COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 5027-13

SECRETARY OF THE LABOR CABINET
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

COMMONWEALTH ROOFING CORPORATION — RESPONDENT

****

Susan Draper, Frankfort, for the Secretary. Phil Williams, Louisville, for Commonwealth Roofing.

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes to us from Commonwealth Roofing's timely petition for discretionary review of our hearing officer's recommended order. Section 48 (1), 803 KAR 50:010 (ROP 48 (1)).

Introduction

Churchill Downs hired Commonwealth Roofing to remove shingles and re-roof several horse barns. Commonwealth Roofing (CR) hired three subcontractors to do the work: Beeson's Enterprises, Javier Rodriguez and Mid West Enterprises. Labor's compliance officer said it was a referral inspection. CO Seth Bendorf testified he looked at photographs his supervisor received from an unnamed person. Transcript of the evidence, page 49 (TE 49). We have no other testimony about the source of the referral inspection.

CO Bendorf took photographs during his inspection. His first photographs of the work site, the roofs under construction, was through a fence. Then the CO gained entrance to Churchill Downs and took more photographs of the employees on the roofs and photographs of electrical cords plugged into wall sockets. Mr. Bendorf said he never went onto any of the roofs and in fact is prohibited from doing so.

KRS 336.015 (1) charges the Secretary of Labor with the enforcement of the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the commissioner of the department of workplace standards issues citations. KRS 338.141 (1). If the cited employer notifies the commissioner of his intent to challenge a citation, the Kentucky Occupational Safety and Health Review Commission "shall afford an opportunity for a hearing." KRS 338.141 (3).

The Kentucky General Assembly created the Review Commission and authorized it to "hear and rule on appeals from citations." KRS 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the Review Commission; the Review Commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the Commission takes a case on review, it may make its own findings of fact and conclusions of law. In *Brennan, Secretary of Labor v OSHRC and Interstate Glass*, 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..."[1]

Our supreme court in *Secretary, Labor Cabinet v Boston Gear, Inc*, Ky, 25 SW3d 130, 133 (2000), CCH OSHD 32,182, page 48,639, said "The review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer." In *Terminix International, Inc v Secretary of Labor*, Ky App, 92 SW3d 743, 750 (2002), the Kentucky 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."

Commonwealth Roofing (CR) received two types of serious citations alleging electrical violations and roofing violations. The first electrical citation charged CR with not providing ground fault circuit interrupters. When an electrical extension cord is plugged into a GFCI which is in turn plugged into an electrical outlet, the GFCI will sense an electrical short and cut off the power before a person can be hurt by the electricity. A second electrical citation said CR permitted employees to use extension cords which did not have grounding plugs.

The second set of citations were about fall protection and fall protection training. The citation for fall protection said the roofers were not properly tied off to prevent falls to the ground below the roofs. Another citation alleged CR did not ensure that the roofing workers received fall protection training.

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

Our hearing officer affirmed all four citations and the $4,900 proposed penalties. CR's defense focused on the legitimacy of the multi-employer worksite doctrine which our Kentucky Supreme Court has endorsed for Kentucky.

The elements for reviewing a standards-based citation

The Secretary carries the burden of proof for cases which come before us. ROP 43 (1). In order for this Commission to sustain a citation, the Secretary must prove the four elements set out in *Ormet Corporation*, a federal review commission decision, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991):

> the standard applies to the cited condition; the terms of the standard were violated; one or more of the employer's employees had access to the cited conditions; and the employer knew, or with the exercise of reasonable diligence, could have known of the violative conditions.

For all four citations, the cited standards apply to the cited conditions. Subcontractor employees were exposed to the hazards alleged by the citations. But there are two issues we must resolve for each citation. One, did the Secretary prove the employer violated the terms of the standard and, two, did the employer know of the violative conditions or could he have known with the exercise of reasonable diligence?

Was Commonwealth Roofing a controlling employer?

CR has maintained it was not a controlling employer; the company argues its contract protects it from multi-employer responsibilities. But federal law on the subject says an employer cannot contract itself out of its OSH obligations. *Frohlick*

Crane Service, Inc v OSHRC,[2] 521 F2d 628, 631 (CA10 1975), BNA 3 OSHC 1432, 1433. See also *Baker Tank Co/Altech, A Division of Justiss Oil Co,* CCH OSHD 30,734, page 42,684, BNA 17 OSHC 1177, 1180 (1995).

Commonwealth Roofing contracted with and then assigned the three subcontractors to work on different barns. CR's contract with the track said it would supply the labor and materials and produce acceptable work for which CR is ultimately responsible. When the compliance officer arrived on site, he asked CR employees who were present on site to order the subcontractor employees off the roof which they did. When the inspection was over, CR ordered the subcontractors back to work. TE 45, 46. One subcontractor wanted to leave the premises during the inspection but CR's Lynn Biggers testified he told the sub he better get back to work because "it would be in everyone's best interest if he continued on that path." TE 96. The CO said he observed Mr. Biggers and Padilla give directions to the subcontractor employees. TE 57 - 58. Compliance Officer Bendorf said Biggers told the sub he would not be paid for his work if he left. TE 46.

Mr. Padilla, a CR employee, identified himself to the CO as a supervisor, a foreman. TE 58. Mr. Hampton told the subcontractor employees to come off the roof for the inspection. TE 58. Mr. Kessinger, a CR employer, also identified himself to the CO as a supervisor. TE 60. Given the detail of the compliance officer's

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[2] In *Kentucky Labor Cabinet v Graham*, Ky, 43 SW3d 247, 253 (2001), the supreme court said because our occupational safety and health law is patterned after the federal act, it "should be interpreted consistently with federal law." *Graham* was abrogated on other grounds by *Hoskins v Maricle*, Ky, 150 SW3d 1 (2004).

testimony, we find President Nathan Sasse was not credible when he said his employees on the job site were not supervisors or foremen. *Terminix, supra.*

Commonwealth Roofing's primary argument is the inapplicability of the multi-employer work site doctrine.

CR's brief to the Commission cites to no case law in support of its rejection of the multi-employer work site doctrine. Nevertheless, 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), BNA 21 OSHC 1073. In *Hargis*, the Kentucky Supreme Court upheld the multi-employer work site doctrine for occupational safety and health cases, even though *Hargis* is not an OSH case.

Our Court of Appeals in *Department of Labor v Hayes Drilling, Inc, and Commonwealth of Kentucky, Occupational Safety and Health Review Commission*, Ky App, 354 SW3d 131, 138 – 139 (2011), has also upheld the doctrine. The *Hayes* court said "The multi-employer work site doctrine is applicable to a construction site where there are numerous contractors." *Hayes* cites to the second circuit court of appeals opinion for *Brennan v OSHRC and Underhill Construction Corporation*, 513 F2d 1032 (CA2 1975), OSHD 19,401, page 23,165, BNA 2 OSHC 1641, 1645, where the court said a controlling employer without exposed employees could be cited under section 5 (a) (2) of the act, 29 USC 654 (a) (2).[3]

[3] KRS 338.031 (1) (b).

The multi-employer doctrine is statutorily confined to situations where the Secretary has issued standards-based citations according to KRS 338.031 (1) (b).[4] On the other hand, an employer's responsibility under the general duty clause is limited to his own employees:

> (1) Each employer:
>
> (a) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards...
>
> KRS 338.031 (1) (a)[5]

All four citations issue to CR are standards-based. Because of its ability to control subcontractors and their employees and its responsibility to produce acceptable work on its contract, we find CR to be a controlling employer on its Churchill Downs work site. CR may therefore be cited for violations of safety standards where its subcontractor employees are exposed to the cited hazards.

The electrical citations

Ground fault circuit interrupter,
serious citation 1, item 1

Citation 1, item 1,[6] alleged CR should have provided ground fault circuit interrupters to employees who plugged their extension cords into wall sockets. The roofers were using power tools on the roofs according to photographic evidence; at

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[4] 29 USC 654 (a) (2) is the federal equivalent.
[5] 29 USC 654 (a) (1).
[6] All four citations carried proposed penalties of $4,900.

the very least the tools were available for use. *Dover Elevator Company, Inc*,[7] a federal review commission decision, 91-862, dated July 16, 1993.

Here is the cited standard:

> 1926.404 (b) (1) (ii)[8] *Ground fault circuit interrupters.* All 120 volt, single-phase, 15 and 20 ampere receptacle outlets on construction sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection...
>
> (emphasis added)

Then citation 1, item 1 makes the following charges:

> 29 CFR 1926.404(b)(1)(ii): *Ground-fault circuit interrupters.* All 120-volt, single-phase 15-and 20-ampere receptacle outlets on construction sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection. Receptacles on a two-wire, single-phase portable or vehicle-mounted generator rated not more than 5kW, where the circuit conductors of the generator are insulated from the generator frame and all other grounded surfaces, need not be protected with ground-fault circuit interrupters.[9]
>
> a. On February 7, 2013 workers were using extension cords for temporary electric that were not connected to a GFCI protected outlet while performing roofing work on Barn Forty-two[10] (42) at Churchill Downs.

The Secretary's compliance officer was not asked for an explanation of a ground fault circuit interrupter and so did not provide one. Fortunately the definitions section provides a definition, albeit one that is not particularly helpful:

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[7] Found at OSHRC.gov. Click on decisions and then final commission decisions for 1993.
[8] Adopted in Kentucky by 803 KAR 2:410, Section 1 (1) (a).
[9] The second sentence does not apply to the facts of this case because no generator was used.
[10] There are three instances of alleged exposure, a, b and c. All are dated February 7. Instance b is for barn 12. Instance c is for barn 40.

> *Ground-fault circuit interrupter*. A device for the protection of personnel that functions to deenergize a circuit or portion thereof within an established period of time when a current exceeds some predetermined value that is less than required to operate the overcurrent protective device of the supply circuit.
>
> 29 CFR 1926.449

From what we can gather from this poorly written definition and its title, a ground fault circuit interrupter will, in order to protect personnel, shut down an electric current when it senses an improper current to ground. For this Commission to sustain the citation, the Secretary must prove all elements found in the cited standard.

The Secretary has encountered several problems with this citation and the cited standard. We have not been informed about the meaning of single-phase because it is not defined in the standards and the compliance officer did not explain it. The standard requires a GFCI for 120 volt, single-phase current carrying 15 to 20 amperes. This means the Secretary must prove the current at the track barns was 120 volt, single-phase, with 15 to 20 amperes and we do not have that proof. Next, the standard requires that outlets "which are not a part of the permanent wiring" must be protected by GFCIs. But the proof for this case is all electrical outlets used by the roofers were built-in and part of the barns being roofed. TE 65. All electricity used by the subcontractors was obtained from "the permanent wiring of the building." In addition, the track's junction boxes were grounded, at least some were grounded. TE 31 and 66. From our experience with these cases, we understand administratively what the term grounded means for electrical work. But because

the concept is technical, we cannot simply rely on our knowledge; instead we must turn to the definition found in the electrical standard. We have found no case law specifically defining the term:

> *Ground.* A conducting connection, whether intentional or accidental, between an electrical circuit or equipment and the earth, or to some conducting body that serves in place of the earth.
>
> 29 CFR 1926.449

From this definition we infer some of the electrical outlets at Churchill Downs investigated by the compliance officer were connected to the ground or earth, providing unspecified protection to users of the outlets.

A federal administrative law judge's recommended order upheld a GFCI citation based on the same standard where extension cords without GFCIs at a construction site were plugged into permanent building wiring. *Gunter Contractors, Inc*, CCH OSHD 29,189, BNA 14 OSHC 1989, 1990 (1990). The ALJ said the purpose of the standard is to protect extension cords whether they are plugged into permanent wiring or not. While we think the federal ALJ was incorrect in his interpretation of the cited standard, we will not rely on *Gunter* to dismiss the citation because we have not been informed about the relationship between a ground fault circuit interrupter and a grounded electrical outlet.

Instead we will rely on *CB& I Contractors, Inc*, CCH OSHD 32,669, page 51,431, BNA 20 OSHC 1310, 1313 (2003), where an administrative law judge held a ground fault circuit interrupter citation cannot stand where there is no proof the current

was single-phase and 15 or 20 amps – or we might add no testimony about the voltage either.

We find CR could have known of the alleged violation because it was in plain sight; all the compliance officer had to do was observe the power extension cords to discover CR was not requiring the use of ground fault circuit interrupters. *Kokosing Construction, Co, Inc*, a federal review commission decision, CCH OSHD 31,207, page 43,723, BNA 17 OSHC 1869, 1871 (1996), KRS 338.991 (11) and *Ormet, supra.*

We dismiss citation 1, item 1, because the Secretary failed to prove the voltage, failed to prove whether the current was single-phase and failed to prove the amperage of the current. *CF& I Contractors and Ormet, supra*

No grounding prong on
extension cords

serious citation 1, item 2

Photographs showed the subcontractors had electrical tools on the roofs which were available for use. See exhibit 2, photographs 81, 99 and 116. These power tools were connected to extension cords which in turn were plugged into the permanent wiring found in the barns being roofed. Compliance Officer Bendorf testified the permanent electrical junction boxes were grounded. TE 66. Compliance Officer Bendorf, referring to exhibit 2, photograph 80, said it was not grounded. TE 31. We find not all outlets were grounded. But the compliance officer found several extension cords did not have a grounding plug, an apparent violation of the standard which reads:

1926.404 (f) (6) *Grounding path.* The path to ground from circuits,

equipment, and enclosures shall be permanent and continuous.

Here is citation 1, item 2:

> Citation 1 Item 002 – 29 CFR 1926.404(f)(6): *Grounding path.* The path to ground from circuits, equipment, or enclosures shall be permanent and continuous.
>
> a. On February 7, 2013, an extension cord used to provide temporary electric for construction activities, near Barn Forty-two (42) at Churchill Downs, was missing the grounding electrode.
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> b. On February 7, 2013, an extension cord used to provide temporary electric for construction activities, near Barn Forty (40) at Churchill Downs, was missing the grounding electrode.

The extension cords found on site have three wires: a hot wire and neutral wire which carry the current and a third, grounding wire. These cords all have three prong plugs. Exhibit 2, photograph 86. CO Bendorf found at least two extension cords which had three wires but no grounding prong, a violation of the cited standard. Photographic exhibit 2, exhibit 29, and TE 38. This cited standard is fairly straightforward: the absence of a grounding plug on an extension cord at a construction site is a violation. In *Milo Construction Corporation*, CCH OSHD 31,521, page 44,894, BNA 18 OSHC 1373, 1374 (1998), a federal administrative law judge upheld a missing grounding plug citation issued under the authority of 1926.404 (f) (6). According to the ALJ, employees were exposed to the risk of an electrical shock or electrocution. We agree and adopt his reasoning.

Because the hazard could be easily discovered with the exercise of reasonable diligence, the CO simply pulled a plug out of its socket to discover the missing

grounding prong, the Secretary has proved constructive knowledge of the hazard. *Kokosing, supra.* We affirm citation 1, item 2, the lack of a ground prong, because the Secretary proved CR violated the elements of the cited standard; we affirm the $4,900[11] penalty as well. The parties have not argued whether the penalties were correctly determined. *Ormet, supra.*

Fall protection citations

Failure to have effective fall protection equipment

Citation 1, item 3

Commonwealth Roofing contracted the roofing work to three subcontractors; it was the subcontract employees who were on the barn roofs doing the work which exposed them to the cited fall protection hazard. But even though the citation and cited standard speaks of guard rails, nets and harnesses and lanyards, the compliance officer during his testimony talked only about harnesses and lanyards or the lack of them on the job.

Here is the cited standard:

> **1926.501(b)(11):**[12] *Steep roofs.* Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toe boards, safety net systems, or personal fall arrest systems.

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[11] The determination of the penalty began with a gravity based penalty of $7,000, based on a high severity injury and greater probability of an injury. Then the CO awarded CR a 30 percent reduction because of the size of the company. TE 37. $7,000 less (7,000 * .3) = $4,900.

[12] Fall protection regulations for the construction industry begin at 29 CFR 1926.500. 803 KAR 2:412, Section 2, states employers in Kentucky must comply with the federal fall protection standards enumerated in Section 2 except for specific Kentucky standards for residential construction. We find the work on the horse barns at Churchill Downs is not residential construction.

Nets are primarily used by ironworkers who construct buildings out of steel. We are all familiar with guardrails which are often used to protect workers from falls at the edge of a building under construction or a hole on the floor of a building under construction. In our experience, if a roofer on a pitched roof is going to use any kind of fall protection, it will be a harness and lanyard. Such was the case for the Commonwealth Roofing workers.

We have no photographs of harnesses, snaphooks or lanyards in our CR record. This is especially unfortunate because Labor's lawyer did not ask the compliance officer to take the time to describe fall protection systems and how they work; he spoke about harnesses as if we all knew all about them. We do not, at least in so far as our record is concerned. To understand a fall arrest system, we must turn to the fall protection regulations, especially 1926.502 (d) which spells out in particular detail the requirements for several types of personal fall arrest systems and to the definitions found at 29 CFR 1926.500 (b) where a fall protection system is defined as a body harness for all four limbs, a lanyard (a wire rope, rope or strap) with a connecter at each end to attach the lanyard to the harness at one end and to a lifeline and then an anchor at the other. The definition for anchorage states it is a secure point for attaching lifelines, lanyards or deceleration devices. 29 CFR 1926.500 (b). "Connectors shall be drop forged, pressed or formed steel, or made [sic] of equivalent materials." 1926.502 (d) (1).

Here is the citation:

> **29 CFR 1926.501(b)(11)**: *Steep roofs.* Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more

above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

a. On February 7, 2013 employees or subcontractors were performing roofing work on a steep sloped, 6.93 in 12 pitch roof, with a ground to eave height of eight (8) feet eleven and one half (11 ½) inches, for Barn Forty-one[13] (41) at Churchill Downs, with no fall protection in use.[14]

Our hearing officer affirmed item 3 with a penalty of $4,900. He found CR was a controlling employer, invoking the multi-employer doctrine. He said he found CR controlling because it hired three subcontractors to do the roofing work. RO 5. As we have stated, we agree with our hearing officer and affirm this finding. Our hearing officer also found CR to be a creating employer; we disagree and reverse our hearing officer on this point: CR was not a creating employer. CR was simply the prime contractor for the barn roofing job and as we have found the controlling employer.

We find the roofs were steep: more than 4 inches vertical for 12 inches horizontal. 29 CFR 1926.500 (b). We find all roofs were more than six feet above the ground below. We find the standard applies to the cited condition. *Ormet, supra.* We then have two questions to answer: one, did the subcontractor employees use fall protection and, two, did CR have knowledge, actual or constructive, of the hazardous condition?

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[13] This citation had five instances; each roof was more than six feet above the ground below. Each roof qualified as a steep roof which is defined in a standard as "a roof having a slope greater than 4 in 12 (vertical to horizontal). 29 CFR 1926.500 (b). This means a right triangle where the horizontal bottom is 12 inches and the upright leg is 4 inches. The hypotenuse describes the slope of the roof.
[14] For instance b the eave height was eight feet, two inches and a slope of 5.85 inches to 12. For instance c the eave height was eight feet, three inches with a slope of 6.38 to 12. For instance d the eave height was nine feet, two inches with a slope of 6.11 to 12. For instance e the eave height was ten feet, three inches with a slope of 5.34 to 12. All cited roofs were steep

There is no doubt the roofers had no fall protection. One, they were not using standard railings or nets as the photographic evidence demonstrates. Company President Nathan Sasse did not dispute the subcontract employees were working without effective harnesses. His argument instead was one of notice; he said one could not tell from the ground the roofers were not in compliance with fall protection harness requirements.

Two, the compliance officer and his photographs demonstrate the roofers who did wear harnesses were either not tied off to anything, a violation visible in exhibit 2, photographs 43 – 47, or they had a ropes tied off to the back of their harnesses which was improper according to the compliance officer because the connector to the harness must be steel or its equivalent; a knotted rope is not an acceptable connector. 29 CFR 1926.502 (d) (17), 29 CFR 1926.500 (b), TE 27, 28 and 29 and exhibit 2, photographs 55 and 61. The lanyard must be attached with a snap shackle and not a knot. TE 29, photograph 61. Compliance Officer Bendorf saw employees without harnesses, TE 25 and 30, and also employees with harnesses but without the required leg straps. TE 62 and the 29 CFR 1926.500 (b) definition of a four limb body harness. Some employees had harnesses and lanyards not tied off to anything. TE 27 and exhibit 2, photographs 37 and 38. Some roof anchors had multiple ropes attached, also a violation.29 CFR 1926.502 (d) (15). TE 62. The CO said improperly installed anchor roofs were easy for him to see while on the job site. TE 77 and 78.

We find the Secretary proved Commonwealth Roofing was not in compliance with the cited fall protection standard. *Ormet, supra.*

Actual or constructive knowledge

Always at issue is whether CR had actual or constructive knowledge of the violations. For the electrical, lack of ground, citation all a supervisor had to do was look. The CO said he simply pulled an extension cord away from its connection to discover grounding plugs were missing. TE 37. CR could have done the same thing, employing reasonable diligence according to the definition of a serious violation. KRS 338.991 (11).[15] The track's junction boxes themselves did not all have a slot for a grounding plug, even though the boxes were grounded. TE 65 – 66. We found the electrical violations were in plain sight. *Kokosing, supra.*

For the failure to train, fall protection citation, the question of employer knowledge is a bit more difficult. President Nathan Sasse testified the subcontractors told him they had trained their employees. He also said his own workers on the job had been trained. The training standard does not require written training records; some standards do require written proof but this standard does not. *Field & Associates*, CCH OSHD 31,879, page 47,113 (1999), a federal ALJ decision. Even so, the compliance officer asked for training records and never received any. TE 75.

The Secretary's compliance officer took many photographs recording the lack of fall protection. Compliance Officer Bendorf took the greater majority of these

[15] The lack of GFCI protection was in plain sight.

photographs on Churchill Downs' property, inside the fence. What we see in the photographs, the compliance officer could see with his own eyes. What we see in the photographs is the appearance of fall protection. From the photographs we see employees wearing harnesses not connected to anything. We see ropes tied improperly to the backs of harnesses instead of using steel snap shackles. We see ropes running horizontally along the roof, ropes so long they could not prevent a fall to the ground below.

We find the lack of fall protection on the barn roofs was in plain sight, proving constructive knowledge. *Kokosing, supra.*

President Sasse said his people could not see whether the roofers were properly tied off while on the ground adjacent to the barn roofs. But the Cabinet's compliance officer could see the lack of fall protection and recounted the problems in detail. Sasse said it was easier to see the workers without fall protection from outside the Churchill Downs fence. But a look at the photographs reveals otherwise. The compliance officer while standing next to barns observed violations and took photographs recording his observations.

We find the fall protection violations were in plain sight, proving constructive knowledge. *Kokosing, supra.* Because Commonwealth Roofing violated the fall protection standard we affirm the fall protection citation, serious item 3, with a penalty of $4,900. *Ormet, supra.*

The failure to train about
fall protection citation

We have already discussed this alleged violation; here is the cited standard:

> *1926.503 (a) Training Program. (1).* The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

Then the citation alleges:

> 29 CFR 1926.503(a)(1): *Training Program.* The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.
>
> a. On February 7, 2013 Commonwealth Roofing had not ensured that Beeson's Enterprises had properly trained fifteen (15) employees, who were performing work on steep sloped roofs, to recognize fall hazards or the proper procedures to be followed to minimize fall hazards and had not certified any previous training conducted.[16]

President Sasse testified his employees had been trained and his testimony was not rebutted; that leaves the subcontractor employees. The CO testified he asked for training records and got none but that is not critical because the training standard does not require written training records – some standards do so require.

Sasse said everyone had been trained and no one contradicted him. The Commission cannot infer a failure to train, given how much trouble the subcontractor employees went to to evince compliance: harnesses improperly worn and tied off, ropes leading on all directions.

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[16] This citation had four instances, all referring to the same date. Instance b is directed to Javier Rodriguez. Instance c is directed to Mid West Enterprises, and instance d to Commonwealth Roofing.

Because we find the Secretary did not prove Commonwealth Roofing failed to provide fall protection training to its employees and to the subcontractor employees, we dismiss the training citation, item 4, and the penalty of $4,900.

It is so ordered.

August 8, 2016.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

Joe F. Childers
Commissioner

Certificate of Service

I certify that a copy of the foregoing brief has been served this eighth day of August, 2016 on the following as indicated:

Messenger Mail:

Susan Draper
Kentucky Labor Cabinet
Office of General Counsel
1047 US 127 South, Suite 4
Frankfort, Kentucky 40601

US Mail postage pre-paid:

Phil Williams
Attorney at Law
2115 Stanley Gault Parkway
Louisville, Kentucky 40223

Frederick G. Huggins
Kentucky Occupational Safety and
Health Review Commission
4 Millcreek Park
Frankfort, Kentucky 40601
(502) 573-6892
Counsel to the Commission