated by the parties that he was electrocuted while working on the 120 volt wires without locking out the current. Uninsulated electrician's tools were found on the crane bridge, and one tool found adjacent to the live wires was

[3] Weyerhaeuser once owned the IP plant and the acronym for the designated worker (WDR) was retained.

burned. At the time of his death, Mr. Dohoney was removing insulation from a live wire without wearing protective gloves. He was connecting new wire to the live wire from which he had removed insulation.

The Citations

The Labor Cabinet issued one serious citation to IP. Our hearing officer affirmed this one serious citation and the $4,500[4] penalty. (IPRO 24).

For serious item 1, The Labor Cabinet cited IP for its alleged failure to de-energize live electrical parts to which an employee may be exposed. The cited standard reads as follows:

> 29 CFR 1910.333(a)(1)[5] *Deenergized parts.* Live parts to which an employee may be exposed shall be deenergized before the employee works on or near them, unless the employer can demonstrate that deenergizing introduces additional or increased hazards or is infeasible due to equipment design or operational limitations. Live parts that operate at less than 50 volts to ground need not be deenergized if there will be no increased exposure to electrical burns or to explosion due to electrical arcs.
>
> (emphasis added)

Serious item 2 of IP's citation reads as follows:

> 29 CFR 1910.333(a)(1) Deenergized parts. Live parts to which an employee may be exposed shall be deenergized before the employee works on or near them, unless the employer can demonstrate that

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[4] Compliance Officer Porter assessed the severity of the injury as high (high, medium or low) because Mr. Dohoney died. Mr. Porter said the probability of an injury was greater (greater and lesser being the choices in his compliance manual) because Dohoney was working on energized wire without any gloves or insulated tools. Thus, the unadjusted penalty, according to a chart found in the compliance manual, was $5,000. This unadjusted penalty may then be reduced by considering three credits found in 803 KAR 2:115, section 1(2). IP received no credit for size (the number of employees nationwide) because it employed over 2,000 people. Neither did the company receive good faith credit (25, 15 or 0 %), according to the compliance manual, because of the high serious/greater probability assessment. IP received the maximum credit of 10 %, from the compliance manual, because it had not had any serious citations within a three year period prior to the fatality.

[5] 29 CFR 1910.333(a)(1) is adopted in Kentucky by 803 KAR 2:318, § 2(1)(a).

deenergizing introduces additional or increased hazards or is infeasible due to equipment design or operational limitations. Live parts that operate at less than 50 volts to ground need not be deenergized if there will be no increased exposure to electrical burns or to explosion due to electrical arcs:

a. International Paper did not ensure that the 60 ton "Kone" overhead crane, located in the Crane Bay Area at International Paper Company in Henderson, Kentucky, was properly de-energized when at least one Konecranes, Inc, dba Crane Pro Services employee worked in the areas of potential electrical hazard(s) when changing/repairing 110 volt electrical cords, etc. On or around August 28, 2009, the employee was electrocuted while conducting maintenance/service on the 60 ton "Kone" overhead crane listed above.

The Hearing Officer's Recommended Order

In her recommended order, our Hearing Officer affirmed serious item 1 and the $4,500 penalty. For reasons fully set forth below, we reverse our hearing officer's recommended order and dismiss International Paper's citation. In doing so, we adopt the hearing officer's findings of fact to the extent they support our decision. Where we disagree with our Hearing Officer's findings, we will state our reasoning.

When Steven Dohoney and Mark Poczerwinski, Konecranes' technicians, arrived at the Henderson factory on the day in question, they reported to the WDR, Mr. Jones. The WDR is the liaison between IP and its contractors. Together, Mr. Jones, Dohoney and Poczerwinski filled out a form known as a Job Planning Safety Analysis ("JPSA"), which includes an evaluation of the hazards involved and a safety checklist. (Exhibit 9, Exhibit 69, at page 16, Exhibit 79. IPRO 6). This JPSA described the work to be performed as "Replace Rope Guide." (IPRO 7). Lock

out/tag[6] out was not required for this work because, as Jones testified, electric power was needed for inspection and testing. (TE 646). On the day of the fatality, Poczerwinski signed a second, unrelated JPSA which involved his work on the hydrapulper hoist at another location in the plant.

Between 9:30 a.m. and 10:30 a.m., Jones talked with Dohoney in the break room. Dohoney told Jones he would need more wire for the rewiring work. From this, Mr. Jones testified that he understood Dohoney and Poczerwinski had discovered that they needed more wiring "during their inspection." (TE 660). That morning Mr. Jones chanced to look up and saw the crane's motor coupling attached to the rafters with a come-along.[7] (TE 659). Our Hearing Officer took this to mean that "[Jones] thought meant [sic] that the Konecranes technicians were changing the motor coupling as a part of the preventive maintenance." (TE 656 – 660, KRO 10 and 11).

Mr. Jones, IP's WDR, observed that Dohoney and Poczerwinski were in the process of exchanging the crane motor coupling. From Jones' conversation with Mr. Dohoney he understood that Dohoney and Poczerwinski were also inspecting the crane and had determined that they would need more wiring. Neither of these activities required the crane's wiring to be de-energized and locked out/tagged out. In fact, the engine coupling work could only be performed with the power turned on so the crane could be moved back and forth.

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[6] IP had a lock out policy which did not apply to the 60 ton crane. Konecranes employees were in charge of locking out the crane because only they knew when they would need to move the crane to perform their maintenance work.

[7] A powerful hand operated winch and cable.

The completed JPSA did not mention the rewiring work. Mr. Jones observed that the engine coupling exchange had commenced and understood that Dohoney and Poczerwinski were inspecting the crane. We find Jones, and by extension IP,[8] neither knew nor had reason to know that Mr. Dohoney was on the crane bridge rewiring the limit switch without de-energizing and locking out/tagging out the power to the crane. Our Hearing Officer's Recommended Order supports our findings. She recognized that IP's Mr. Jones, during his testimony, "made a distinction between 'inspecting' the wiring...and 'repairing' the wiring on the limit switches on the house crane." She found, and we adopt her finding, that Jones knew another JPSA would be needed for the rewiring. (IPRO 19 – 20).

Our Hearing Officer found that Mr. Dohoney died "between 11:00 am and noon...[o]ne thing was very clear...Dohoney was working on a live wire. There was absolutely no indication that he had attempted to shut down the power or lock off." (IPRO 11). We agree and adopt our Hearing Officer's finding.

In *Ormet Corporation,* CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), the federal 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.

[8] *Safeway Stores, Inc,* CCH OSHD 22,400, page 27,003, BNA 6 OSHC 1176, 1177 (1977).

Our Hearing Officer found the cited standard required that power to the crane, specifically the electric wire, had to be de-energized before Mr. Dohoney began his wire replacement work. Without any analysis, and in one sentence, she then covered the four elements required for the Labor Cabinet to prove a violation. She held that 29 CFR 1910.333(a)(1) "did apply to the situation, the standard was violated, an employee had access to the hazard, and both employers should have known about the hazard with the exercise of reasonable diligence." (IPRO 23).

We agree with our Hearing Officer that the cited standard applied to the condition, that the terms of the standard were violated, and that Mr. Dohoney, Konecranes' employee, had access to the cited condition. We do not, however, agree that the Cabinet met its burden of showing that IP, with the exercise of reasonable diligence, could have known of the violative conditions, and therefore we reverse.[9]

Konecranes and IP both pled the employee misconduct defense. In *Jensen Construction Co*, CCH OSHD 23,664, page 28,695, BNA 7 OSHC 1477, 1479 (1979), the federal Commission set out four elements the employer must prove to establish the defense:

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

Our Hearing Officer found that both Konecranes and IP had rules and communicated those rules to their employees. *Jensen*, elements one and two. (IPRO

[9] For this commission to sustain a citation, the Cabinet must prove all four elements set out in *Ormet, supra.*

16 - 17). However, while she found that Konecranes "did not effectively audit the work practices of its employees in regard to locking out/tagging out," *Jensen* element three, our Hearing Officer made no similar findings for IP. (IPRO 17). In fact, our Hearing Officer made no findings for IP for *Jensen* elements three or four.

Our Hearing Officer correctly found that Dohoney, before his death, "had shed the required hard hat, goggles, and ear protection."[10] She said when he died "it was apparent that the employee had little regard for work rules." (IPRO 17). She found Mr. Dohoney knew he was going to be replacing limit switch cords but left his volt meter in his truck. (IPRO 17). She found that "[b]y far the primary responsibility for Dohoney's death was his own carelessness and overconfidence. However, this is not a comparative negligence case, it concerns the violation of an OSHA standard. With proper diligence by Konecranes and International Paper, the standard could have been met." (IPRO 22).

Our Hearing Officer concluded that for International Paper the cited standard, 29 CFR 1910.333(a)(1), "did apply and was violated." She said "both employers should have known about the hazard with the exercise of reasonable diligence." She then affirmed the citation for International Paper and the $4,500 penalty. (IPRO 24).[11]

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[10] IP required all employees and outside contractors to wear ear plugs while in the facility.

[11] IP has taken the position in its brief that the multi-employer doctrine does not apply to general industry, as opposed to the construction industry. Cf, *Secretary of Labor Cabinet v Hayes Drilling, Inc, and Commonwealth of Kentucky, Occupational Safety and Health Review Commission*, Ky App, 354 SW3d 131 (2011). We choose not to address the question of whether the multi-employer doctrine applies to general industry at this time; for the reasons set forth herein, we believe the Labor Cabinet has not met its burden of proving the four elements necessary to uphold the citation under *Ormet, supra.*

Whether The Labor Cabinet Proved the Alleged Violation.

As we have stated, in *Ormet, supra,* the federal 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.

According to our rules, the Labor Cabinet has the burden to prove all four elements set out in Ormet. ROP 43 (1). The cited standard clearly applies: 1910,333 (a) (1) is an electrical standard and Mr. Dohoney died while working on the crane's electric wiring. All three parties, the Labor Cabinet, Konecranes, and IP agree that the crane's wiring was energized when Mr. Dohoney accidently completed a circuit and tragically lost his life. Therefore, the terms of the standard were violated. As a result, the Labor Cabinet proved elements one and two. *Ormet, supra.*

Mr. Dohoney, a Konecranes employee, had access to the cited condition, the live electric parts, and so the Labor Cabinet met its burden of proving *Ormet* element three. What remains is for us to decide is whether the Labor Cabinet proved IP had knowledge, actual or constructive, [12] of the cited condition. KRS 338.991 (11).

The Labor Cabinet Failed to Prove IP Had Knowledge of the Violation.

Our hearing officer found, and we agree, that Mr. Dohoney died alone on the bridge of the crane. Dohoney worked on the crane bridge and so he could not be seen when viewed from the shop floor. IP did not have a duty to investigate further

[12] Knowledge "may be actual or constructive." Mark A. Rothstein, *Occupational Safety and Health Law*, 2011 edition, section 5:15, page 191.

whether Mr. Dohoney was working on live wires, as agreed by Compliance Officer Porter, who said IP was not required to be on the bridge watching Dohoney work. (TE 221).

The Labor Cabinet has not proved IP had actual knowledge of the violation: working on live electric parts. Therefore, for the Commission to sustain the citation, the Labor Cabinet must prove IP had constructive knowledge of the violative conduct. *Ormet, supra.* Constructive knowledge is directly related to the concept of reasonable diligence. KRS 338.991 (11) says in part "...a serious violation shall be deemed to exist...unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." (emphasis added).

In *N & N Contractors, Inc v Occupational Safety and Health Review Commission*, 255 F3d 122, 127 (4th Cir. 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.
>
> (emphasis added)

When Mr. Dohoney, Mr. Poczerwinski and Mr. Jones filled out the JPSA for the day, it did not mention the wire replacement job. IP's Brent Jones said he would

have filled out another JPSA had he known Mr. Dohoney was, that day, going to work on the limit switch wiring. (TE 662 – 663).

IP in its brief cites to *Precision Concrete Construction*, a federal Review Commission decision, CCH OSHD 32,331, page 49,552, BNA 19 OSHC 1404, 1407 (2001). In *Precision Concrete* the Commission said the company had constructive knowledge of the violation because it failed to exercise reasonable diligence.

> Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.
>
> (emphasis added)

The Labor Cabinet has not met its burden of showing that IP had constructive knowledge of the violation. Mr. Dohoney, Mr. Poczerwinski and the IP WDR filled out a JPSA which did not mention the crane limit switch wiring job. IP's Brent Jones said he would have filled out another JPSA if he had known the limit switch wiring work would be performed the day Dohoney died. The three individuals knew the rewiring needed to be done during the manufacturing hiatus, but not specifically on the day of the fatal injury. Because the two Konecrane employees were at times working on the crane bridge all by themselves where IP supervisors did not go, the safety rules required all employees to use fall protection harnesses and lanyards. From the shop floor, Mr. Jones could only see the engine coupler hanging from the ceiling, an indication that Konecrane's employees were doing

annual maintenance work on the engine coupler, which would require the crane to have electric power in order to be moved. Earlier on the morning of the fatal accident, Mr. Dohoney had told Mr. Jones that more wire would be needed to complete the crane rewiring work. However, as our hearing officer correctly found, this left the impression that Dohoney was inspecting the crane rather than replacing wire at that time.

The Labor Cabinet's compliance officer said IP did not have to have a manager or WDR on the crane bridge while Konecranes employees worked there. In its brief, the Cabinet argued that IP's WDR, Mr. Jones, would act as a foreman; however, there is no testimony to support that contention.

Constructive knowledge can often be found where the violation was in plain sight. *Kokosing Construction Co, Inc*, CCH OSHD 31,207, BNA 17 OSHC 1869 (1996). Konecrane's work on the bridge, however, was not in plain sight. Dohoney and Mr. Poczerwinski had been given the two crane remote control devices. Compliance Officer Porter said there was no requirement for an IP manager to be on the crane bridge with the two Konecrane employees. What IP's Jones saw from the ground was the engine coupling work which required the crane to move and to be energized. With visual knowledge that the coupling work was underway, no JPSA listing limit switch rewiring work, and Jones' understanding that Dohoney was inspecting the crane, IP had no reason to anticipate that Mr. Dohoney would violate the cited standard. *Precision Concrete, supra.*

We find that the Labor Cabinet failed to prove IP was not reasonably diligent. Therefore, we find that the Labor Cabinet failed to meet its burden of showing that IP had constructive knowledge of the violation. Because the Cabinet failed to prove the fourth element of *Ormet, supra*, we reverse our hearing officer and dismiss the serious citation and penalty.

IP Failed to Prove the Employee Misconduct Defense.

Our hearing officer did not explicitly rule on IP's employee misconduct defense. She did, however, find IP and Konecranes proved *Jensen* elements one and two: that the employers had rules and communicated them to their employees. By operation of law, our hearing officer rejected the defense by affirming the citation. We agree that IP did not prove its employee misconduct defense. In its Brief, IP says "[t]he affirmative defense does not explicitly exclude controlling employers and IP is not aware of any existing case law that restricts the application of the employee misconduct defense to direct employers." IP then says "controlling employers may rely on the affirmative defense in the absence of any evidence to the contrary." IP brief, page 48.

We are unaware of any case law which permits a controlling employer with no exposed employees to prevail on the employee misconduct defense. While a controlling employer with no exposed employees could prove, as IP has, that it has rules and communicates those rules to its employees, it would be unlikely for that same employer to prove that it had the ability to discipline another employer's employees. IP has not attempted to make such an argument and in fact concedes it

had no authority to discipline Konecranes' employees. IP brief, page 51. Even if a controlling employer raising the defense had proved it had a history of disciplining its own employees for infractions of its safety rules, that discipline would have no practical effect on the conduct of another employer's employees.

We find IP cannot and did not attempt to prove *Jensen* element four, a history of discipline. See IP brief, pages 51 and 52.

IP made no arguments about *Jensen* element three, a system for detection of violations of safety rules. In fact IP concedes its "WDR does not supervise or control the work of contractors." IP brief, page 49. We find IP did not prove *Jensen* element three.

As such, we deny IP's employee misconduct defense.

A controlling employer with no exposed employees may certainly raise the employee misconduct defense. But to prevail, any employer must prove all four elements set out in *Jensen*: the company has rules, it communicates those rules to its employees, it has a system for detecting violations and it has a history if disciplining its employees for infractions. These four *Jensen* elements are in reality a system for managing employees. If an employer can prove he has rules and has taught them to his employees and then can prove he looks for violations of the rules and disciplines employees who break those rules, we will dismiss the citation because the employer has done all he may reasonably be expected to do to enforce the standards. KRS 338.031 (1) (b) and *Jensen, supra.*

We have dismissed the citation because the Labor Cabinet could not prove International Paper had knowledge, actual or constructive, of the violation. We have denied IP's affirmative defense of employee misconduct because the company did not prove *Jensen* elements three and four.

It is so ordered.

March 12, 2013.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

Joe F. Childers
Commissioner

Certificate of Service

I certify this decision of the review commission was served on this March 12, 2013 on the following in the manner indicated:

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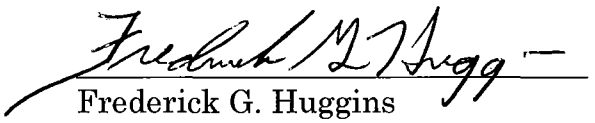

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