

Kentucky Review Commission dismisses fall protection citation for lack of evidence

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In a case it described as “ill-conceived from the start,” on April 15, 2015 the Kentucky Occupational Safety and Health Review Commission dismissed a repeat, serious citation against a roofing contractor due to lack of evidence of inadequate fall protection for its employees.

The Kentucky Labor Cabinet had issued a citation and a proposed \$7,000 penalty against the contractor for having an insufficient number of roof anchors for its employees working on the roof of a house.

The Labor Cabinet contended that five or six employees were working on the steep-sloped roof more than 15 feet above the ground, but claimed that there were only three anchor points for them to connect their fall protection harness lanyards to. According to the cited standard, each 5,000 lb. rated anchor point is to be used by only one worker.

The hearing officer in the underlying trial ruled that the company had violated the standard, because she found there were only three anchor points on the roof.

However, the Review Commission disagreed, finding that the Labor Cabinet’s evidence of the number of anchor points – photographs – were inadmissible under the Kentucky Rules of Evidence. The outcome turned on the rule of evidence of admissibility of photographs that requires a person who has seen what the photographs show authenticate them by testifying that they accurately show what they purport to show. However, the Labor Cabinet failed to do so.

When the OSHA compliance officer arrived at the job site, he did not have any fall protection equipment with him or a hard hat. So he did not go up on the roof himself. Instead, he gave his camera to one of the roofing contractor’s employees and asked him to go up on the roof and take photographs, which the employee did. While the employee was doing so, the compliance officer was interviewing other employees.

The compliance officer never personally observed the conditions on the roof, including the number of anchor points.

At the trial, the Labor Cabinet offered the photographs as exhibits during the compliance officer’s testimony. Since the compliance officer had not personally seen the conditions on the roof, he could not authenticate the photos.

The Labor Cabinet did not call as a witness the employee who had taken the photographs or any other employee who had been on the roof. Thus, the Review Commission held that the photographs were inadmissible. Since no other evidence about the number of anchor points was offered, the citation was dismissed.

The Labor Cabinet issued a second citation to the contractor for failure to train employees on fall protection. However, the Labor Cabinet’s only evidence to support this citation was the compliance officer’s testimony that there were not enough anchor points.

When the compliance officer interviewed the employees, he did not ask them any questions about their training. The Review Commission cited some federal Review Commission cases holding that the mere violation of a standard is not proof of failure to train employees about the standard. Unfortunately for the roofing contractor, though, it did not appeal the hearing officer’s ruling against it on the training citation. If the contractor had appealed that ruling to the Commission, it would have prevailed on that citation and avoided a \$3,500 penalty.

In its summary of the decision, the Commission chastised the Labor Cabinet, saying:

This case was ill-conceived from the start. Asking an employee to take photographs for the compliance officer and then not calling the employee photographer is difficult for us to understand, given the law on the admission of photographs in Kentucky. Similarly, writing a failure to train citation where the only proof consisted of an apparent violation of a standard — without more

is nonsensical in light of the case law on the subject. Compliance officer Dickerson said he interviewed employees, and in fact was interviewing when the employee photographer took the pictures for him, but he did not inquire about training. But for [the contractor's] failure to preserve this argument in its appeal to us, we would have reversed this citation. However, [the contractor] has waived its right to challenge this failure to train citation, and so we affirm.

The lesson of this case is twofold: (1) the Kentucky Rules of Evidence will be applied in these kinds of cases, and (2) if you are going to ask the Commission to review a case, consider asking it to review all of the issues. If future inspections are conducted as sloppily as this one was, employers should be prepared to challenge the evidence if citations are issued.

New hazard information standard

Under a new federal rule that began June 1, 2015, chemical manufacturers, importers, distributors and employers are required to provide a common approach to classifying chemicals and communicating hazard information on labels and safety data sheets.

Chemical manufacturers and importers must provide a label that includes a signal word, pictogram, hazard statement, and precautionary statement for each hazard class and category. View examples at <https://www.osha.gov/dsg/hazcom/pictograms/index.html>.

Beginning in December 2015, distributors may only ship containers labeled by the chemical manufacturer or importer if the labels meet these requirements.

The June 1 deadline was established when OSHA aligned its Hazard Communication Standard in 2012 with the global standard for chemical product labeling.

The provisions for labeling offer workers better protection from chemical hazards, while also reducing trade barriers and improving productivity for American businesses that regularly handle, store, and use hazardous chemicals.

The Hazard Communication Standard, as revised in 2012, requires that chemical manufacturers, distributors and importers provide Safety Data Sheets (formerly called Material Safety Data Sheets) for each chemical to downstream users. The new format requires 16 specific sections to ensure consistency in the presentation of the protection information. See <https://www.osha.gov/Publications/OSHA3514.html>

Employers must ensure that the SDSs are readily accessi-

ble to employees for all hazardous chemicals in their workplace. This may be done in many ways. For example, employers may keep the SDSs in a binder or on computers, as long as the employees have immediate access to the information without leaving their work area when needed and a back-up is available for rapid access to the SDS in the case of a power outage or other emergency.

For more information on Hazard Communication, visit <https://www.osha.gov/dsg/hazcom/index.html>

OSHA's summer safety campaign

Summer is upon us, and OSHA's "Stay Safe This Summer" campaign is underway. It's not just about heat. The campaign also includes a variety of other weather hazards, such as hurricanes, thunderstorms, lightning, wildfires, rip currents at beaches, floods, droughts and poor air quality.

For more information, visit the **Weather-Ready Nation** web site of the National Oceanic and Atmospheric Administration and the resources provided by OSHA on its **Emergency Preparedness and Response** web site.

Here are some general facts:

1. Since 2003, in the continental U.S., 43 states have come under a tornado watch; 49 states have come under severe thunderstorm watches; and lightning strikes occur in every state.
2. In 2014, there were 26 lightning fatalities — six were in Florida.
3. More than 100 people each year die in the surf zone waters of the U.S., most of which are caused by rip currents.
4. Wildfires kill 300 people, destroy 2,800 homes and burn more than 7 million acres, on average, each year.
5. Flash flooding is the number one killer associated with severe weather.
6. Poor air quality is responsible in the U.S. for an estimated 60,000 premature deaths each year.

Heat-related illness warning signs & symptoms

Muscle cramps might be the first sign of a heat-related illness and may lead to heat exhaustion or stroke. Here's how to recognize heat exhaustion and heat stroke and what to do.

1. Heat Exhaustion

Warning signs

- Heavy sweating
- Weakness
- Cold, pale, clammy skin
- Fast weak pulse
- Nausea or vomiting
- Fainting

What you should do

- Move to cooler location
- Lie down, loosen clothing
- Apply cool, wet cloths
- Sip water
- If you vomit and it continues, seek medical help immediately