

Court of Appeals rules in favor of KY Labor Cabinet

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Not many Kentucky OSHA cases are litigated beyond the administrative hearing level. When they are, it is usually the employer who has lost at the administrative level and is seeking relief in the courts.

However, the Kentucky Court of Appeals issued a published opinion in March 2011 in which the Kentucky Labor Cabinet was seeking a reversal of an adverse ruling of the Franklin Circuit Court. The case is *Kentucky Labor Cabinet vs. Morel Construction Co., et al.* (2010-CA-000193-MR), in which one of the issues was whether a citation for the employers' violation of the fall protection standard at 803 KAR 2:417 § 3(1)(b) should be classified as serious or other than serious.

Employees were allegedly working 42 feet above ground without appropriate fall protection. The Kentucky Occupational Safety and Health Review Commission had ruled that this was a serious violation, and the employer sought review in the Franklin Circuit Court.

The Circuit Court ruled in favor of the employer, holding that the evidence was insufficient to prove that the violation was serious, because there was insufficient evidence that any employee had actually been exposed to a fall hazard and also because the evidence did not demonstrate more than a low degree of probability that an injury would occur.

The Circuit Court thus held that this violation should be classified as other than serious.

The Labor Cabinet appealed this decision to the Court of Appeals, which ruled in the Cabinet's favor. The Court of Appeals held that the Circuit Court erred as a matter of law because the factors relied upon by the Circuit Court — exposure to a

fall hazard and probability of injury — are not relevant to the issue of the seriousness of the violation. Rather, they are relevant only to the issues of (a) whether a violation in general occurred, and (b) the amount of the penalty.

In other words, evidence of employee exposure to a hazard is necessary in order to find any violation at all, and the probability of an injury is relevant to the calculation of the monetary penalty, not whether the violation is serious.

In contrast, according to the Court of Appeals, the question of whether or not a violation is serious turns upon two separate factors:

- (1) Whether an injury could result from an employee's exposure to the cited condition, and
- (2) Whether there is a substantial likelihood that such an injury would be serious or cause death.

In this case, there was no dispute that employees were working at a height of 42 feet above ground without fall protection. The Court of Appeals reasoned that the violation was serious because it was certainly possible for an employee to sustain an injury by falling from that height, and there was a substantial likelihood that any such injury would be serious or would cause death.

This case actually involved three employers, Morel, the general contractor, Midwest Steel Inc., the roofing contractor, and East Iowa Deck Support Inc., the roofing subcontractor whose employees were performing the work and were allegedly exposed to a fall hazard.

Both Morel and Midwest were cited under KOSHA's multi-employer worksite policy, even though none of their own employees were exposed to this hazard. The Commission found them in violation, too, but they did not appeal this ruling to the Circuit Court. ▲

Whether a violation is serious turns upon two separate factors:

(1) Whether an injury could result from exposure to the cited condition, and

(2) Whether there is a substantial likelihood that such an injury would be serious or cause death.