

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
ADMINISTRATIVE ACTION NO. 19-KOSH-0174

KOSHRC # 5588-19

COMMISSIONER OF WORKPLACE STANDARDS
COMMONWEALTH OF KENTUCKY

COMPLAINANT

V.

HENRY'S PLUMBING, INC.

RESPONDENT

DECISION AND ORDER OF THE REVIEW COMMISSION

Request for Reconsideration

On December 10, 2021, Counsel for Henry's Plumbing submitted a petition for discretionary review for our hearing officer's recommended order dated November 29, 2021. The issues advanced for review relate to Henry Plumbing's perception of procedural and evidentiary errors. Henry's Plumbing insists we overturn the recommended order on grounds of prejudice caused by amendment of citations at hearing, erroneous weight accorded to evidence presented at hearing, hearing officer bias, lack of due process in a virtual hearing, failure to prove the citation was "serious", improper consideration of subsequent remedial measures, and improper consideration of prior acts.

On January 5, 2022, the Commission granted the petition for discretionary review and set a briefing schedule.

Jurisdiction

The Commission is the administrative agency charged by statute to hear appeals from citations, notifications, and variances issued under the provisions of KRS Chapter 338. Henry's Plumbing submitted its petition for discretionary review of the recommended order within the permissible time period. ROP 48. The Commission has the requisite jurisdiction.

The Citations

At hearing the Commissioner presented its case for two citations alleging violation of the following standards:

Citation 1: item 1

1926.651(c)(2)

Means of egress from trench excavations. A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

Gravity: classified as Repeat amended at hearing to Repeat Serious

Citation 1: item 2

1926.652(g)(1)(iii)

Employees shall be protected from the hazard of cave-ins when entering or exiting the areas protected by shields.

Gravity: classified as Repeat amended at hearing to Serious

Citation 2: item 1

1926.100(a)

Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

Gravity: classified as Serious

Citation 2: item 2

1926.651(j)(2)

Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

Gravity: classified as Serious

Amendment of Citation at Hearing

Henry's Plumbing argues the hearing officer erred when he allowed the Commissioner to amend the classification for Citation 1 Item 1 from Repeat to Repeat Serious at the beginning of the hearing. Commission precedent at the state and federal level allows the Commissioner to liberally amend citations before, during, and even after a hearing unless the employer can demonstrate prejudice is caused by the amendment.¹ In this case, neither the underlying facts alleged in the complaint, nor the cited standards allegedly violated were changed by the amendment. After the amendment, Henry's was defending against the same alleged facts and the same citations. The amendment increased the potential monetary penalty if the Commissioner proved her case. We are unpersuaded by Henry's argument and find no impairment to Henry's ability to defend against the citation after the change from serious to repeat serious. We **affirm** our hearing officer's decision to allow the amendments.

Hearing Officer Bias

Henry's Plumbing asserts our hearing officer exhibited bias against employers when he cited to a Commission's ruling in *Secretary of Labor v. Emerson Masonry, Inc.* In that

¹ See Rothstein Chapter 17.

instance, this Commission stated it affords little or no credence to the testimony of employees who are called as corroborating witnesses due to the coercive power an employer has over the testifying employee. While coercion is a legitimate concern, the testimony of employees at our hearings is not to be automatically afforded less credence. Employee testimony must be given the same consideration as testimony from any other witness. Nothing in the rules of evidence would allow another approach as a baseline for evaluating employee testimony. *See* KRE 602.

We acknowledge our ruling in *Emerson* may have misguided our hearing officer. We therefore reconsider the testimony of Henry's Plumbing employees and evaluate their testimony under the standards of KRE 602. Upon review of the record, we do not find evidence the testimony of Henry's Plumbing employees was coerced, duplicitous, or internally contradictory. We find their observations and ability to recount their understanding of those observations creditable. This leads us to consider the weight of the testimony.

Weight of Evidence

When assessing the value of witnesses' testimony, the trier of fact may assign more weight to the testimony of one witness than to another. Weight of evidence has been defined as "[t]he persuasiveness of some evidence in comparison with other evidence." Black's Law Dictionary (11th ed. 2019) The witnesses at hearing claimed first-hand observation of the excavation conditions, so the outcome turns on which witness's understanding of their observations and the requirements of excavation standards is most persuasive to the fact finder.

Compliance Officer Morley testified he received numerous trainings over the past twenty years, including construction safety training at the Federal OSHA Institute. Transcript page 31, day 1. In contrast, witnesses for Henry's Plumbing provided no comparable record of training for excavations found within the construction standards. Employee Withrow did not testify of any training in excavation safety. When describing how trenching was performed, he concluded his explanation with, "We prefer this at this depth of digging. Its' just the way we do things." Transcript page 32, day 2. Employee Rhoads was called on direct to testify about the safety of the trench. When asked if he had been trained how to safely exit the trench he replied, "[A]s far as OSHA regulations go on a broad spectrum of things, I didn't know. I didn't know all the regulations of every little intricacy of OSHA regulations." Transcript page 72, day 2. Henry Plumbing employee Cox also testified about the conditions of the trench. When asked if he had safety training, he replied "I had confined space training." Transcript page 85, day 1. Excavation provisions are under the construction standards, not confined space standards. From this record, we find no error in our hearing officer's decision to afford more weight to the testimony of Compliance Officer Morley and his application of the standards to his observations.

Further Arguments

We have considered Henry Plumbing's remaining arguments: the hearing officer improperly considered prior acts; a virtual hearing deprived it of due process; the Commissioner failed to prove the citation was "serious"; and the hearing officer improperly considered subsequent remedial measures. We have reviewed the transcript and the

admitted exhibits. In that light, we find Henry Plumbing's remaining arguments lack merit and do not warrant our further consideration.

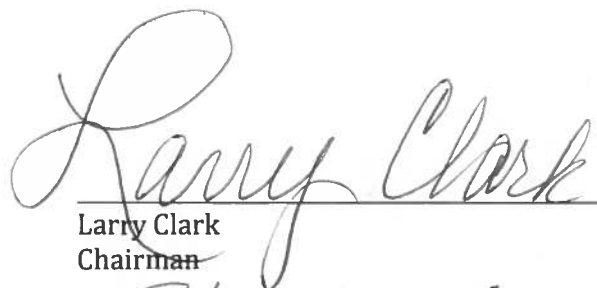
Based on the foregoing and after our reassessment of Henry Plumbing's employee testimony, we **strike** from the recommended order's conclusions of law the following:

"As correctly noted by the counsel for Commissioner, the Commission has given little or no credence to the testimony of employees who area called as corroboration witnesses. Given the fraught relationship between an employee who has been asked to testify on behalf of his/her owner/supervisor, there is an element of coercion present. See Secretary of Labor v. Emerson Masonry Inc. KOSHRC 695-09 (August 3, 2010 at 5.)"

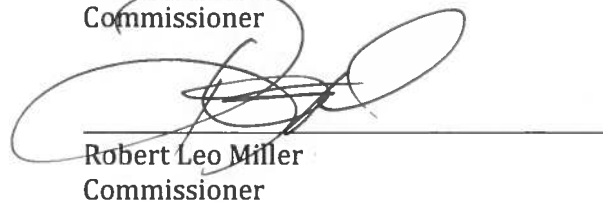
We **affirm** the remaining portions of our hearing officer's findings of fact, conclusions of law, and recommendations as contained in the recommended order.

It is so **ORDERED**.

April 6, 2022


Larry Clark
Chairman


Frank Jeff McMillian
Commissioner


Robert Leo Miller
Commissioner

Certificate of Service

I certify that a copy of the foregoing order and decision has been served this 6th day of April, 2022, on the following as indicated:

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