COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 5045-13

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

AMAZING CONTRACTORS LLC — RESPONDENT

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S. Kelly Gilliam, Frankfort, for the Secretary. Joseph D. Buckles, Lexington, for Amazing Contractors.

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes to us on Amazing Contractor's petition for discretionary review. Our hearing officer in her recommended order affirmed two citations: a repeat serious citation[1] alleging Amazing failed to protect its employees against falls from a roof and a serious citation[2] which alleged a failure to provide fall protection training. When he arrived to conduct his inspection, the Secretary's compliance officer found six Amazing employees working on the roof which was fifteen feet, ten inches above the ground below. Recommended order, pages 3 and 5 (RO 3 and 5) and transcript of the evidence, page 19 (TE 19). According to information gleaned from photographs taken by an Amazing employee, the employer provided an insufficient number of roof anchors employees used to secure their lanyards which in turn were attached to their fall protection harnesses. As the compliance officer

[1] Our hearing officer sustained a $7,000 penalty for the repeat serious citation.
[2] Our hearing officer sustained a $3,500 penalty for the serious citation.

explained, the cited standard requires a roof anchor to support five thousand pounds per employee. TE 26. In her recommended order our hearing officer found "There were three anchors that were nailed down on the roof" for six employees; she concluded that was a violation of the standard. RO 4, 5 and 10.

Before our hearing officer, Amazing argued it had no employees and thus was not subject to citation. Our hearing officer "concluded that Lackaby [Amazing's representative on site and at the trial] was 'an employer.'" RO 9. In neither its petition for discretionary review nor its briefs to the Commission did Amazing Contractors argue it was not an employer and so it has abandoned that argument.

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*,[3] 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

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

OSHD 19,802, page 23,611, BNA 3 OSHC 1299, 1302, where the Court said "the Commission is the fact-finder, and the judge is an arm of the Commission..."[4]

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."

The repeat serious fall protection citation.

The Cabinet's repeat serious fall protection citation carried a proposed penalty of $7,000;[5] it is based on an allegation the six workers on the roof did not have enough roof anchors to go around. According to the Cabinet and the cited standard, the 5,000 rated anchor points were only to be used by one worker. The disputed photographs, Amazing argues they were admitted into evidence in error, show the

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

[5] Compliance officer Dickerson rated this violation as high serious because a potential fall from height could result in death and greater probability of an injury because the roofers had been working on the roof for five to six hours that day. Dickerson assigned an unadjusted penalty of $14,000. TE 42. He told the hearing officer the $7,000 unadjusted penalty was increased to $14,000 because it was a repeat. TE 78 and KRS 338.991 (1). Compliance officer Dickerson said he awarded a credit of 50 % for size, the number of employees, because Amazing employed eight workers. TE 47. Good faith was not awarded because of the high serious/greater probability characterization. No history credit was awarded; the CO was not asked why. TE 47. The $14,000 unadjusted penalty was reduced to $7,000 by the 50 % credit for size.

To prove the elements of a repeat, the Cabinet must show a prior citation for a substantially similar violation was now a final order. *Potlatch Corporation*, CCH OSHD 23,294, BNA 7 OSHC 1061 (1979). The repeat serious citation stated the prior citation used to prove the repeat was a final order; Amazing did not challenge this allegation. Labor proved this citation was a repeat violation.

three anchors on the roof were rated at 5,000 pounds each. One photograph, exhibit 8, shows two lanyards attached to one D ring. Photographic exhibit 6 depicts an anchor with two D rings; Amazing Contractors has argued the two D rings on the 5,000 rated anchor were confusing; while we agree with Amazing on this point, the standard specifically limits each 5,000 pound anchor to one employee. As the photographs show, exhibits 5, 6, 7 and 8, the anchors are clearly rated at 5,000 pounds.

For the repeat serious citation, the Cabinet cited to standard 29 CFR 1926.502 (d) (15);[6] it says:

> Anchorages used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds... per employee attached...

Then the citation[7] alleges:

> Anchorage used for attachment for personal fall arrest equipment was not capable of supporting at least 5,000 pounds...per employee... a)...six...employees of Amazing Contractors, LLC were exposed to a fifteen (15) foot ten (10) inch fall hazard...without adequate fall protection...

For the cases which come before us, the Kentucky Labor Cabinet has the burden of proof. 803 KAR 50:010, section 43 (1) (ROP 43 (1)). For our Commission to sustain a citation, the Cabinet must prove the four elements set out in *Ormet Corporation*, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), where the federal review commission said:

> In order to prove that an employer violated a standard,

[6] Kentucky has adopted the federal standard at 803 KAR 2:412, section 2 (1).
[7] Exhibit 4.

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,[8] or with the exercise of reasonable diligence, could have known of the violative conditions.

Whether the standard applies?

Amazing Contractors, on the day of the inspection, was engaged in roofing which is construction work and we so find. TE 17. Amazing worked as a subcontractor for Craftsman Restoration, LLC. Exhibit 2, the contract between Amazing and Craftsman, TE 21 and TE 103. We find Amazing was properly cited according to 1926.502 and 1926.503 which are found in the construction standards. *Ormet, supra.*

Whether Amazing violated the terms of the standard?

Our hearing officer found the standard was awkwardly cited; we agree. The citation's instance description speaks about a lack of "adequate fall protection," without defining the term, while the standard says an anchor must be capable of supporting 5,000 pounds per employee exposed. As our hearing officer stated in her recommended order,[9] the violation rested on six roofers relying on three anchors which were individually rated at 5,000 pounds each. RO 5. For 5,000 pound anchors, each employee must be tied off to a separate anchor, a detail left out of the instance description.

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

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

Compliance officer David Dickerson said he used a Leica Disto meter to measure the height of the roof where he saw employees working; he took photographs of the men on the roof. Photographic exhibits 9, 10 and 11. He testified the "left-hand corner of the house" measured fifteen feet, ten inches from the ground. TE 19. Individual fall protection, a harness and lanyard tied off to an anchor, is required when an employee engaged in construction is working at an unprotected height of six feet for a steep roof according to the compliance officer. TE 83. An employer has the option of providing guard rails or safety nets. CO Dickerson said "I didn't see anything along the edge" which we infer to mean he observed no safety nets or guardrails. TE 19. Labor's repeat serious citation did not set out why fall protection was required.

To prove a violation of the cited standard, the Cabinet must establish the six employees on the roof were not individually tied off to an anchor capable of supporting 5,000 pounds. 1926.502 (d) (15). During his walk around inspection, CO Dickerson said he observed one employee working "right at the edge." He then walked around the house and took photographs. He said there "were four people in the photographs I took on the back of the house." TE 19. Mr. Dickerson said during his inspection he found six employees on the roof; our hearing officer found six employees on the roof as well. TE 51 and RO 3. CO Dickerson, relying on photographic exhibits 5, 6, 7 and 8, determined there were only three 5,000 pound anchors. Three anchors are, according to the cited standard, insufficient for five or six employees. TE 26 and 40. For us, the crux of this case is whether the Cabinet

proved Amazing had installed only three anchors on the roof for the six employees; without those critical facts, we must dismiss the repeat serious citation as we shall.

Compliance officer Dickerson said he did not go up on the roof because he had no fall protection; he said compliance officers generally do not have fall protection harnesses with them when they conduct inspections. TE 27 and 53. This means he was, confined to the ground, unable to count or to inspect the roof anchors himself. CO Dickerson had no hard hat with him either and so he maintained a ten foot distance between himself and the edge of the roof; he said the employees continued their work on the roof while he photographed them. Mr. Dickerson was concerned about objects falling from the roof and, we suppose, hitting him on his head. TE 19.

In its brief to our Review Commission, the Secretary relied exclusively on photographs 5, 6, 7 and 8 to prove the number of roof anchors – three. Amazing has preserved its objection to these photographs. We find the photographs were admitted as evidence, over the objection of Amazing in error. Because CO Dickerson could not go up on the roof to inspect and count the roof anchors, he asked an employee of Amazing Contractors to take his camera to the roof to take the photographs. CO Dickerson said he could not remember the employee's name; the employee did not testify. TE 28. Dickerson, when asked if he observed the taking of the photographs, said "I did not visible see him take the photographs because I was on the ground and I was conducting employee interviews at that point." TE 29. When asked on direct examination when the exhibits, 5, 6, 7 and 8, appeared on his

camera, Dickerson said they were "present when he returned with the camera." TE 30.

As Amazing Contractors has argued, a piece of evidence, a photograph, must be authenticated by the person offering the evidence at a trial. KRE 901 (a). That rule states:

> General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

In her recommended order, our hearing officer admitted the photos; she said "Dickerson watched the photographs being taken." RO 4. Mr. Dickerson, however, said he was busy interviewing employees when the photos were taken. TE 29. Our hearing officer then "found that the resulting photographs were true and accurate representations of the anchors as attached to the roof." RO 4. Certainly, the employee photographer, or others who observed the roof anchors, could have testified his photos were "true and accurate presentations of the anchors" which he had observed; but he did not testify. CO Dickerson could not make that representation because he did not go onto the roof and never personally observed the anchors. Equally troubling to us is the compliance officer's inability to tell whether two employees were actually tied off to the anchor depicted in photographic exhibit 8; he could not see if anyone was attached to the anchor shown in exhibit 8 because he was not on the roof. CO Dickerson admitted he asked no questions about the number of employees tied off to the exhibit 8 anchor. TE 75 – 76.

Here is what Professor Lawson[10] has to say about authentication of photographs:

> Authentication is a 'condition precedent' to admissibility of a photograph, meaning that an offering party is required by KRE 901 to produce 'evidence sufficient to support a finding that [what is depicted in the photograph] is what its proponent claims.'

In *Gorman v Hunt*, Ky, 19 SW3d 662, 669 (2000) our Kentucky Supreme Court set down the requirements for admitting a photograph into evidence:

> First, the photographs shall be properly authenticated. 'An authentic photograph is one that constitutes a fair and accurate representation of what it purports to depict.' Thus, 'the photograph must be... verified testimonially as a fair and accurate portrayal of [what] it is supposed to represent.
>
> (emphasis added)

While the employee photographer, or others, could have authenticated the photographs because they observed the anchors; they did not testify. CO Dickerson could not authenticate the photos because he never saw the anchors, only the photos. We conclude our hearing officer erred when she admitted photographs 5, 6, 7 and 8. We strike exhibits 5, 6, 7 and 8 from the record; we shall place these exhibits in a separate, sealed envelope. KRE 103 (a) (1).

In its brief the Cabinet cited to a case which it said would permit the admission of the roof photographs taken by an Amazing employee even though the admitting compliance officer could not testify the photos, 5 through 8, accurately represented the actual anchor brackets. In *Litton v Commonwealth*, Ky, 597 SW2d 616, 618 (1980), the trial judge in a burglary case admitted photographs taken by a security

[10] Fifth edition, 2013, page 830.

camera: a "witness is only required to state whether the photograph fairly and accurately depicts the scene about which he is testifying." In that case the "owner [of the building] identified the background in the photographs as being a fair and accurate representation of the area behind his pharmacy counter, an area not open to patrons." *Litton.*

In *Litton,* the owner identified the scene of the photograph. The same cannot be said of the compliance officer in our case; he was not on the roof, he did not see the anchors and he testified he was interviewing witnesses when the Amazing employee photographer was on the roof taking the pictures.

Stevie Lockaby testified he was "a member of the LLC, known as Amazing Contractors." TE 91 – 92. Mr. Lockaby said he never saw the anchors depicted in photographic exhibits 5, 6, 7 and 8. He said he was not on the roof on the day of the inspection and did not install the anchors. TE 97. When asked, Mr. Lockaby could not authenticate photos 5 through 8 because he was not on the roof. TE 101. Neither on direct examination nor on cross was Lockaby asked about the number of anchors on the roof.

Several times CO Dickerson said Mr. Lockaby told him there were three anchors on the roof. TE 26, 27 and 40. Later, however, Mr. Dickerson contradicted himself. When asked on redirect how many anchors were on the roof, he said "Three according to the photographs that were given to me." TE 71. CO Dickerson's reliance on the photographs explains why the Cabinet in its brief to the Commission focused exclusively on the disputed photographs, photographs Dickerson did not

take and could not authenticate, to prove the number of anchors. We assign little weight to the CO's statements about what Mr. Lockaby told him about the anchors. *Terminix, supra*, at 92 SW3d 750. Mr. Lockaby was not on the roof, did not install the anchors and could not authenticate the photographs. Because Mr. Lockaby had not gone on the roof, we have no confidence in his ability to report on the number of anchors independent of the photographs which had been provided to respondent prior to the trial. Transcript of the record, item 19. (TR 19).

We hold that the Cabinet, without the photographs, has failed to prove the number of anchors in use on the roof, the essential piece of evidence for the repeat serious citation, and so we dismiss the citation.

Whether Amazing's roofing employees had access to the cited condition?

We have already ruled that Amazing has abandoned its argument it had no employees on the work site. We find the employees on the roof worked for Amazing and had access to the cited condition.

Whether with the exercise of reasonable diligence the employer could have known of the violative condition?

Assuming for the fourth element required by *Ormet, supra*, a violative condition, we find Mr. Lockaby could have, with the exercise of reasonable diligence, easily determined whether his roofing employees were protected from the hazard of falling off the roof. KRS 338.991 (11).

The serious, failure to train citation.

Our hearing officer in her recommended order affirmed this failure to train citation and the penalty of $3,500.[11] In the citation the Cabinet alleged:

> Six employees of Amazing Contractors, LLC were not properly trained in the use of fall protection equipment, namely anchors, while performing roofing work...Two employees were observed tied off to one anchor with a load rating of 5,000 pounds per person. This application would have required a 10,000 pound anchor.

According to the compliance officer he issued this failure to train citation because the employees on the roof were not observing the rule that only one employee could be tied off to a 5,000 pound anchor; this, to the CO, was proof of improper training. TE 44 and RO 7. Oddly, the compliance officer in his testimony made no mention of employee interviews about training.

In its petition for discretionary review Amazing Contractors elected not to ask this Commission to reverse the hearing officer and dismiss this citation. Amazing made no mention of this serious, failure to train citation in its brief to the Commission.

We found two federal commission cases which have ruled that instances where employees are not complying with a standard are not evidence of a failure to train. *James Construction*, a federal ALJ decision, CCH OSHD 31,140, BNA 17 OSHC

[11] Dickerson said the violation was serious because, according to the CO, the lack of training exposed employees to a 15 foot fall. Compliance officer Dickerson rated this violation as high serious because of a potential fall from height and greater probability of in injury because the roofers had been working on the roof for five to six hours that day. Dickerson assigned an unadjusted penalty of $7,000. TE 46. He awarded a credit of 50 % for size, the number of employees. TE 47. Good faith was not awarded because of the high serious/greater probability characterization. No history credit was awarded. TE 47. The 50 % credit resulted in a proposed penalty of $3,500.

2173, 2176 (1996). *Superior Rigging & Erecting Co,* a federal ALJ decision, CCH 31,534, page 44,955 (1998).

Because Amazing Contractors did not petition our Commission to dismiss this failure to train citation, it is now a final and unappealable order. ROP 48 (3) and KRS 338.091 (1).

This case was ill-conceived from the start. Asking an employee to take photographs for the compliance officer and then not calling the employee photographer is difficult for us to understand, given the law on the admission of photographs in Kentucky. Similarly, writing a failure to train citation where the only proof consisted of an apparent violation of a standard without more is nonsensical in light of the case law on the subject. Compliance officer Dickerson said he interviewed employees, and in fact was interviewing when the employee photographer took the pictures for him, but he did not inquire about training. But for Amazing's failure to preserve this argument in its appeal to us, we would have reversed this citation. However, Amazing has waived its right to challenge this failure to train citation, and so we affirm.

It is so ordered.

April 7, 2015.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

Joe F. Childers
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Certificate of Service

I certify this decision was served on the following in the manner indicated on April 7, 2015:

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