COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4886-12

SECRETARY OF LABOR,
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

COHEN BROTHERS OF LEXINGTON, INC
dba BAKER IRON & METAL CO, INC — RESPONDENT

* * * * * * * * * *

S. Kelley Gilliam, Frankfort, for the Secretary. Robert A. Dimling, Cincinnati, and Kyle D. Johnson, Louisville, for Cohen Brothers.

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes to us on Cohen Brothers' petition for discretionary review. Our hearing officer in her recommended order upheld a single, serious citation and a penalty of $3,400.

Cohen Brothers[1] ("Cohen") operates a steel scrap yard in Lexington. Cohen buys scrap metal and processes it so it can be sold to steel makers. Cohen will accept large items, even bulldozers. Transcript of the evidence, page 80 ("TE 80"). Pieces of steel, to be accepted by a steel mill, must be no larger than two feet by five feet, and are therefore often required to be cut. Cohen had a contract with T & B Recycling which specified T & B would provide Cohen's yard with employees who use acetylene torches to do the cutting. TE 231. Cohen has 85 of its own employees at its Lexington yard. TE 256.

[1] Cohen Brothers had purchased Baker Iron and Metal. TE 38.

Scrap steel which must be cut to size is first placed by a grappler crane in the cutting area. When the steel is cut to size, a magnetic crane moves the steel to the prepared pile. When asked about how the work in the cutting area proceeds, Harry Newman, Cohen's yard manager, said the torch cutters must periodically tell the grappler crane operator where to place steel to be cut. TE 94.

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 ("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. The Commission may then grant the PDR, deny the PDR or elect to call the case for review on its own motion. 803 KAR 50:010 Section 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*,[2] 487 F.2d 438, 441 (8th Cir. 1973), CCH OSHD 16,799 page 21,538, BNA 1 OSHC 1372, 1374, the 8th Circuit U.S. Court of Appeals held that when the federal Commission hears a case it does so "de novo." See also *Accu-Namics, Inc v OSHRC*, 515 F2d 828, 834 (5th Cir. 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..."[3]

In *Secretary, Labor Cabinet v Boston Gear, Inc*, 25 S.W.3d 130, 133 (Ky. 2000), CCH OSHD 32,182, page 48,639, the Kentucky Supreme Court stated: "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*, 92 S.W.3d 743, 750 (Ky. App. 2002), the Kentucky Court of Appeals held: "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 affirmed a single serious citation alleging Cohen had permitted subcontractor employees to use an acetylene torch to cut a steel cylinder which had not been thoroughly cleaned to remove flammable substances. T & B Recycling ("T & B") employee Delmar Miller, using a torch, cut into a cylinder containing hydraulic fluid which exploded, burning the two T & B employees (TE 63

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[2] In *Kentucky Labor Cabinet v Graham*, Ky, 43 S.W.3d 247, 253 (Ky. 2001), the Kentucky Supreme Court said that because Kentucky's occupational safety and health law is patterned after the federal law, it should be interpreted consistently with the federal act.

[3] See federal Commission rule 92(a), 29 C.F.R. 2200.

and 116). T & B employee Edgar Howard was kept in the hospital overnight and employee Miller returned to work that same day. TE 66.

Our hearing officer found these two T & B employees were cutting up a telescoping crane boom Cohen had received from Link-Belt, one of Cohen's good customers.[4] These two employees did not realize the telescope boom had a hydraulic cylinder when Mr. Miller made the cut. The cutting torch ignited hydraulic fluid contained in the cylinder. Harry Newman, the yard manager employed by Cohen, said hydraulic oil is a fire hazard. TE 50.

These two employees, Edgar Howard and Delmar Miller, worked for T & B and not Cohen Brothers. Because the Labor Cabinet cited Cohen for a violation of a general industry standard, and because the two employees did not work for Cohen but rather for T & B, this case now before us squarely raises the question whether the Cabinet may issue a multi-employer citation based on a general industry standard.

We first address the general industry standard and the citation, after which we will address the law on the application of the multi-employer work site doctrine to a general industry employer.

Following an investigation triggered by a media referral, TE 223, the Secretary issued a citation based on a standard found in the welding and cutting chapter. This general industry standard is found in a chapter titled "Welding, Cutting and Brazing," and reads:

Used containers. No welding, cutting, or other hot work shall be

[4] We adopt our hearing officer's findings of fact to the extent they support our decision.

> performed on used drums, barrels, tanks or other containers until they have been cleaned so thoroughly as to make absolutely certain that there are no flammable materials present or any substances such as greases, tars, acids, or other materials which when subject to heat, might produce flammable or toxic vapors...
>
> 29 C.F.R. 1910.252(a)(3)(i) (emphasis added)

The welding and cutting chapter specifies how employers shall protect employees from hazards presented by cutting and welding. The cited standard[5] requires employers to make sure no cutting will take place on containers, such as hydraulic cylinders, until the cylinders have been so thoroughly cleaned "as to make absolutely certain that there are no flammable materials present." This carefully written standard prohibits cutting unless no flammable materials are present.

Edgar Howard, a cutter for T & B, testified that drain plugs had been removed (to facilitate the evacuation of hydraulic fluid) and it was not apparent there was a hydraulic cylinder on the boom. TE 117. However, we find there was a cylinder containing hydraulic fluid and that is what caused the explosion when cut into by Delbert Miller wielding a torch. TE 58 and 117. No Cohen employees were working on the boom when it exploded; however, Harry Newman, Cohen's yard manager, had just been talking to Edgar Howard and had just driven off in a front end loader when the cylinder exploded. TE 62 and 120.

The citation issued by the Secretary to Cohen Brothers carefully limits employee exposure to the two T & B employees; Edgar Howard and Delmar Miller:

> For the employees who serve as Scrap Metal Cutters for Cohen Brothers of Lexington, Inc, dba Baker Iron & Metal Co, Inc...the employer did not ensure the hydraulic cylinder located within an

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

> All Terrain First Generation Link-Belt boom was cleaned of Conoco Super Hydraulic oil # 46, a substance that when introduced to a source of ignition may produce a flammable vapor resulting in explosion, prior to cutting with a six foot Victor Bulldog Scrap Cutting Torch.
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> (emphasis added)

Exposed employees in this citation are specifically defined as "Scrap Metal Cutters." At the Cohen yard in Lexington, all employees, and particularly Cohen's manager Harry Newman, understand the scrap metal cutters are employees of T & B. TE 75 – 76. Cohen has a contract with T & B to provide the cutters. TE 76. We agree with our hearing officer's finding of fact that the two T & B employees were paid by the hour by T & B which in turn was paid "on the basis of the weight of the steel that the cutters cut." Recommended order, page 3 ("RO 3") and TE 146. We find, based on the language of the citation and the contractual arrangement between Cohen and T & B, that according to the citation only T & B employees were allegedly exposed to the hazard. *Accu-Namics, supra.*

The Labor Cabinet has the Authority to issue Multi-Employer Citations to General Industry Employers.

Cohen, in its briefs to this Commission, argues that the Secretary has no authority to issue a multi-employer citation to a general industry employer. We disagree.

The citation invokes the multi-employer doctrine because it states that T & B employees, not employed by Cohen Brothers, were exposed to the alleged hazard. In *Hargis v Baize*, 168 S.W.3d 36, 44 (Ky. 2005), BNA 21 OSHC 1073, 1078, the

Kentucky Supreme Court had before it a negligence case where the plaintiff sought to make use of an OSHA standard to prove the defendant was liable per se for the injury suffered. Citing to *Underhill*[6] and to KRS 338.031(1)(b), the *Hargis* court found an employer had a duty to protect all the employees who worked at his work site, including those who worked for an independent contractor, so long as the employer and his employees were engaged in a common undertaking with the independent contractor's employees.

In an occupational safety and health case, our Court of Appeals upheld the multi-employer doctrine. See *Department of Labor v Hayes Drilling, Inc*, 354 S.W3d 131 (Ky. App. 2011), which cites to *Underhill, Hargis, Teal*[7] and to KRS 338.031(1)(b).[8]

In *Hayes Drilling, supra*, Hayes was a contractor on a construction site while in *Hargis v Baize, supra,* Mr. Baize operated a lumber yard and so was not subject to the construction standards. This case presents to our commission a novel issue: must the multi-employer doctrine, which we have heretofore only applied to the construction industry, also be applied to a general industry[9] employer? In other words, may the Secretary of Labor issue a multi-employer citation to Cohen Brothers, a general industry employer? In Kentucky, the short answer is yes. *Hargis v Baize, supra.*

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[6] *Brennan v Occupational Safety and Health Review Commission and Underhill Construction Corporation*, 513 F.2d 1032 (2nd Cir. 1975), CCH OSHD 19,401, BNA 2 OSHC 1641.
[7] *Teal v E. I. DuPont de Nemours & Co*, 728 F.2d 799 (6th Cir. 1984), CCH OSHD 26,887, BNA 11 OSHC 1857.
[8] 29 U.S.C. 654(a)(2) is the federal equivalent.
[9] In Kentucky and elsewhere, there are two sets of occupational safety and health standards: one for the construction industry and a second for general industry employers. 29 C.F.R. 1926 and 29 C.F.R. 1910.

The occupational safety and health law compels an employer to enforce the general industry standards for the benefit of all employees working at his work site. Kentucky has a state occupational safety and health program, KRS chapter 338. In Kentucky, the Secretary of Labor[10] enforces the act. KRS 338.101, KRS 338.141. By and large, enforcement takes the form of occupational safety and health standards,[11] one volume for general industry and a second for the construction industry. According to KRS 338.031, an employer must comply with these standards; when no standard applies, an employer may be cited for a violation of the general duty clause. KRS 338.031[12] says:

> **Obligations of employers and employees.**
> (1) Each employer:
> (a) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees;
> (b) Shall comply with occupational safety and health standards promulgated under this chapter.

KRS 338.031(1)(a) is known in the trade as the general duty clause. It can only be cited when there is no specific safety and health standard covering the hazard. Section (a) is also known as the catch-all provision, meaning that if there are hazards not covered by a standard, then resort to the general duty clause may be had. According to its language, section (a) is limited to an employer and "his employees." This means the general duty clause can only be cited when an employer's own employees are exposed to a hazard. The phrase "his employees" is

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[10] KRS 336.040(1).
[11] By convention, our occupational safety and health regulations are known as standards.
[12] This statute is identical to 29 U.S.C. 654(a)(1) and (2).

used twice in section (a) for emphasis. The same cannot be said of KRS 338.031(1)(b), which reads in full: (1) Each employer...(b) Shall comply with occupational safety and health standards..." For section (1)(b) there is no limitation to an employer's own employees. In *Cohen* now before us, the company was cited for an alleged violation of a general industry standard, 29 C.F.R. 1910.252 (a)(3)(i),[13] and so KRS 338.031(1)(b) applies.

This essential difference in the two sections of the statute was first explained by the 2nd Circuit United States Court of Appeals in *Brennan v Occupational Safety and Health Review Commission and Underhill Construction Corporation, supra.* Underhill was a general contractor in charge of a work site. Construction materials on a multiple story building under construction were stored improperly, that is the materials extended over the side of the building and presented a hazard to those who worked below. Employees, but not those of Underhill, worked on a floor beneath the improperly stored materials. The improperly stored materials were directly over the heads of bricklayers. Underhill, the general contractor, received a citation even though none of its own employees was exposed to the hazard. As is so often the situation on a construction site, Underhill, the general contractor, engaged a number of sub-contractors whose employees worked in the skilled trades throughout the construction site.

In its decision the court in *Underhill* first held that the general duty clause, 29 U.S.C. 654(a)(1),[14] is limited to an employer and "his employee." The court then

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[13] 29 CFR 1910.252 is adopted by 803 KAR 2:316, Section 2(1).
[14] The equivalent of KRS 338.031(1)(a).

held that the specific duty clause, 29 USC 654(a)(2),[15] contained no such limitation. Mindful of the circumstances where multiple employers and their employees work at the same work site, the *Underhill* Court stated:

> In a situation where, as here, an employer is in control of an area, and responsible for its maintenance, we hold that to prove a violation of OSHA the Secretary of Labor need only show that a hazard has been committed and *that the area of the hazard was accessible* to the employees of the cited employer or those of other employers engaged in a common undertaking...
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> 513 F.2d, at 1038, CCH page 23,165, 2 OSHC 1645 (emphasis added)

Underhill and its progeny have been accepted by the greater majority of the circuit courts (except for the 5th and the D.C. Circuit Courts of Appeal) and by the federal Commission in support of the multi-employer work site doctrine applied to construction work. As Professor Mark Rothstein put it in his *Occupational Safety and Health Law*, 2014 edition, page 307, "*Underhill* is an important decision... ."[16] Kentucky, as we have explained, has adopted the multi-employer work site doctrine. Citing to *Underhill , supra,* and to KRS 338.031(1)(b), the Court in *Hargis, supra*, held that an employer had a duty to protect all the employees who worked at his work site, including those who worked for an independent contractor, so long as the employer and his employees were engaged in a common undertaking with the independent contractor's employees.

In support of its decision in *Hargis*, the Kentucky Supreme Court adopted the reasoning of the 6th Circuit U.S. Court of Appeals in *Teal v E. I. DuPont de*

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[15] The equivalent of KRS 338.031(1)(b).

[16] In *Occupational Safety and Health Law*, 2014 edition, section 7:6, page 309, Professor Rothstein said "The Commission's multi-employer rule has been well received by the circuit courts." See footnote 16 on page 268.

Nemours & Co, 728 F2d 799 (CA6 1984), CCH OSHD 26,887, BNA 11 OSHC 1857, where the court "extended OSHA's coverage to employees of independent contractors who work at another employer's workplace... ." *Hargis, supra,* at 168 S.W.3d 42. What we find so compelling about *Hargis* and *Teal*, for the purposes of the case now before us, is that they both deal with employers who work in general industry, that is to say not in construction. These two cases apply the logic found in *Underhill*, a construction industry case, and 29 U.S.C. 654(a)(2)[17] to general industry employers.[18]

In its *Hargis* decision, the Kentucky Supreme Court, citing *Underhill* and *Teal, supra*, has embraced the multi-employer doctrine for the construction industry and for general industry. However, the Kentucky Supreme Court was careful to limit the reach of *Hargis v Baize.* Appellee Allen Baize, in his brief to the Supreme Court, argued the 6th Circuit Court of Appeals "subsequently departed from *Teal* in *Ellis v Chase Communications, Inc*, 63 F.3d 473 (CA6 1995)." Mr. Baize was incorrect. *Teal* and *Ellis* are distinguishable on the facts.

Mr. Teal, the employee of an independent contractor, was injured at DuPont's chemical factory and DuPont had its own employees on site as well. Teal's employer and its employees were engaged in a common undertaking with DuPont and its employees working at DuPont's facility. On the other hand, when Mr. Ellis in *Ellis v Chase Communications* unhooked his safety belt and fell to his death, it was not a

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[17] KRS 338.031(1)(b) in Kentucky.

[18] In Kentucky and elsewhere a general industry employer must enforce, for the benefit of its employees, 29 C.F.R. 1910, the general industry standards, while a construction employer must enforce 29 C.F.R. 1926, the construction standards.

site where Chase employees were commonly on the work site. Mr. Ellis' employer was not engaged in a common undertaking with Chase employees at the communications tower where Mr. Ellis fell to his death. The *Hargis* Court explained as follows:

> The premise for *Teal* was that the responsible employer had control of the workplace and, therefore, an opportunity to assure compliance with OSHA regulations. *Teal*, 728 F.2d at 804. In *Ellis*, however, the tower was not a 'regular job site on which Chase had a duty to protect its own employees.' *Ellis*, 63 F.3d at 478.
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> *Hargis v Baize*, 168 S.W.3d, at 45

As we pointed out, *Hayes, supra,* was a construction case, yet it cited to *Hargis, Teal* and KRS 338.031(1)(b).[19] About the multi-employer doctrine, the *Hayes* court said:

> The doctrine has its genesis in the construction industry where numerous employers, often subcontractors, work in the same general area, and where hazards created by one employer often pose dangers to employees of other employers.
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> *Hayes*, supra, 354 S.W.3d, at 138 (emphasis added)

In its decision, the *Hayes* court's judicious use of the word genesis, together with its cite to *Hargis* and *Teal*, conveys its understanding that the multi-employer doctrine in Kentucky applies to any employer on a work site engaged in work with another employer who regularly has employees on site and is therefore responsible for safety at the site. When we read *Hayes* and *Hargis* together, we must accept the inescapable conclusion that "once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works at his

[19] 29 U.S.C. 654(a)(2).

workplace," whether the work is performed at a construction site or at a general industry site. *Hayes* at 354 S.W.3d 139. *Hargis* and *Teal, supra,* cited by the *Hayes* court, are not construction industry cases but instead apply this same duty to protect each employee at a work site to general industry employers.

When the Secretary issued the citation to Cohen Brothers, his reference in the citation to the access of the T & B employees[20] to the cited hazard on Cohen's lot invokes the multi-employer doctrine because the citation is directed to Cohen, not T & B. Furthermore, the citation does not allege that Cohen employees were endangered. *Hayes, supra,* at 354 S.W.3d 138 and *Hargis, supra,* at 168 S.W.3d 44. In Kentucky, KRS 338.141(1) authorizes the Secretary to issue citations. Because the citation, introduced at the hearing as Exhibit 13, alleges that the company failed to enforce a standard, 29 C.F.R. 1910.252 (a)(3)(i), the Secretary has interpreted KRS 338.031(1)(b) to apply to an employer in general industry whose own employees are not exposed to the alleged hazard. In more practical terms, in issuing the citation the Secretary alleges Cohen must enforce 29 C.F.R. 1910.252 (a)(3)(i) for the benefit of T & B employees at its work site. *Hargis, Hayes, Underhill* and *Teal, supra.*

Cohen, in its brief to the Commission cites to *IBP, Inc v Herman,* 144 F.3d 861 (D.C. Cir. 1998), CCH OSHD 31,577, BNA 18 OSHC 1353, to demonstrate that, according to the D.C. U.S. Circuit Court of Appeals, the multi-employer doctrine should not be extended to general industry. We are not persuaded. In the first place,

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[20] Harry Newman, Cohen's yard manager, understood T & B employees did the cutting at the scrap yard. TE 75.

the D.C. Circuit has never adopted the doctrine for the construction industry.[21] To support its holding in *IBP*, the court relied on Commissioner Montoya's dissent where she stated that she did not understand IBP's citation since DCS "had already been held liable for the same violation." 144 F.3d 867, CCH page 45,309, 18 OSHC 1357. Commissioner[22] Montoya apparently possesses the same reluctance to find a multi-employer duty as does the D.C. U.S. Circuit Court of Appeals.

Second, the D.C. Circuit's analysis depends in large part on its assessment of the contract between IBP and its independent contractor, DCS. According to the Court there is no provision in the contract permitting IBP to discipline DCS's workers and so the Secretary cannot prove IBP exercised control. Because the Secretary cannot prove IBP exercised control over DCS's work site, IBP's citation must be dismissed, according to the Court. We question the Court's strong reliance on the contractual relations between IBP and DCS because it has long been held that an employer cannot contract himself out of his responsibility to enforce the safety and health laws. *Frohlick Crane Service, Inc v Occupational Safety and Health Review Commission*, 521 F.2d 628, 638 (10th Cir. 1975), CCH OSHD 19,922, BNA 3 OSHC 1432, 1433, and *Baker Tank Co/Altech, A Division of Justiss Oil Co*, BNA 17 OSHC 1177, 1180, CCH OSHD 30,734.

In the case before us, Cohen exercises control over its work site, specifically the work performed by the T & B cutters. Cohen performs an inspection of the steel as it arrives at its gate, keeping in mind its list of materials it will not accept.

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[21] See *Anthony Crane Rental, Inc v Reich*, 70 F.3d 1298 (D.C. Cir. 1995), CCH OSHD 30,953, BNA 17 OSHC 1447.
[22] OSHRC Commissioner.

Exhibit 1, TE 41 - 42 and 46 – 47. At this step in the process, Cohen inspectors discover and reject flammable materials. We find Cohen's inspection of the Link-Belt crane boom failed to discover the hydraulic fluid container.

In his brief to us, the Secretary calls our attention to *Harvey Workover, Inc*, CCH OSHD 23,830, BNA 7 OSHC 1687 (1979), where the federal Review Commission stated:

> We no longer find the distinction between construction sites and other work-sites valid. The safety of all employees can best be achieved if each employer at multi-employer worksites has the duties to (1) abate hazardous conditions under its control and (2) prevent its employees from creating hazards.
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> CCH page 28,909, 7 OSHC 1689

When read in concert with *Hargis, Hayes, Underhill* and *Teal, supra*, we find *Harvey Workover* persuasive.

In *Teal, supra*, cited by the Kentucky Supreme Court in *Hargis* and by the Kentucky Court of Appeals in *Hayes, supra*, the court said:

> We believe that Congress enacted Sec. 654(a)(2)[23] for the special benefit of *all* employees, including the employees of an independent contractor, who perform work at another's workplace...
> In our view, once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works at its workplace. *See, e.g., Marshall v Knutson Construction Co*, 566 F.2d 596, 599 (8th Cir. 1977)
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> 728 F.2d 804 - 805, CCH page 34,438, 11 OSHC 1860 - 1861

Harry Newman, the Cabinet's first witness, was at the time of the inspection Cohen's yard manager. TE 39 and 40. Mr. Newman testified that steel arriving at

[23] In Kentucky, KRS 338.031(1)(b).

the yard would first be inspected by the scale man at the inbound scale. Then another Cohen employee performed a second inspection. TE 41. Cohen's inspectors looked for items the yard would not accept. TE 46 – 47 and Exhibit 1. According to Newman, pieces of steel larger than one quarter inch by five feet by two feet must be cut with torches. Cohen places this steel in an unprepared pile. TE 42. The uncut steel is brought to the unprepared pile by a crane operated by a Cohen employee. Mr. Newman said Cohen sets up the steel which is then cut by the T & B employees. TE 43. The T & B employees work and cut steel next to the unprepared pile. TE 43. Cut steel is then placed in the prepared pile by a Cohen operated crane. TE 43.

Cohen's grappler cranes bring uncut steel to the cutting area, regularly under the direction of the T & B employees. TE 43 and 79. Harry Newman, Cohen's yard manager would, as often as necessary, direct his cranes to bring pieces of uncut steel to the cutting area. TE 80. Newman performed a safety walk-through of the facility every day. He said he had the authority to stop T & B cutters if he saw them engaged in an unsafe act. TE 87.

We find Cohen and its employees were at the time of the explosion engaged in a common undertaking with T & B employees, to wit: operating a scrap yard which bought scrap steel and, when necessary, cut that steel to a size which could be sold to its customers. We find as the owner of the scrap yard, Cohen exercised control over its work site, including the cutting area where the T & B employees worked. *Underhill,* 513 F.2d, at 1038, *Hargis*, 168 S.W.3d, at 44. As we shall explain in

detail, Cohen created the hazard which led to the explosion, burning the two T & B employees.

We hold, before reaching the merits of the citation, that the Kentucky Secretary of Labor has the authority to issue a multi-employer citation to an employer in control of an area who has the duty to enforce the general industry occupational safety and health standards for the benefit of all employees[24] engaged in a common undertaking at his work site. *Underhill, Hargis, Hayes, Teal* and KRS 338.031(1)(b).

Cohen argues that the Secretary impermissibly relied on a federal interpretation, CPL 2-0.124, to write its citation because, as Cohen explains, while the interpretation was adopted in Kentucky[25] it was not promulgated according to KRS Chapter 13A. We have not relied on this federal interpretation for our decision which extends the multi-employer duty to an employer working in general industry. This multi-employer duty, for both construction and general industry, springs directly from the authority of KRS 338.031(1)(b) which states "Each employer...(b) Shall comply with occupational safety and health standards promulgated under this chapter." This statutory duty is not limited to an employer's own employees as is Kentucky's general duty clause, KRS 338.031(1)(a). *Underhill* and *Hargis, supra.*

The Secretary Proved Cohen
Brothers is in Control of its
Own Work Site.

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[24] In Cohen's citation, the Secretary elected to limit allegations of exposure to T & B employees who were exposed to the hazard presented by the cylinder which had not been thoroughly cleaned and prepared by Cohen.

[25] In his brief, page 8, the Secretary states that the interpretation was adopted by the Cabinet on March 14, 2000.

Cohen argues the Secretary cannot prove it had control of its work site, specifically the cutting area, without a contract specifying such control.[26] We reject this premise because it is not in accordance with multi-employer law. In *Underhill, supra*, where the 2nd U.S. Circuit Court of Appeals first recognized the import of the specific duty[27] clause, the court clearly held that when the employer is in control of the area and responsible for the maintenance of that area, the Secretary need only show that the area of the hazard was accessible by the employer's employees and those employees of another engaged in a common undertaking. The Court stated: "To prove, for the purposes of the multi-employer work site doctrine, a violation of a standard, the Secretary must demonstrate the "employer is in control[28] of an area and responsible for its maintenance..." Cohen, we find, is in control of its scrap metal salvage yard in Lexington including the cutting area.

Harry Newman is Cohen's yard manager. TE 39. Except for the two T & B cutters, all employees at the yard work for Cohen under Mr. Newman's direction. TE 40. Steel, to enter the premises, must be inspected by Cohen employees at the gate and again at a second inspection if the received scrap is complex and difficult to inspect. TE 41. These Cohen inspectors must reject any material referred to on the "Do Not Buy" list. Exhibit 1. Mr. Newman said he regularly inspected the yard

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[26] Cohen brief, page 17.

[27] An employer's specific duty to enforce the occupational safety and health standards. KRS 338.031(1)(b) and 29 C.F.R. 654(a)(2).

[28] Cohen cited to *Dilts v United Group Services, LLC,* 2010 U.S. Dist LEXIS 10027, (E.D. Ky 2010),a case where a factory hired a subcontractor to install a steel furnace. Subcontract workers fell while performing the installation. Labor's compliance officer who testified at the civil trial said she would not cite Dilts for the violation. We are not surprised because Dilts and the subcontracting installer were not engaged in a common undertaking. *Underhill, supra.* Cohen and T & B were engaged in a common undertaking, the scrap steel business. We do not find *Dilts* helpful to Cohen.

and had the authority to stop the T & B cutters from performing an unsafe task. TE 87.

The Secretary has the burden of proof. 803 KAR 50:010, Section 43(1)(ROP 43 (1)). We shall now turn to our analysis of the Cabinet's case.

Whether the Cabinet Proved Cohen Brothers Violated the Cited Standard?

Our hearing officer, in her recommended order, sustained the single, serious citation and a penalty of $3,400. RO 9. We have examined the arguments set out by the parties in their briefs. We affirm our hearing officer's order. We shall now discuss the Secretary's case, and Cohen's defenses, in detail.

In *Ormet Corporation,* CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), the federal Review Commission set out the elements the Secretary must prove to establish a violation:

> 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.

Whether the standard applies?

At the time of the explosion, the two T & B cutters used acetylene torches to cut scrap metal which was set out for them in the cutting area by Cohen crane operators working under the direction of Harry Newman. Edgar Howard, a T & B

employee injured by burns in the explosion, said T & B employee Delmar Miller was cutting on the hydraulic cylinder when the explosion occurred. TE 119.

Because of the work performed by the T & B employees, cutting metal with torches, and because, as we shall further explain, Cohen had not thoroughly cleaned the hydraulic cylinder before the cutting, we find the standard, 29 CFR 1910.252 (a)(3)(i), applies. *Ormet, supra.*

In its brief, Cohen makes the unorthodox argument that the welding and cutting chapter identifies the responsibilities of welders and cutters but not employers. We are not surprised Cohen's position does not rely on cited authority. Employers in the federal system as in ours have a statutory duty to enforce the occupational safety and health standards for the benefit of employees. KRS 338.031(1)(b), 29 U.S.C. 654 (a)(2) and *Underhill, supra.* In *Atlantic & Gulf Stevedores, Inc, et al v OSHRC*, 534 F.2d 541, 555 (3rd Cir. 1973), CCH OSHD 20,577, BNA 4 OSHC 1061, 1071, the Third Circuit U.S. Court of Appeals, in an exhaustive review of the legislative history of the act, concluded "primary responsibility for safety in the work place" rests with the employer. We agree with the third circuit and adopt its reasoning.

In his *Occupational Safety and Health Law* text, 2014 edition, Professor Rothstein states that where employees refuse to comply with their employer's requirements to comply with a standard, the employer may plead employee

misconduct as a defense.[29] Section 5:28, page 248. Cohen Brothers has not pled employee misconduct.

In the three reported cases we found in *CCH Employment Safety and Health Guide* where an employer is cited for a violation of the standard now before us in this case, the cases deal exclusively with an employer's duty to comply with the act. *Basic Rock Products*, CCH OSHD 15,521, BNA 1 OSHC 3028 (1973); *Active Oil Service, Inc.,* CCH OSHD 23,802, BNA 21 OSHC 1092 (2005); and *Jess Howard Electric Co*, CCH OSHD 19,256, 2 OSHC 3305 (1975). We hold that Cohen is charged with the statutory responsibility to enforce the cited standard, 29 CFR 1910.252 (a)(3)(i). KRS 338.031(1)(b). The standard applies. *Ormet, supra.*

Whether Cohen Brothers
Violated the Terms of the
Cited Standard?

The cited standard, found in the welding and cutting section of OSHA standards, 29 CFR 1910.252, states that an employer shall not permit any welding or cutting on "unused drums, barrels, tanks or other containers until they have been cleaned so thoroughly as to make absolutely certain that there are no flammable materials present..." 29 CFR 1910.252 (a)(3)(i). Edgar Howard, a T & B cutter, testified for the Secretary. Mr. Howard confirmed that he had been shown a photograph, Exhibit 3, of the hydraulic cylinder which, when cut, set off the

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[29] 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; he must show that it 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.

explosion. TE 133 – 134, Mr. Howard said Delmar Miller, the other T & B employee, did the cutting. TE 135.

Harry Newman, Cohen's yard manager, testified that Cohen examines cylinders to see if fluid has been drained out of the cylinder: "It has to be cut in the lowest part" of the cylinder. TE 51. Mr. Newman admitted company training did not discuss hydraulic fluid. TE 51. Prior to the explosion Mr. Newman had never dealt with a cylinder containing hydraulic fluid: "I never recollect ever getting one that had fluid in them." TE 54. "I don't know about cleaned. I just know they were drained." TE 54. Here Mr. Newman made a distinction between a thorough cleaning, as required by the standard, and draining which, we find, confirms a violation of the standard. Cohen has never thoroughly cleaned hydraulic cylinders, including in the instant matter. It certainly did not ". . . [clean] so thoroughly as to make absolutely certain that there are no flammable materials present..." 29 CFR 1910.252 (a)(3)(i).

Mr. Newman knew hydraulic fluid was a fire hazard. He said it "can combust." TE 50. Cohen Brothers understood the danger presented by hydraulic fluid on a job site where torch cutting of cylinders took place.

On redirect, the Secretary's counsel asked Mr. Newman a question which triggered the following exchange:

> Q. ...I think you testified earlier to this. It wasn't your practice to clean tanks or cylinders before cutting them, is that correct?
> A. No.
> Q. And, in fact, in this one, you didn't – you didn't clean this one after the – Delmar cut it the first time –
> A. No

TE 101

Cohen argues there is no admissible proof in the record establishing the cut cylinder contained hydraulic fluid. While this is not true, it is immaterial. In reaching our decision we have not relied on any hearsay testimony from T & B employees to prove the violation of the standard. Cohen at the hearing properly objected to the compliance officer's recounting of her conversations with T & B employees during her inspection. Because the T & B cutters were not Cohen employees, Cohen's hearsay objection was properly taken. KRE 801A (b)(4). We affirm our hearing officer's order sustaining Cohen's objection. TE 176.

On the other hand, Mr. Newman, a Cohen employee, was asked about the cylinder in the crane boom on which Delmar Miller cut, setting off the explosion. When asked about this crane boom, Mr. Newman gave the following answers:

> Q. ...What's the hydraulic cylinder do in – in the crane if you know?
> A. It's a – in this particular boom, it's a telescope boom. And, that cylinder extracts and, you know, brings it back together... Brings it in and out.

TE 58

In his testimony, Mr. Newman proves, without contradiction, that the Link-Belt boom contained a hydraulic cylinder. Mr. Newman also established hydraulic fluid was explosive. Edgar Howard proved Delmar Miller set off the explosion when he cut into the uncleaned cylinder with his torch. Harry Newman admitted on the stand that while Cohen would drain tanks containing flammable substances, it would not thoroughly clean them as required by the standard. However, regardless

of whether the flammable substance in the cylinder was *hydraulic* fluid, it certainly was a flammable fluid which caused an explosion when it was met with fire. The standard was violated.

The Secretary placed substantial evidence in the record that the cylinder contained hydraulic fluid, which was the cause of the explosion which burned Mr. Howard and Mr. Miller. We find neither Cohen nor the T & B employees thoroughly cleaned the cylinder before cutting it and causing the explosion, a violation of the cited standard.

Whether an Employee
Had Access to the
Cited Condition?

To establish a violation, the Secretary must prove employees had access to the cited hazard. *Ormet, supra.* In his citation, the Secretary chose to aver that only T & B employees, Edgar Howard and Delmar Miller, were exposed to the hazard. Here is the description for the single, serious citation:

> For the employees who serve as Scrap Metal Cutters for Cohen Brothers of Lexington, Inc, dba Baker Iron & Metal Co, Inc...the employer did not ensure the hydraulic cylinder located within an All Terrain First Generation Link-Belt boom was cleaned of Conoco Super Hydraulic oil # 46, a substance that when introduced to a source of ignition may produce a flammable vapor resulting in explosion, prior to cutting with a six foot Victor Bulldog Scrap Cutting Torch.

(emphasis added)

Because the Secretary issued this citation to Cohen Brothers and because the citation language limits employee access to the hazard to the two T & B employees, we must dismiss the citation unless we find that the multi-employer work site

doctrine applies. As we have discussed in our decision today, the multi-employer worksite doctrine in Kentucky applies to construction and general industry employers. Cohen, a scrap metal dealer, is not engaged in construction. The Secretary cited Cohen for a violation of 29 CFR 1910.252(a)(3)(i), a general industry standard.[30] *Hargis, supra,* and *Hayes Drilling, supra.*

We find there is ample proof in the record of T & B employee access to the cited hazard. Both Edgar Howard and Delmar Miller received burns when Miller cut into the cylinder which contained hydraulic fluid and which had not been thoroughly cleaned as required by the cited standard.

The hearing officer found that a Cohen employee had access to the hazard despite the specific and limiting language of the citation. RO 9. As Cohen observes in its brief to the Commission, the Secretary did not raise the issue of Cohen exposure to the hazard until its reply brief to the hearing officer following a hearing on the merits. We found this issue important enough that we asked for supplemental briefs. The Secretary, in his supplemental brief, has urged us to affirm the hearing officer's recommended order finding a Cohen employee had access to the hazard. The Secretary argued that we could find Cohen employee exposure in the language of the citation.

The Secretary contends, in his supplemental brief, that the language in the citation which reads as follows:

> [f]or the employees <u>who serve as Scrap Metal Cutters</u> for Cohen Brothers...

[30] 29 CFR 1910 is the general industry standard. See 29 CFR 1910.1 (a). 803 KAR 2 adopts numerous, federal general industry standards including the cited standard.

(emphasis added)

can be rewritten or understood to say '[f]or the employees...for Cohen Brothers.' This, the Secretary contends, means the citation is also directed to Cohen employees. But this argument overlooks the use of the phrase "who serve as Scrap Metal Cutters," a restrictive clause which supplies essential information for the meaning of the sentence. Elimination of this restrictive clause reverses the meaning of the citation. If the Secretary wished to prove Cohen employee exposure, he could have written the citation differently or, prior to the hearing, moved to amend the citation. We cannot rewrite the citation ourselves, given its specific language. We find support for our decision in a case supplied to us by Cohen in its supplemental brief. *Williston Basin Interstate Pipeline Co v FERC*, 165 F.3d 54, 63 (D.C. Cir. 2005):

> It is well-established that "[a] party is entitled ... to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation...' The law will not tolerate ... after-the-fact, in fact retroactive, imposition of standards,' especially where there is 'no evidence either to support or justify' the new standard.

In our cases, the Secretary must file a complaint with this Commission. ROP 20 (1). To his administrative complaint, the Secretary attaches a copy of the citation[31] and incorporates it by reference into the complaint, so the citation becomes a pleading.

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[31] Cohen transcript of the record, item 6 (TR 6).

Cohen argues "this attempt at quote cropping should be rejected because omitting the six words from the passage completely changes the meaning..." We agree. We cannot, given the restrictive language of the citation, consider the possibility of Cohen employee exposure without making use of Kentucky Rule of Civil Procedure 15.02, amending pleadings (the citation) to conform to the evidence. In our supplemental briefing order, we asked the parties to discuss whether we could or should amend the citation to include Cohen employee exposure.[32] We quote this lengthy rule in its entirety:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby **and the objecting party fails to satisfy the court that admission of such evidence would prejudice him in maintaining his action or defense** upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.
>
> CR 15.02 (emphasis added)

[32] Harry Newman testified he spoke with Delmar Miller just before the explosion. After his conversation with Mr. Miller, Harry Newman got into his front end loader and drove away. TE 61 – 62. Cohen crane operators regularly deposit uncut steel on the torching area and then remove it when the cutting is done. TE 43.

Cohen to us recounts instances during the lead up to the trial, the trial and its aftermath where the Secretary stated that the only exposed employees were the T & B cutters:

> one, the cabinet did not mention Cohen employee exposure until its reply brief before the hearing officer.
>
> two, the compliance officer's investigative report, labor's prehearing memo, labor's opening statement at the trial, the compliance officer's testimony and labor's first post-hearing brief all took the position only T & B employees were exposed.
>
> three, Cohen says the compliance officer testified only T & B employees were exposed even after listening to the testimony of Harry Newman, Cohen's yard manager, and Edgar Howard, a T & B cutter. We recall Newman testified he had asked Delmar Miller when he wanted the next piece of steel to be placed just before the explosion occurred.

Cohen says rewriting or reinterpreting the citation as the Secretary suggests is a "theory change" the court in *Yellow Freight* said an administrative agency such as the Labor Cabinet, in its citation, cannot make. An agency "must give the party charged a clear statement of the theory on which the agency will proceed with the case," but may not change theories without "giving respondents reasonable notice of the change." *Yellow Freight, Inc v Martin*, 954 F.2d 353, 357 (6th Cir. 1991). We find Cohen had no notice of the Secretary's intention to prove Cohen employee access to the hazard until after the trial on the merits. The few questions about Harry Newman's brief conversations with Delmar Miller and Edgar Howard made no attempt to pin down the location of Cohen employees or to suggest that Cohen employees were exposed to the hazard.

In our supplemental briefing order we asked the parties to discuss several cases including *Nucor Corporation v General Electric Co*, 812 S.W.2d 136, 146 (Ky. 1991). In *Nucor*, the Kentucky Supreme Court cited to a case from the 10th U.S. Circuit Court of Appeals where the court held:

> In *De Haas v Empire Petroleum Company*, 435 F.2d 1223, 1229 (10th Cir. 1970), the court stated:
> The test for allowing an amendment under Rule 15 (b) to conform pleadings to issues impliedly tried is whether the opposing party 'would be prejudiced by the implied amendment, ie, whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory.'

We find Cohen would have offered additional evidence had it known the questions put to Mr. Newman about his conversation with Delmar Miller, and Edgar Howard's conversation with Newman, would be used to establish Cohen employee exposure. Cohen did not have this opportunity. The hearing officer, in her recommended order, found Cohen employee exposure. This finding constitutes actual prejudice to Cohen's ability to defend itself, given the limiting language of the citation.

In *Nucor, supra*, General Electric proceeded on the theory of breach of warranty with a four year statute of limitations. At the end of the trial, Nucor moved to dismiss because GE's suit was filed beyond the four year limit. The trial judge, affirmed by Kentucky's Supreme Court, dismissed the breach of warranty claim but amended the pleadings to include a breach of contract claim (with a fifteen year statute of limitations). The court did so, as the Kentucky Supreme

Court put it, because the new theory utilized "the same evidence to substitute breach of contract for breach of warranty." *Nucor, supra,* 812 S.W.2d, at 145. To justify its ruling upholding the amendment of pleadings in *Nucor*, the Court held:

> Whether styled breach of warranty or breach of contract, the factual basis for the claim was the same...
> The proof necessary to establish breach of contract was already in evidence, presented in support of the breach of warranty claim, all without objection.

Nucor, supra, 817 S.W.2d, at 146

Breach of contract testimony was, throughout the trial, used to support the warranty claim. *Nucor, supra.* The same cannot be said of our Cohen hearing, where Harry Newman's discussion with Delmar Miller, and Howard's with Newman, were brief and, as Cohen argues, did not inquire where the three men were standing during their conversations. Location is everything because if Mr. Newman was in the area where the cutting took place, that would prove Cohen employee access or exposure to the hazard.

We find our trial record contains insufficient facts to permit an amendment of the citation to include Cohen employee exposure to the hazard. KRCP 15.02, *Nucor, supra,* and *Williston Basin Interstate Pipeline, supra.*

We find the Secretary proved T & B employees had access to the hazard presented. *Hargis, Hayes Drilling, Underhill, supra.*

Whether Cohen knew or
with the exercise of reasonable
diligence could have known of
the violative condition?

For each citation, the Secretary must prove the employer had either actual or constructive knowledge of the violation of the cited condition; the cited standard says that no cutting "shall be performed on unused drums, barrels, tanks or other containers until they have been cleaned so thoroughly as to make absolutely certain there were no flammable materials present..." Here the question is whether Cohen had actual knowledge of that violation.

Cohen never thoroughly cleaned cylinders but drained them instead according to Harry Newman, Cohen's yard manager. TE 101. Don Mynear, Cohen's safety director, said running the hydraulic boom up and back would clean the cylinders. TE 247. We have found that while Cohen drained hazardous containers, it did not thoroughly clean them, as required by the cited standard. Harry Newman, Cohen's yard manager stated the difference very directly: "I don't know about cleaned. I just know they were drained." TE 54. Cohan had no rules specifically addressing a thorough cleaning of tanks before cutting. Mr. Mynear admitted T & B employees would drain tanks but were not instructed to clean them thoroughly before torch cutting. TE 248. We find Cohen had actual knowledge of a violation of the cited condition. *Ormet, supra.*

In *Occupational Safety and Health Law*, page 214, 2014 edition, Professor Mark Rothstein says "'knowledge' refers to an awareness of the existence of the conditions allegedly in noncompliance with OSHA standards. It is not necessary to

prove that the employer knew the requirements of the standard or that the conditions were actually hazardous," citing to *Boh Brothers Construction Co, LLC*, CCH OSHD 33,276, BNA 24 OSHC 1067 (2013).

Harry Newman testified Cohen would drain cylinders before cutting them. TE 101. Cohen knew that T & B employees regularly cut metal to fit Cohen's requirements; a piece of steel could be no larger than 2 feet by 5 feet by one quarter inch. This, according to Professor Rothstein and *Boh Brothers Construction*, is proof Cohen was aware it did not thoroughly clean cylinders before cutting them with a torch, proof of actual knowledge of the violation:

> Under Commission precedent, '[t]he knowledge element is directed to the physical conditions that constitute a violation, and the Secretary need not show that an employer understood or acknowledged that the physical conditions were actually hazardous.' *Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1501, 2001 CCH OSHD 32,397, page 49,865...
>
> *Boh Brothers* at CCH 33,276, page 58,434

The cited standard requires cylinders to be thoroughly cleaned before cutting or welding. Cohen, according to its yard manager Harry Newman, knew it did not thoroughly clean cylinders before cutting them. This is the physical condition described in the standard, putting Cohen in noncompliance. *Boh Brothers Construction, supra.* We find the Secretary proved Cohen had actual knowledge of the violation. *Ormet, supra.*

Cohen cannot prove it exercised reasonable diligence to discover violations because managers Harry Newman and Don Mynear admitted they understood that while Cohen drained hazardous containers, it did not thoroughly clean them. KRS

338.991(11). According to Newman and Mynear, if they had exercised "reasonable diligence," that diligence would have been directed to simply discovering whether containers had been drained, which is not a defense to the cited standard requiring a thorough cleaning.

In its brief, Cohen argues it cannot be expected to have knowledge of every violation its independent contractor, T & B, might commit. Cohen argues it hired T & B because of its expertise and so may rely on that expertise. *Frey's Tank Service, Inc*, BNA 4 OSHC 1515 (1976); and *Sasser Electric & Manufacturing Co*, CCH OSHD 26.982, BNA 11 OSHC 2133 (1984). Sasser hired an outside contractor to perform an irregular service. Frey's Tank was hired by Cities Service Oil Company to clean an oil tank and replace anodes, a job Cities employees did not perform. Cohen employees, on the other hand, customarily drained fluids from tanks prior to cutting the tanks. These two cases, cited by Cohen, are therefore distinguishable. Cohen's managers knew the company did not thoroughly clean tanks and cylinders but drained them instead, a violation of the cited standard. Cohen did not rely on T & B employees to thoroughly clean tanks and cylinders before cutting In *Sasser, supra,* and *Frey's Tank Service, supra*, the cited companies relied on their subcontractors to perform jobs they were either unable or unwilling to perform. Cohen had an express, self-imposed duty to inspect each scrap metal piece which arrives at its yard for cutting. First, the scale man inspects the load, looking for items Cohen may not accept as set out in its "do not buy" list. Exhibit 1. If the item is complex, a second inspector, also using the do not buy list, performs a second

inspection. Normally, if Cohen's inspections had discovered a cylinder on a boom, Cohen would have directed that the cylinder be drained, but not thoroughly cleaned before cutting with a torch.

The Secretary has proved each element of the violation. *Ormet, supra.* We affirm the hearing officer's order to sustain the citation and the penalty of $3,400.[33]

It is so ordered.

December 2, 2014.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

Joe F. Childers
Commissioner

Certificate of Service

[33] The calculation of the penalty was not at issue before our Commission.

I certify a copy of this decision was served on the following parties in the manner indicated on this December 2, 2014:

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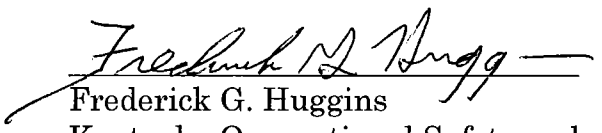

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