

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION

KOSHRC 5103-13

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v

CROSSROADS MASONRY LLC

RESPONDENT

* * * * *

DECISION AND ORDER
OF THIS REVIEW COMMISSION

Mark F. Bizzell, Frankfort, for the Secretary. Michael S. Fore, Richmond, for Crossroads Masonry.

This case comes to us on Crossroads Masonry's petition for discretionary review. We granted review and asked for briefs. 803 KAR 50:010, sections 47 (3) and 48 (5) (ROP 47 (3) and 48 (5)). Our hearing officer in his recommended order had affirmed a single serious citation alleging a fall protection violation and a penalty of \$4,900. Recommended order, page 12 (RO 12).

Crossroads is a masonry contractor, at the time of the inspection engaged in setting bricks on the front of a church in Richmond. To accomplish the work Crossroads erected a self-contained adjustable scaffold which could be cranked up or down to where it was needed on the side of the building. Transcript of the evidence, page 14 (TE 14). Labor's serious citation alleges the standard railing on the scaffold was removed, exposing the masons to an unprotected fall of 18 feet.

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*,¹ 487 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..."²

¹ 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.

² See federal commission rule 92 (a), 29 CFR 2200.

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."

Crossroads Masonry allegedly violated 1926.451 (g) (1) (iv)³ which says:

Each employee on a self-contained adjustable scaffold shall be protected by a guardrail system (with minimum 200 pound toprail capacity) when the platform is supported by the frame structure, and by both a personal fall arrest system and a guardrail system (with minimum 200 pound toprail capacity) when the platform is supported by ropes.

(emphasis added)

Because the compliance officer during her inspection expressed concern about guard rails or the lack of them, and not personal fall arrest systems,⁴ we infer the scaffold was not supported by ropes. TE 21 – 22.

In its citation the Cabinet alleged Crossroads failed to protect its employees from falls:

1926.451(g)(1)(iv) – Each employee on a self-contained adjustable scaffold was not protected by a guard-rail system.

³ Adopted in Kentucky by 803 KAR 2:411.

⁴ A personal fall arrest system is a harness worn by employees; the harness is attached to a lanyard which in turn is tied off to a structure which will support the employee's weight in case of a fall. The citation makes no mention of harnesses or personal fall arrest systems.

- a. On or about June 13, 2015 seven (7) employees working on a self-contained adjustable scaffold at the First Christian Church located at 418 West Main Street in Richmond, Kentucky, were not protected from falling eighteen (18) feet to the ground below.

To facilitate a complete understanding of the Secretary's issuance of the citation, we must discuss events which transpired on two separate days: the compliance officer's inspection of the work site on June 13, 2013 and a day prior to June 13. Compliance Officer Roseanne Hurst on June 13 arrived to conduct, what she called, a referral inspection. TE 21 and exhibit 3. She said a concerned citizen had taken photographs of Crossroads' construction site and emailed them to the Labor Cabinet. TE 25. At the trial, Larry Couch, Crossroads' supervisor, said when the CO arrived on site, June 13th, the scaffold had been cranked down and was not in use. TE 86. Ms. Hurst, we find, did not witness a violation; her testimony about the alleged violation comes from her study of photographs she did not take. TE 26.

On June 12, the day before the inspection according to Ms. Hurst (TE 22), a person variously described as a concerned citizen by the compliance officer (TE 25), as a confidential informant by our hearing officer (RO 3) and as a man who purportedly asked the general contractor if he would hire union members as masonry workers (TE 29) came on to the work site and took the photographs. As we shall explain in more detail, our hearing office erred when he admitted the photographs as evidence.

On the witness stand Ms. Hurst identified five photographs she said the Cabinet received by email, the referral; they depicted, she said, employees on a scaffold with no guard rails. TE 21 – 22. When our hearing officer examined his copies of the

photographs, he noticed there were two sets; he called the two sets exhibits 1 and 2. TE 23. CO Hurst said she printed exhibit 1 from her laptop computer and later printed exhibit 2 after she saved the photographs attached to the email to a disc. She said the exhibit 2 photographs were clearer because they were printed from her disc. TE 24. She said she took exhibit 1 with her to the inspection she performed on June 13. TE 25. Crossroads' supervisor Larry Couch testified he saw only the exhibit 1 photographs on the day the CO inspected. He described the exhibit 1 photographs as blurry. TE 90.

When the Cabinet moved to admit exhibits 1 and 2 into evidence, Crossroads objected. TE 36 – 37. Denying Crossroads' objection and admitting both exhibits, our hearing officer said "obviously the witness has shown familiarity with the photographs and what they depict," referring to the offering compliance officer. TE 37. Hearing Officer Dickerson said he had previously, in the pretrial stage of the proceedings, denied Crossroads' motion to compel the identity of the photographer. TE 37. In its motion to compel, Crossroads argued the identity of the photographer was "essential to establish the admissibility of the photographs and the foundation for their use." Transcript of the record, item 16 (TR 16). In his order denying Crossroads' motion to compel the identity of the photographer, our hearing officer stated "the photos can be admitted without the testimony of the photographer but can be authenticated by other means..." TR 22.

Our procedural rules are spelled out in 803 KAR 50:010, Hearings; procedure, disposition. Rule 42⁵ states “Hearings before the commission and its hearing officers insofar as practicable shall be governed by the Kentucky Rules of Evidence.” In a case we recently decided, our Commission held it was error to admit photographs which had not been properly authenticated. *Amazing Contractors, LLC*,⁶ KOSHRC 5045-13. In *Amazing Contractors*, the Cabinet offered photographs through its inspecting compliance officer. But the compliance officer did not take the photographs and did not observe the scenes depicted in the photographs. Instead, the compliance officer gave his camera to an employee who, not in the presence of the CO, climbed onto the roof and took the photographs. In *Amazing Contractors*, the Secretary did not call the photographer as a witness. We ruled that the hearing officer admitted the photographs in error and we dismissed the citation because the photographs were the only evidence supporting the citation.

The same is true for the case now before us. Compliance Officer Hurst who offered the photographs, one, did not take the photographs and, two, was not able to state the photographs were an accurate representation of what she had seen because she was not present when the photographs were taken and did not, herself, see what the photographs represented. In the words of our hearing officer, CO Hurst did not see what the photographs depicted. Ms. Hurst had no knowledge of

⁵ We understand our procedural regulations are not rules but refer to them as such for convenience. KRS 13A.120 (5).

⁶ Our cases can be found on our website: koshrc.ky.gov. We have attached a copy of our decision for *Amazing Contractors* as appendix 1. See pages 7 to 11.

the scenes depicted in the photographs. KRE 901 (b) (1).⁷ Because the photographs were not properly authenticated by the offering witness, or any witness for that matter, we hold it was error for the hearing officer to admit them. In *Amazing Contractors* we relied on KRE 901 (a) as we do here; it says:

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.

Here is what Professor Lawson in his *Kentucky Evidence Law Handbook*⁸ 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.'

Our hearing officer admitted the photographs, exhibits 1 and 2, because he said the compliance officer was familiar with the photographs and what they depict. TE 37. But that is not accurate. The compliance officer was not present when the photographs were taken; she may have been familiar with the photos because she had studied them. But she could not authenticate the photos according to the requirements of KRE 901 (a). Any person may peruse photographs and become familiar with them. To comply with the requirements for KRE 901 (a), the offering witness must be able to state she saw the scene depicted in the photograph and the photograph was an accurate representation of what she saw. *Amazing Contractors*,

⁷ KRE 901 (b) (1). Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

⁸ Lawson, Robert A, fifth edition, 2013, page 830.

supra. The unknown photographer could have authenticated the photographs he had taken, but he was not called as a witness. The Secretary made no effort to authenticate the photographs through other witnesses because he could not. Larry Couch said he did not know when the photographs were taken. What he actually said was “I don’t know when the pictures were taken – if it was the next day or” - he did not finish his sentence. TE 15. We find Mr. Couch could not state, indeed he did not know, what day the photographs were taken. Mr. Couch was the Cabinet’s first witness. He named his workers who were present on June 12 but he was not asked to authenticate the photograph; he simply confirmed the employee names read to him by his examiner: “If I read them off, would you be familiar?” TE 15 – 17. At this point of the trial the photographs had not been offered as an exhibit. That job fell to Compliance Officer Hurst who did not take the photos. TE 36 - 37. After direct examination of Mr. Couch by the Secretary’s lawyer, Crossroads reserved the right to call him as their witness, which the company did at the completion of CO Hurst’s testimony in chief.

When prompted, Larry Couch identified his workers on the scaffold, including himself, but he reliably maintained he had no recollection of June 12 and did not know when the photographs were taken. TE 15. He was asked if he had “a specific memory of the work on June 12th, 2013, and what would have happened that one day. He did not. TE 84 – 85. When asked if he “spoke with Ms. Hurst the next day, correct, [sic] on June 13th, is that correct,” Mr. Couch said “I don’t know if that was the right day or not, but I did speak with her, yes.” TE 15. This is not testimony

upon which an acknowledgement of photographs can be based. Mr. Couch knew nothing about how the photographs came to be and in fact had no specific memory of the event depicted. KRE 901 (a).

According to CO Hurst, Couch did not dispute the accuracy of the photographs he was shown on June 13, the day of the inspection. TE 36. But that was not what he said. Mr. Couch consistently testified he did not specifically recollect June 12:

Q. Do you have a specific memory of the work on June 12th, 2013 and what would have happened that one day – I guess a little over a year ago?

A. Not really – I mean, you know, it was just a regular working day.

TE 84 -85

In fact Mr. Couch stated he did not recall what day he spoke with the compliance officer; he simply recalled speaking with the CO during her inspection::

Q. The next day you spoke with Roseanne Hurst, is that correct?

A. I don't know if that was the next day or not. I don't know when the pictures were taken – if it was the next day...

TE 14 – 15

To sum up Mr. Couch's testimony, the Secretary could not introduce the photos through him because he had no distinct recollection of June 12 or the precise relationship between June 12, of which he had no recall, and June 13 when the compliance officer inspected. TE 102. KRE 901 (a) requires proof "the matter in question is what its proponent claims." Because Mr. Couch could not recall when or under what circumstances the photographs were taken, he could not authenticate them. Mr. Couch, for example, could not offer any testimony about the accuracy of

the photographs or if they had been altered in some way because he could not connect the photographs with a recollection of the events of June 12; he had no recollection. While Mr. Couch identified employees depicted in the photographs, that is not the same as authenticating the photographs were representative of the day and time they were taken or the circumstances depicted.

Similarly, Erik Newlin, Crossroads' fork lift truck operator who testified at the trial, could not authenticate the photographs. While he said he recognized the church front from the photos, he was not asked if he saw the scaffold as it was depicted in exhibits 1 and 2, a critical piece of information necessary for proper authentication. KRE 901 (a), TE 109, TE 110 and TE 114. Mr. Newlin said he did not know when the photographs were taken. TE 112.

Compliance Officer Hurst showed the photographs to Mr. Epperson, a representative of the general contractor. Ms. Hurst said Mr. Epperson never remarked about the accuracy of the photos. Mr. Epperson, according to Ms. Hurst, was shown the photographs on the day of the inspection; he said they had been taken the day before the inspection. TE 29. But when the compliance officer was asked if Mr. Epperson had offered any details about the photographs, she had no answer. TE 29. Then the compliance officer was asked if Mr. Epperson had said anything about the accuracy of the photographs:

Q. Okay – and did Mr. Epperson – was he accurate – or have any argument with the photographs as it [sic] pertained to him?

A. He...

Q. I mean, did he say that they were accurate?

A. I don't recall him saying.

TE 30.

We find Mr. Epperson offered nothing about the details of the photographs and had no opinion about the accuracy of the photographs he was shown. We reverse our hearing officer on this point. RO 5.

Compliance Officer Hurst testified at length about Crossroads' alleged violation, but she did so while referring to exhibits 1 and 2 which we have now held were admitted in error. See TE 25, 26, 31, 33, 37, 46, 47, 48 and particularly 38 where the CO was asked if she saw an apparent violation while studying the photographs admitted in error. Larry Couch was also asked about the apparent violation but again he was testifying from the improperly admitted photographs; Mr. Couch said he had no recollection of when the photographs were taken. TE 14 and 15.

In its brief to us the Cabinet has directed our attention to *Litton v Commonwealth*, Ky, 597 SW2d 616 (1980), where a defendant was charged with second degree burglary of a pharmacy. In support of its case, the prosecution offered photographs taken by an automatic camera; the owner of the pharmacy identified the background of the photographs as being an area behind his pharmacy counter and not open to the public. In *Litton*, the Court explained a photograph can be admitted as demonstrative evidence "on the theory either they are merely a graphic portrait of oral testimony or that a qualified witness adopts the photograph as a substitute for words. At 597 SW2d 618. The court explained:

When a photograph is used as demonstrative evidence, the witness need not be the photographer, nor must he have any personal knowledge of the time, method or mechanics of taking the

photographs. The witness is only required to state whether the photograph fairly and accurately depicts the scene about which he is testifying.

At 597 SW2d 618 – 619

In the case before us Compliance Officer Hurst was not present on site on the day the photographs were taken; neither did she observe the scaffold as depicted in the photographs. The photographs, thus, are not a graphic portrayal of what she saw during her inspection. Mr. Couch testified the scaffold had been cranked to the ground, with no employees working on it, when the CO began her inspection. TE 86. Ms. Hurst testified the photographs were emailed to her office. TE 21. Ms. Hurst then explained she printed exhibit 1 from the email and printed exhibit 2 after she had saved the photographs to a disc. TE 24. We find exhibits 1 and 2 are not demonstrative evidence of what the CO saw during her inspection.

Mr. Couch testified he was unaware of the presence of the photographer and did not know when the photographs were taken. TE 15. Mr. Couch confirmed the names of his employees when prompted by his examiner. TE 15 – 17. Mr. Couch recalled the events of the June 13th inspection. But we find no one asked Mr. Couch if exhibits 1 and 2 were an accurate representation of the scaffold when the photographs were taken. KRE 901 (b) (1). We find Mr. Couch did not state whether the photographs were an accurate representation. KRE 901 (a).

Mr. Epperson knew what day the photographs were taken. But he was not asked if the photographs were an accurate representation of the scaffold. TE 30.

We find exhibits 1 and 2 are not demonstrative evidence. We find no witness was able to say the photographs fairly and accurately depicted the scaffold. *Litton* and KRE 901 (a).

In *Litton* our Supreme Court said “Photographs can be admitted as real evidence in a proper case.” At 957 SW2d 619. Citing to 3 *Wigmore on Evidence*, section 790, the Court said:

We agree and hold that when a reasonable foundation indicating the accuracy of the process producing the photograph is laid, it can be received as real evidence having inherent probative value and such credibility and weight as the trier of fact deems appropriate.

At 957 SW2d 619 (emphasis added)

Compliance Officer Hurst testified she printed the photographs, first directly from the email and again after saving the photos to a disc. But we have no details about the taking of the photographs. For the *Litton* case, the pharmacy owner testified he removed the film from the automatic camera, send the film to the installer of the automatic camera “and received the photographs in due course.” At 957 SW2d 620. We do not know how the photographs were taken, how they were handled by the photographer, or, for that matter, if the photographs were an accurate representation of what the photographer observed. KRE 901 (a).

Citing to *United States v Stearns*, 550 F2d 1167, 1171 (CA9 1977), the *Litton* court stated:

‘Even if direct testimony as to foundation matters is absent, however, the contents of a photograph itself, together with such other circumstantial or indirect evidence as bears upon the issue, may serve to explain and authenticate a photograph

sufficiently to justify its admission into evidence.'

Litton at 619 - 620

In the *Stearns* case, it was crucial for the prosecution to prove that two sailing vessels were on the high seas at the same time. A photograph was introduced which proved that to the satisfaction of the court. In the foreground of the photograph the rigging of the *Sea Wind* was visible; this rigging was a distinctive red netting used to prevent dogs from falling off the boat when it was at anchor. In the background of same photograph is the vessel *Iola*; both vessels were at sea at the same time. The ninth circuit held the photograph of the two vessels authenticates the other four photographs because of similar cloud patterns, light and the relative distance of one vessel from the other. *Stearns* at 550 F2d 1171.

In the case before us, we find there is no testimony from CO Hurst or foreman Larry Couch or hearsay testimony from Mr. Epperson which authenticated exhibits 1 and 2. No witnesses could state the photographs were representative of the condition of the scaffold when the photos were taken. Mr. Couch was not aware when the photographs were taken; he was not even sure of the juxtaposition of the day of the inspection and the day when the photographs were taken. While Larry Couch did testify about the scaffold, he did so with the unauthenticated photographs before him; we find he was testifying from the photographs themselves. We find exhibits 1 and 2 were not authenticated as real evidence.

Litton and *Stearns, supra*, and KRE 901 (a).

Stearns and *Litton* are distinguishable on the facts from *Crossroads Masonry* now before us. Stearns directed the photographs to be ordered and printed; the film and the developed photos were in the possession of persons in privity with Stearns until they were seized by authorities. In *Litton* the burglars removed the security camera from the building and threw it in the woods. When the police officers found the camera, they returned it to the pharmacist, the owner, who removed the film from the camera and sent it to the burglary alarm installer who returned the three developed and printed photographs to the pharmacist.

For both *Stearns* and *Litton*, the film was under the control or direction of its owners before the photographs were printed. For *Crossroads Masonry*, on the other hand, while the compliance officer printed the digital photographs, once from the email and a second time from a disc, we have nothing in the record to reassure us the photographs represent what the photographer saw because he did not testify. KRE 901 (a). The five *Crossroads* photographs present us with other difficulties. The exhibit 1 photos which the compliance officer said she printed directly from the digital email were blurry. TE 90. The second set, exhibit 2, were printed from the CO's disc. This second set is, when compared with exhibit 1, much clearer, demonstrating how easily a digital photograph may be altered or changed in appearance. KRE 901 (a) makes provision for this by requiring the offering witness to vouch for the photograph – to state the photograph accurately depicts what the witness saw. We do not have any witness in the case before us who testified the five

photographs, exhibits 1 and 2, were an accurate representation of the scene observed when the photographs were taken.

We have other concerns. Exhibit 2 – 2 shows a US Mail truck which appears only in that photograph. In exhibit 2 – 5 we see a pickup truck in the lower left corner of the photograph; this pickup truck appears in no other photographs. Only the photographer could have explained the sequence of the photos; for example, we do not know when one photograph was taken relative to another. This illustrates the importance of KRE 901 (a): the photographer would have been forced to explain what he saw at the construction site and how the photographs he took depicted what he saw. He could also state the timing of the photographs. No witness in this case was able to do that.

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,⁹ or with the exercise of reasonable diligence, could have known of the violative conditions.

The cited standard applies because the alleged violation, referenced in the citation, was directed toward a self-contained adjustable scaffold. The Cabinet has failed to prove a violation of the cited standard. Exhibits 1 and 2 are the only evidence in this case tending to prove a violation. We have ruled the photographs

⁹ 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.

were admitted as evidence in error. Similarly, the Cabinet has failed to prove employee exposure to the cited standard for the same reason. The photographs were admitted in error and the compliance officer did not see any Crossroads employees on the scaffold. Mr. Couch simply confirmed the names of employees read to him by the Cabinet's lawyer. Finally, the Cabinet has failed to prove employer knowledge of a violative condition, actual or constructive, because it failed to prove the presence of a violation.

As the charging party in these cases which come before us, the Cabinet has the burden of proof. ROP 43. Because the photographs are the only evidence supporting the Cabinet's citation and because we have ruled the photographs were improperly admitted and reversed our hearing officer, we dismiss the citation and penalty.


It is so ordered.

October 5, 2015.

Faye S. Liebermann
Chair



Paul Cecil Green
Commissioner



Joe F. Childers
Commissioner

Certificate of Service

I certify a copy of this order was served on the following in the manner indicated on this October 5, 2015:

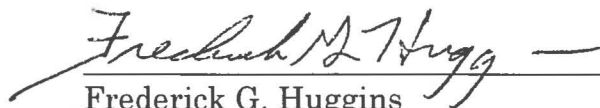
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