COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #5053-13

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

EGL INC dba CEVA FREIGHT, LLC — RESPONDENT

* * * * * * * * * *

John R. Rogers, Frankfort, for the Secretary. Kyle D. Johnson, Louisville, and Robert G. Lian, Jr., Washington, D. C, for respondent.

DECISION AND ORDER OF THIS REVIEW COMMISSION

After an employee complaint inspection of CEVA's facility on Westport Road in Louisville, the Cabinet issued four serious citations. Respondent, once our hearing officer issued a recommended order, filed for discretionary review with this Commission. 803 KAR 50:010, section 48 (1) (ROP 48 (1)). We granted review and asked for briefs.

Hearing Officer Susan Durant in her recommended order had dismissed serious item 1 with penalty of $4,250; item 1 charged the company with failing to test two eye wash stations which were adjacent to a battery charging facility. She affirmed serious item 2 with a penalty of $7,000; item 2 alleged CEVA did not maintain a clean floor in a working area. Ms. Durant affirmed serious item 3 with a penalty of $4,250; item 3 charged the company with not removing a powered industrial truck

from service. Item 3 said the truck was in use despite a defective condition: "hydraulic lines held up with strips of plastic." Hearing Officer Durant then reduced serious item 4 to a nonserious citation with no penalty. Ms. Durant in her recommended order said a "lack of labels on pipes did not create an immediate danger." Item 4 alleges the company should have posted a sign in a boiler room warning of asbestos. Recommended order, page 10 (RO 10).

CEVA supplies parts to a Ford plant in eastern Jefferson County. As our hearing officer described CEVA's business: "CEVA is a warehouse facility that stages parts for the local Ford manufacturing plant...Approximately 800 skids, or pallets, with containers of parts are brought in each day. Around 2400 parts are stored. The containers of parts are then metered into the Ford plant as Ford requests. Once the Ford plant has emptied a container [a tote according to CEVA], it comes back to CEVA as return container dunnage[1] to be sorted and stacked and returned to the suppliers." RO 2.

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

[1] Dunnage is a term used for the cardboard which falls out of the containers when they are upended and for the "empty returnable containers." TE 137.

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). 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 F2d 438, 441 (CA8 1973), CCH OSHD 16,799 page 21,538, BNA 1 OSHC 1372, 1374, the Eighth Circuit said when the Federal 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..."[3]

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),

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

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

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."

Serious Item 1

In her recommended order our hearing officer dismissed serious item 1 which alleged CEVA did not test two eye wash stations located next to one another. A CEVA janitor testified he cleaned the eye wash stations weekly and tested them as required; his testimony was not rebutted. The compliance officer said she relied on the dusty condition of the eye wash stations; the janitor, however, said the warehouse was very dusty, explaining the condition of the eye wash stations. Because the Cabinet did not file a petition for discretionary review of the dismissal of this serious item 1, it is now a final and unappealable order of the Commission. ROP 47 (3) and KRS 338.091 (1).

Serious Item 4

Our hearing officer reduced serious item 4 to nonserious with no penalty. This item alleged CEVA did not post labels or signs to warn employees that asbestos wrapped pipes were present in the boiler room. At trial we learned only a few supervisors and maintenance workers went into the boiler room, one, to adjust the plant's thermostat or, two, to replace light bulbs. These supervisors and maintenance personnel had received asbestos awareness training. There was no proof or even an allegation of any exposure to asbestos. Our hearing officer said item 4 was "not convincingly evaluated," meaning it was not a serious violation. RO

10. Neither the Cabinet nor CEVA Freight asked this Commission to review item 4 and so it is now a final and unappealable order of this Commission.

Serious Item 2

When the parts containers, the totes, come back from the Ford plant, the containers have cardboard and paper packing and the occasional part which Ford missed. CEVA employees, according to the directions of the parts manufacturers, empty these containers on the floor, sort them and return them to manufacturers who fill them with parts and send them back to CEVA. Transcript of the evidence, pages 75 and 131 (TE 75 and 131).

Item 2 said CEVA "did not maintain a clean floor as a working area floor was littered with paper and cardboard presenting a slip/trip/fall hazard." Here is the cited standard:

> 1910.22 (a) (2) The floor of every workroom shall be maintained in a clean and, so far as possible, dry condition. Where wet processes are used, drainage shall be maintained...

Then the citation says:

> 1910.22 (a) (2): The floor of every workroom was not maintained in a clean and, so far as possible, a dry condition. When wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places should be provided where practicable:
>
> a) For the 48 employees of...CEVA Freight, LLC...the employer did not maintain a clean floor as the working area floor was littered with paper and cardboard presenting a slip/trip/fall hazard.

The cited standard directs employers to keep workrooms clean and where fluids are present in the work place the employer shall maintain the floor "so far as

possible" in a dry condition. This standard applies to the alleged condition even though a substantial majority of reported cases are about wet floors.

The floor at the CEVA warehouse was an area where the returnable dunnage, the containers with cardboard padding (TE 161), comes back from the Ford auto assembly plant. Our hearing officer found when the totes are turned upside down, dunnage or cardboard waste is spilled out and onto the factory floor. In about an hour, ten employees must sort through 700 to 800 containers for a parts cycle. RO 5. After turning over the containers to expel any missed parts and the cardboard packaging, these employees then go about picking parts from the warehouse for the next hourly cycle.

According to Mr. Osborn, the supervisor who accompanied the CO on her inspection, photograph 2 – 21 shows the warehouse area in the cleanup phase, coming toward the end of the cycle. TE 138. Mr. Griffo, a warehouse worker who drives a forklift truck and cleans the floor, said he had swept up the area depicted in exhibit 2 – 21 three times before the CO inspected that day; he said "We sweep quite often." TE 191 and 192. He said if he hadn't swept up before the photograph was taken "it'd be a lot bigger pile of stuff if I hadn't picked any up already...It would be pretty deep and I couldn't drive my forklift through there because it would get in the tires and stuff like that." TE 193.

Mr. Michael Bradley, CEVA's operations supervisor, admitted the warehouse could get messy; he said the warehouse was no better or worse than it was on the date of the inspection. TE 210 and exhibit 2 – 21.

For the 1910.22 (a) (2) cases, the employer may escape liability if he can demonstrate he has an enforced policy to clean up floors as necessary. In *USS Division of USX Corp*, BNA 14 OSHC 1647 (1990), a federal administrative law judge decision, the company threaded steel pipe at a high volume. The threading was facilitated by a mixture of water and oil which lubricated and cooled the threading machines and the pipe. The oil, and hydraulic fluid on the floor, was to be treated with a compound called oil dry. The CO found pools of oil and saturated oil dry on the floor. Sustaining the citation, the administrative law judge said:

> it would be impractical to assume that USS could keep its floors dry without adversely affecting its production process.

But the ALJ also found that while USS had a housekeeping policy, it was inconsistently enforced. At 14 OSHC 1648. The ALJ observed there was no proof when USS had last cleaned the areas cited.

CEVA employees sweep up dunnage hourly during a return dunnage cycle. TE 133. Luke Osborn, CEVA's operations manager at the time of the inspection, said it was impossible to keep the warehouse floor entirely dunnage free because of "the sheer amount of volume[4] that comes through hourly and with the number of totes that we sort..." TE 122 and 136. He said "we are cleaning throughout the workday. We've dedicated two employees to maintaining the housekeeping out there." TE 136. Mr. Osborn, responding to a question put to him by the hearing officer, said the return dunnage area, exhibit 2 – 21, is never empty because of the dunnage containers returning to CEVA on an hourly basis. TE 136.

[4] CEVA receives inbound 800 skids per day from Ford; the individual containers are loaded on the skids.

Dunnage, the cardboard packing, is swept up each cycle when the totes come back from the Ford plant. When the photograph was taken, the dunnage had been pushed toward an area where it would be swept up by an employee. The CO, rather than observe an hourly container cycle, simply took one photograph and then moved off to another area. Without more from the compliance officer, we find CEVA was doing what it could to keep the dunnage policed up during a cycle. CEVA has a policy of cleaning up the floor daily, and in fact during each hourly cycle, while for *USS* there was no proof when the oil and oil dry had last been cleaned up.

John Deere Parts, another 1910.22 (a) (2) case, involved a warehouse where the roof leaked on a regular basis. Deere had spent $265,000 on repairs in two years but the leaks continued. The federal ALJ determined maintenance workers would immediately begin the process of removing the water when it accumulated. The Secretary of Labor stipulated "that John Deere is making a bona fide effort to keep the roof repaired." In his recommended order, the ALJ said "This [standard] language indicates that a certain degree of latitude is given in complying with the standard" and dismissed the citation. *John Deere Parts Distribution Warehouse of Deere & Company*, BNA 11 OSHC 1747, 1748 (1983).

In *Clopay Corporation*, KOSHRC 760 (1981), our Commission was confronted with several 1910.22 (a) (2) citations. In his recommended order our hearing officer discussed a cited instance in the plant where water and "joy" were used to clean machinery. Our hearing officer found the area to be wet "but that floor dry had been spread over it...At the time of inspection, the floor dry which had been spread on the

floor had not as of yet been swept up...The record indicates that spreading floor dry is the correct method of removing the hazard and that it takes some amount of time for the wetness to be absorbed." RO 6 and 7. In his conclusions of law our hearing officer stated Clopay "was employing all reasonable procedures" for cleaning up the water and joy and so dismissed the citation. On review our Commission upheld the hearing officer's decision.

The Department of Labor also alleged Clopay violated 1910.22 (a) (2) because a rest room was not maintained in a clean and dry condition. In his recommended order the hearing officer sustained this citation; he said the commode was filthy and the floor was dirty. Page 5. On review our Commission reversed the hearing officer, stating that cleaning the restroom at the beginning and end of each shift satisfied the cited standard. 1910.22 (a) (2).

Clopay stands for the proposition that some industrial processes necessarily create wet, oily or messy conditions and an employer will avoid citation if it imposes reasonable procedures to keep the conditions under control. The same holds true for USS above, except USS had inconstantly enforced its clean-up efforts.

But the same cannot be said for CEVA; supervisors and cleaners said the container dunnage was cleaned up within each hourly cycle. Had the Cabinet's compliance officer spent time to observe and photograph the cycle, she would have seen the intentionally spilled dunnage, an essential part of the cycle, was cleaned up as work progressed. Mr. Griffo said he had already swept the floor depicted in

exhibit 2 – 21 three times that day; he also said the floor shown in the photograph had looked much worse earlier in that cycle.

Standard 1910.22 (a) (2) is found in the walking and working subpart of the general industry standard; and so the proper standard was cited. CEVA employees were exposed to the alleged hazard because they worked on the floor of a work room. CEVA supervisors regularly walked through the area depicted in photographic exhibit 2 - 21 and so CEVA had knowledge of the alleged hazard. But the Cabinet has not proved a violation of the cited standard. CEVA's warehouse process deliberately and necessarily causes dunnage, cardboard and paper, to litter the floor when containers are returned from the Ford plant and CEVA employees dump the contents on the floor. CEVA has a program in place which causes the dunnage to be swept up within each hourly container cycle. *Ormet Corporation*, a federal review commission decision, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991).

The Cabinet's compliance officer could not recall if slip and falls in the area depicted by photo 2 – 21 were found on the 300 injury and illness log. TE 78. We find, however, the only injury in the cited warehouse space was a sprained ankle caused by an employee who was struck by a fork lift truck. TE 153 – 154.

For item 2, the cited standard says "The floor of every workroom shall be maintained in a clean and, so far as possible, dry condition." Given the wording of the cited standard, we understand an employer is required to keep a workroom in a clean and dry condition, so far as possible, according to conditions found in the work

place. For the reasons we have given, we dismiss item 2. *USS, Division of USX Corp, John Deere Parts* and *Clopay, supra.*

Item 3

Item 3 alleges a fork lift truck should have been removed from service because hydraulic hoses shown in photographic exhibit 2-8 were fixed in place with plastic strips. Here is the standard for the powered industrial truck, a stand up fork lift:

> 1910.178 (p) **Operation of the truck**. (1) If at any time a powered industrial truck is found in need of repair, defective, or in any way unsafe, the truck shall be taken out of service until it has been restored to safe operating condition.

For us the question is whether the cited truck was in an unsafe operating condition or defective because that is how the citation, item 3, was written.

> Powered industrial truck(s) with defect(s) or in any way unsafe had not been withdrawn from service until restored to safe operating condition(s):
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> a) For the 48 employees of EGL Inc dba CEVA Freight LLC, located at 12220 Westport Road...who run Powered Industrial Trucks (PIT), the employer did not remove a PIT from service that had hydraulic lines held up with strips of plastic material.

Photograph 2-8 shows the front of the truck where two hydraulic lines were held up, and prevented from dragging the ground or becoming entangled in a load on the forks, by what is described as "strips of plastic material" in the citation.

James Griffo, the fork lift truck operator, at the beginning of his shift found the plastic strips on the hydraulic hose. TE 179. Mr. Griffo, driving his truck, encountered the compliance officer[5] and supervisor David Richardson; this was the

[5] CEVA has argued it was improper for the compliance officer to testify about what she was told by employees during her inspection; CEVA's argument is without merit. KRE 801A (b) (4) is an

first time Mr. Griffo had seen a supervisor since he had filled out a form notifying management about the plastic strips and placed the form into its proper slot to bring it to the attention of a supervisor. TE 176 - 177. This raises questions about employer knowledge of an alleged hazard, because supervisor David Richardson saw it at the same time as the CO. Before this, Mr. Griffo had not spoken with anyone about the missing bracket on the truck. TE 178. Mr. Griffo said that without the plastic strips in place, the hoses would have become entangled with one another; but the hoses were too short to drag the ground. TE 179 and 180. Mr. Griffo said he had begun his work with the fork lift truck because the hoses were secure. TE 182.

CEVA said "a nylon band [was used] to restrain hoses between the forks of the forklift..." And indeed, the photograph shows the two hydraulic hoses restrained and under control.

In her recommended order our hearing officer found a clip holding the hoses had apparently broken and someone replaced the clip with strips of plastic. She found the plastic repair was not suitable because it was not approved by the manufacturer. RO 7. Our hearing officer found the hazard of the hoses becoming tangled or caught by the chain was a high serious hazard. RO 7.

Operations Supervisor Michael Bradley was CEVA's last witness. He said he did not see the forklift truck repair form until the day after the inspection. TE 209. This reinforces our understanding that CEVA had no knowledge of the truck's missing

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exception to the rule against hearsay; it permits hearsay testimony when that testimony comes from an employee who spoke about a matter concerning his work or working area.

hose bracket. Here is the compliance officer's rationalization for the plastic strip citation:

> there wouldn't be a citation if they were anchored by what the manufacturer put there but because it is something outside of what the manufacturer puts on there that is considered a defect and as a defect it is a violation of the standard...
> But this material being something that the manufacturer didn't provide, didn't approve, you know, that is what I can – that is a fact that goes against our standard so that is why I recommended that citation
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> TE 90

For our cases, the Labor Cabinet has the burden of proof. 803 KAR 50:010, section 43 (1). In *Ormet Corporation*, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), the federal review commission said:

> In order to prove that an employer violated a standard, the Secretary must show that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew,[6] or with the exercise of reasonable diligence, could have known of the violative conditions.

The cited standard, 1910.178, is found in the fork lift truck subpart and so reliance on it is proper. The fork lift operator was exposed to the alleged hazard, proving CEVA employees had access to the cited condition. We find the absence of a manufacturer's supplied bracket for the hydraulic hoses is proof of a defect according to the terms of the cited standard. When CEVA supervisor David Richardson saw the plastic strips on the fork lift truck, he ordered the truck removed from service, acknowledging the presence of the defect.

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[6] 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.

CEVA argued the cabinet failed to prove the employer had either actual or constructive knowledge of the hazard. The fork lift operator who drove the truck when the compliance officer spotted the nylon bands on the hydraulic fluid hoses said he wrote on a form that the truck had "Hoses loose in forks." But this same operator said he did not consider the truck to be unsafe and thus began to operate it. He did not orally report the bands to a supervisor, but then he wasn't required to. And no one, apparently, in management had seen the form before the CO saw the plastic bands and the company took the truck out of service. In other words, there is no proof in the record that the company had either actual knowledge of the alleged hazard or constructive knowledge.

In *Cleveland Electric Illuminating Co*, the federal ALJ dismissed a citation for lack of employer knowledge because while employees had a duty to daily inspect their vehicles, two employees failed to report a dented cover which led to an employee fatality. Employer "knowledge cannot be imputed to CEI because each operator was responsible for inspecting his own vehicle and for reporting any problem." CCH OSHD 28,685, BNA 14 OSHC 1340, 1341 (1989). Because the two CEI employees were not management, their knowledge could not be imputed to their employer.

Cleveland presents a set of facts analogous to our CEVA Freight. The CEVA fork lift operator had a duty to inspect his truck and file a report requesting maintenance to replace the hydraulic cable bracket. While he did so, he was according to the proof under no duty to also report the matter orally to a supervisor.

At the trial a supervisor testified he did not see the request for repair form until the day after the inspection. The CEVA fork lift operator said he did not consider the fork lift to be dangerous and so proceeded to use the truck. Thus, the Secretary failed to prove employer knowledge of the alleged hazard; the repair form did not come to management's attention until the day after the inspection. A supervisor did not become aware of the alleged hazard until he and the inspecting compliance officer encountered the fork lift truck and operator.

After a compliance inspection, the federal Department of Labor issued a citation to Major Construction alleging an electrical panel was open, exposing employees to live electrical parts. On discretionary review of the administrative law judge's recommended order, the full commission dismissed the citation. In its decision the commission said:

> To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition.
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> *Major Construction Corp*, CCH OSHD 34,860, page 53,042, BNA 20 OSHC 2109, 2111 (2005)

Major had argued there was no proof how long the panel had been open, raising the knowledge issue. The commission said "Here, there is no evidence how long the violative condition existed. We are unable, therefore, to evaluate whether Major could have known of the condition if it had been reasonably diligent."

For CEVA Freight, there was no showing the company had knowledge, actual or constructive, before the compliance officer and an accompanying manager saw the fork lift truck with plastic strips securing the hydraulic hoses in place. The

compliance officer and the company became aware of the alleged violation at the same time. The Cabinet had made no effort to prove the fork lift truck had been driven around CEVA's factory that day where it would have been in plain sight, proving constructive knowledge.

Because there is no proof of employer knowledge, actual or constructive, we find there was no violation. *Cleveland, Major Construction and Ormet, supra*. We dismiss item 3.

It is so ordered.

August 4, 2015.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

Joe F. Childers
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Certificate of Service

I certify a copy of this decision was served on the following in the manner indicated on August 4, 2015:

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