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Kentucky Review Commission recent decisions

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The Kentucky Occupational Safety and Health Review Commission ("Commission") is a three member body appointed by the governor "on the basis of their experience and competence in the fields of occupational safety and health." Ky. Rev. Stat. § 338.071(1). The Commission members are required to represent the interests of employers, employees, and the occupational safety and health profession. The current members are: Kevin G. Sell, representing the occupational safety and health profession; Sandra Kay Jones, representing employers; and William T. Adams, Jr., representing employees.

Among other things, the Commission rules on appeals from recommended orders of hearing officers regarding citations issued to employers. Ky. Rev. Stat. § 338.071(4). An employer that contests a citation has the right to a hearing before a hearing officer, where it may present its evidence.

The Secretary of Labor, through legal counsel, presents the government's case at the hearing. After legal briefs are filed, the hearing officer issues a recommended order. Either party aggrieved by the order may ask the Commission to review it. The Commission has the discretion to grant or deny this request or to call the case on its own motion.

According to the Commission's website, http://www.koshrc.ky.gov/, the Commission has issued a total of sixty one (61) decisions since 1991. These decisions have come in spurts. The large majority of decisions were issued between 1994 and 1997. Since 2007, the Commission has issued nine decisions. The last three decisions have all concerned the same issue: fall protection.

Since 2007, the Commission has issued nine decisions. The last three decisions have all concerned the same issue: fall protection.

The most recent decision unanimously affirmed a serious citation and penalties against the general contractor, drilling subcontractor, and masonry subcontractor on a construction site, as a result of an investigation initiated after an employee of the masonry subcontractor fell into an 18-foot deep, 36-inch wide hole and broke both of his ankles.

The businesses involved were River City Development Corp., Hayes Drilling, and D.W. Wilburn. The case is KOSHRC No. 4251-05, 4248-05, 4253-05 (Jan. 9, 2009).

The Commission rejected the drilling subcontractor's arguments that, first, it was not at fault because the employee deliberately moved an unsecured, plywood cover off of the hole, and, second, that the general contractor was responsible because it had failed to erect a barricade around this particular hole, as it had done with other holes.

The Commission found that the drilling subcontractor's failure to secure the cover so that the injured employee could not move it and rendered it responsible; and that since the drilling subcontractor had drilled the hole in question, it created the hazard, not the general contractor.

The next most recent decision affirmed serious and non-serious citations and penalties against the general contractor and two subcontractors on a construction site. The case largely involved the question of whether employers with no employees on a construction site may nevertheless be cited for violations involving employees of another employer on the site.

The businesses involved were Morel Construction Co. Inc., East Iowa Deck Support Inc., and Midwest Steel Inc. The case number is KOSHRC No. 4147-04,4151-04,4149-04 (Oct. 7, 2008).

In this case, the general contractor and two subcontractors were cited for allowing employees of

one of the subcontractors to install roof decking 42 feet above the ground without fall protection, without securing the decking, and without being trained on Kentucky's 10-foot fall protection standard.

Following a lengthy analysis, the Commission decided to follow the federal Review Commission in holding that the Secretary has authority to issue multi-employer citations for violations on a multi-employer job site even though not all of the cited employers have employees on the site.

The Commission ruled that because of the company's history of prior steep roof violations, it had a duty to do more than just train the employees and then "take no steps to ensure compliance with the fall protection standards."

Thus, the general contractor, Morel, and one of the subcontractors, Midwest, were cited for the fall protection violation involving East Iowa's employees, who were installing the decking.

The Commission also held that the failure to train the employees that Kentucky's fall protection standard is triggered at 10 feet above ground rather than 15 feet, which is the federal standard, was not serious.

The Commission said: "A lack of training about the 10-foot rule, with the employees working at 42 feet, would not contribute to a serious physical injury."

The third most recent decision affirmed a serious, repeat citation and penalty against a roofing company for the failure of its employees to use fall protection equipment provided by the employer. David Gaines Roofing, LLC, KOSHRC No. 4334-06 (July 1, 2008).

At the time of the inspection, the fall protection equipment was on the job site, but in the company's truck. The evidence was that the company provided the equipment and trained employees how to use it, but did not supervise them to ensure that they used it.

The owner of the company argued that he could not force the employees to use the equipment because he was at another job site. The Commission ruled that because of the company's history of prior steep roof violations, it had a duty to do more than just train the employees and then "take no steps to ensure compliance with the fall protection standards."

The Commission ruled that the company had an obligation to ensure compliance, either by conducting periodic inspections or by appointing a member of the roofing crew to act on its behalf.

Although all three of these cases were heard as a result of petitions filed by one or more parties, and not on the Commission's own motion, they nevertheless reveal that fall protection is a hot issue. ▲

Safety and Health
Training Schedule
April 20 - April 24, 2009

The following are free courses offered by the state OSHA agency. Register online at *http://rsvpbook.com/event.php?63319*, or call 502-564-3070.

Bowling Green
Parks and REC Community Room
225 3rd Avenue

Agenda

Monday, April 20
Overview of KY OSH Program 8:30 - 11:30 a.m.
This session discusses the obligation to provide a safe and healthy workplace, free from recognized hazards. Topics of discussion include the operations of the Kentucky Occupational Safety and Health Program, including enforcement and voluntary compliance services, and safety and health topics currently being considered for future standards and policies.

Injury/Illness Recordkeeping 1:00 - 4:00 p.m.
This session is for those persons responsible for maintaining the revised injury and illness records. The forms 300, 301, 300A will be covered. The regulations and guidelines for recordkeeping will be discussed, as well as the compliance directive the Kentucky OSH compliance officer will use to evaluate your records. A recordkeeping example workshop will be part of the course, time permitted.

Tuesday, April 21
Noise & Hearing Conservation 8:30 - 11:30 a.m.
This course explains the composition of sound, the instrumentation and criteria used to determine excessive noise levels, the effects of noise on the hearing mechanism, personal protection equipment, and basic noise control methodology. Also included is a discussion of the hearing conservation requirements. These requirements include employee exposure monitoring, audiometric testing, hearing protection, employee training, and related recordkeeping.

Hexavalent Chromium Course 1:00 - 4:00 p.m.
This three hour course will cover the new hexavalent chromium standards as they apply in General Industry and Construction. Employees exposed to "hex" chrome are at increased risk of developing serious adverse health effects including lung cancer,

***Continued**, see **Training**, page 7*