

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
ADMINISTRATIVE ACTION NO. 04-KOSH-0463, 0472, 0494

KOSHRC DOCKET
4147-04, 4151-04, 4149-04

COMMISSIONER OF DEPARTMENT OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v

MOREL CONSTRUCTION CO, INC
EAST IOWA DECKS SUPPORT, INC
MIDWEST STEEL, INC

RESPONDENTS

* * * * *

**ORDER OF THE COMMISSION
ON INTERLOCUTORY APPEAL
AND ORDER REMANDING.**

This matter comes to us on complainant department of labor's motion for interlocutory review of the hearing officer's order directing the complainant to "send the Hearing Officer the compliance officer's rough work notes in this case, a copy of the compliance officer's finished notes, and a list of claimed privileges." Mr. Head said he would conduct an *in camera* review of the notes to "determine if the finished notes contain all non-privileged information in the rough work notes...and to determine that no additional information or embellishments are included." Mr. Head said if there are discrepancies between the rough and finished notes, he would give the department an opportunity "to explain why the information should be withheld." Then, if he determined there is no privilege for the withheld information he "will disclose the information in an order." Mr. Head's order, p 6.

To avoid confusion, now and in the future, we will refer to the compliance officer's rough work notes as the "notes" and the finished notes as the "report." Massman-Johnson (Luling), Massman Construction Co, and Al Johnson Construction Co¹, a review commission decision, CCH OSHD 24,436 at p. 29,802. At the hearing in this case the parties, the hearing officer and the compliance officer used the terms notes and report, attaching the same meaning to the words as did the commission in Massman. See volume I, transcript of the evidence, page 124 (TEI 124).

Labor's interlocutory appeal presents us with several difficult issues. What is the relationship, if any, between a compliance officer's notes which he takes during his inspection at an employer's work site and his report prepared back at the office? How can the issues of privilege versus effective cross examination of witnesses be resolved within the confines of an occupational safety and health case? What role does the hearing officer play when performing the *in camera* examination of the notes and the report? When the hearing officer reaches a decision, before or during a trial on the merits, to turn over the notes or portions of them to the employer, should the review commission play an active part in the decision or await review of the recommended order?

Mr. Head in his order denied respondents' motion for complainant to produce portions of the notes "concerning statements by employees who allegedly will voluntarily testify for the Respondents..." Order, p 6. We agree with Mr. Head's decision to withhold notes about the employees testifying for the employer. His analysis reinforces important employee confidentiality rights and sheds light on the issues now before us.

The primary issue in this interlocutory appeal is what purpose if any the notes

¹ The Kentucky occupational safety and health act "should be interpreted consistently with federal law." Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2001).

may serve during trial² preparation and a trial on the merits. Mr. Head found a "presumption of coercion" when an employer calls employees to testify on its behalf. Respondents grounded their motion to produce the notes on the fact the compliance officer's testimony contained information learned from conversations he had with "unnamed employees." Head order, p 1. Mr. Head said there was no way he could tell if employees were testifying voluntarily or were being coerced. "The employment relationship's coercive effect on the employee to testify favorable for the employer can never be removed." Head order, p 3. Mr. Head is correct on this issue and we adopt that portion of his order as our own. While a party is obviously free to call whomever it wants as a witness, we are concerned that here the employer called employee witnesses in a situation where the compliance officer testified he talked with some of them who then provided him with information about working conditions. Head order at page 1.

In Chemcentral Corporation, KOSHRC 2943-96, August 5, 1997, the employer sought the compliance officer's notes. Chemcentral obtained waivers from five of its employees who said, in documents we determined were prepared by the employer, they waived their rights to confidentiality. At page 2. We found those waivers were coerced. Chemcentral's conduct demonstrates the power employers hold over their employees. We find a common thread within Chemcentral and the case at bar: employers intent on seeing the notes about employee interviews and willing to manipulate their employees to get them. In Chemcentral the employer procured waivers for employees while in Morel the employer announced plans to call employees as witnesses and, we infer, examine them on what was recorded in the compliance officer's notes. In Morel, specifically, the

² In this order we use the words hearing and trial interchangeably.

employer in possession of the notes is then in a position to discover which employees provided information to the compliance officer.

KRE 508 creates an informer's privilege which applies to our cases. While we find the name of the privilege unfortunate³, we note it began in Kentucky case law as a criminal rule of evidence⁴ which has been expanded to include civil matters by adoption of the Kentucky rules of evidence. In our cases the civil rules apply where our rules of procedure are silent. Section 4 (2), 803 KAR 50:010. CR 26.02 (1) says "Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter..." Kentucky Practice says in part "...privileged matter should be limited to communications...which are excluded by...statute..." 6 Kentucky Practice, rule 26.02, author's comment 5, section (1). It is clear KRE 508 applies to our occupational safety and health cases because of KRS 338.101 (1) (a) which says the commissioner may question employees and employers privately and KRS 338.121 (1) which says employees may ask the division of compliance to withhold their names when they file a safety and health complaint. KRE 508 and the two statutes charge the commissioner with the responsibility for protecting employee confidences, after all the commissioner enforces the act. Since individual employees are not often parties to our cases, it is the commissioner's job to protect employee confidentiality.

When a compliance officer during an inspection talks with an employee who gives him information about the company and then puts the substance of the conversation into his notes, the privilege applies. The privilege also protects employees who file formal safety and health complaints. Massman at page 29,804. This privilege cuts in two

³ Employees who provide information about working conditions perform a public service; they are assisting themselves, their fellow workers, their employers and society in general.

⁴ Jenkins v Holbert, Ky, 485 SW2d 238 (1972);

different directions: one, it prevents the names or identities of employees from being released to the employer and, two, if the employer has called one or more employees as witnesses in the hope of finding out who talked with the compliance officer, the privilege protects that employee as well. Massman, supra, p. 29,804, citing to Quality Stamping Products Co, a review commission decision, 7 BNA OSHC 1080, CCH OSHD 23,520. When the employer calls employees as witnesses, knowing at least one employee talked with the compliance officer during the inspection, there is no voluntary disclosure of the informant's name, as employers may claim, because the employer still has no idea who that person is. KRE 508 (c) (1).

Here is how the federal commission described the privilege:

The essence of the informer's privilege...is the protection of an informer's identity, and the confidential information in a statement is that which tends to indicate that the person giving it has cooperated with the government against the employer.

Massman, supra, at p. 29,805.

In Morel, the employer wants to call employees as witnesses. If the employer could see the notes about compliance officer conversations with employees, then he could determine who gave information and put pressure on him to recant or otherwise take action against him. If all an employer had to do was call as its witness any employee the compliance officer (CO) talked to during the inspection, and then moved for production of the compliance officer's notes to see what the employees told the CO, the informer's privilege would be rendered meaningless and unenforceable..

Mr. Head denied respondent's motion to produce that portion of the compliance officer's notes which pertain to "statements by employees who allegedly will voluntarily testify for the Respondents..." Let us assume for the sake of argument the employer

during the inspection observed the compliance officer talking with five employees. Further, we assume the compliance officer testified he obtained information from two employees. At this point the employer does not know which employees gave the compliance officer useful information. So the employer calls all five employees as witnesses and then moves for production of the notes, arguing he must see the notes for effective cross examination. With the notes in hand, the employer has manufactured the tools to discover the identity of the two employees and pressure them into recanting. In short, there is no way to preserve the privilege of confidentiality for the two employees except by withholding any information about the employees which is found in the notes.⁵ In the case at bar the employer listed the employees as witnesses and then moved for production of the notes, a tactic which if successful would reveal the identity of the informers.

Mr. Head made the right decision for the reasons given. KRE 508 protects the identify of informing employees called as witnesses by an employer. Massman. We hold when Mr. Head examines the compliance officer's notes, any references to the employees listed as employer witnesses is privileged. We leave for another day the question whether KRE 508, KRS 338.101 (1) (a) and KRS 338.121 (1) protect employees called as witnesses for the state because labor called no employee witnesses.

Mr. Head in his order said he would conduct an *in camera* review of the notes to see if the report "contain[ed] all non-privileged information in the rough work notes,

⁵ In Massman, the employer moved for production of the notes because of employee witnesses called by the secretary. In the case at bar the employer wants to call its own employees as witnesses. An employer calling employee witnesses cannot lump informing employees with non informers in an attempt to ferret out the culprit. Employees may elect to testify for the secretary or decide not to; but employees have no such discretion when their employer calls them to testify because of the coercive power their employer holds over them.

regardless of whether it is relevant or not to the citation, and to determine that no additional information or embellishments are included." (emphasis added) At p 6.

When Mr. Head said in his order he would examine the notes but would not limit his inquiry to relevant information, he was in error and we reverse him on this point.

"Parties may obtain discovery regarding any matter, not privileged, which is relevant..."

CR 26.02 (1). In Quality Stamping Products Company, supra, at 28,503, the commission said: "the party seeking the information must first show that it is relevant to a material issue ...before the question of privilege is even reached."

Then Mr. Head in his order said he would examine the report to see if it contained all the information found in the notes "and to determine that no additional information or embellishments are included." Head order, p 6. We directed this line of inquiry in our order in Secretary of Labor v Tyson Shared Services, et al, KOSHRC 3391-00, 3397-00, 3398-00 and 3399-00 dated June 3, 2003. In the Tyson order we said "A compliance officer's finished work notes [his report] are the rough work notes [his notes] with the privileged portions removed. Chemcentral⁶, KOSHRC #2943-96." At p 3. On the facts of this case, however, we can see our June 3 Tyson order is distinguishable from the case at bar. In the instant matter the compliance officer testified as follows:

A My report is a kind of summary of my findings. It includes information from pictures, video tape, rough work notes used to jog my memory, cited standards, discussions with supervisor, those materials, independent research I do on standards and applicability and things like that... (emphasis added) TE VIII, 106.

⁶ What we actually said in Chemcentral is "When the secretary has prepared these finished notes [the report], we infer all traces of employee identify have been removed." What we meant here is we understand the compliance officers when they write their reports take care to remove anything that would lead an employer to discover which employee the compliance officer talked to.

Although the CO's report contains many things including pictures and video tape, notes, the standards, discussions with his supervisor, analysis and research, the notes themselves, taken as they were during the inspection, are simply an aid to his memory. In other words, the compliance officer's report and his notes in the case before us were prepared at different times for very different reasons. Given that the notes and report in this case are very dissimilar, it would serve no purpose for the hearing officer to review them to see if they are the same⁷, they certainly are not, just as it would serve no purpose to ask the compliance officer if they are the same. Based on the facts of this case we therefore reverse the hearing officer on this point. In this case, we hold the hearing officer cannot examine the report and notes to see if they are the same. Similarly, it would serve no purpose to ask the compliance officer if the notes are the same as the report as he has already answered that question in the negative.

Morel, in its brief to us, said the appeal is "not about discovery or breach of employee confidentiality." P 1. Morel here is mistaken. Morel has moved for production of documents - the compliance officer's notes. It wants to see the notes or portions of them. That is discovery. Massman, supra, at page 29,802. Issues of discovery and employee confidentiality are always at play when motion is made for the hearing officer in one of our cases to examine the notes with an eye to releasing portions of them to the employer. In Massman the review commission said the hearing officer, when examining the notes upon motion of the employer "...should have centered his analysis on the issue of protecting the informers' identities rather than the nature of the information itself." At page 29,805. So must our hearing officers. The critical issue is

⁷ Agencies are creatures of their statutes and regulations; we have no authority to tell the department of labor how a compliance officer is to prepare reports.

preserving the privilege. Whether the hearing officer is examining notes about employee statements or examining notes after a compliance officer has testified on direct, we hold the hearing officer must protect the privilege. Massman at page 29,805.

Then Morel said it wanted the hearing officer to examine the notes as a fact finder who "can further evaluate and possibly resolve discrepancies...such a review would assist him in evaluating the raw perceptions of the Compliance Officer." Head order, p 2. Section 38⁸ of our rules of procedure says "Witnesses shall be examined orally under oath." The rule says witnesses testify before the hearing officer who as fact finder⁹ listens to and evaluates what they say. There is no provision in the rules for the hearing officer to form impressions of witnesses by examining their writings *in camera*. Morel wants the hearing officer to examine the compliance officer's notes to gain insight about his "raw perceptions." That is the purpose of cross examination. The compliance officer witness in this case enforces the safety and health laws; as a law enforcement officer his "investigative reports," his notes and his report, are not an exception to the rule against hearsay. KRE 803 (8) (A). If the compliance officer's notes cannot be admitted into evidence, then they shall not be used by the hearing officer as a way to search independently for facts.

At the close of the compliance officer's direct examination, Morel moved for an *in camera* examination of his notes to assist it in cross examination. Because the notes may and often do contain extracts or summations of what he learned from employees during his inspection, the notes potentially contain privileged information. KRE 508. To

⁸ Section 38, 803 KAR 50:010.

⁹ Section 47 (1) of our rules of procedure.

resolve the issues raised by this intersection of the right to cross examine and privilege, we must look for the proper balance.

To make an intelligent decision about the balance between the privilege and cross examination, we must discuss what the employer, assuming for the sake of argument no access to the notes, has to assist him in the cross examination of the compliance officer. Well before the hearing, perhaps after the first prehearing conference call, the employer has received a copy of the compliance officer's report. As the compliance officer testified, his report details what he knows about the inspection: what he learned during the inspection and afterwards. Perhaps more importantly, the employer accompanies the compliance officer during the inspection; this right is built into the law. KRS 338.111. An employer who follows the compliance officer knows what the compliance officer has seen¹⁰ and who he has talked to even though those discussions are privileged. Similarly, the employer knows what company documents the compliance has received and what photographs he has taken. Everyone, of course, has access to the safety and health standards and OSHA case law.

Because of the plethora of information¹¹ available to an employer who has not seen the notes, it would be the unusual case where the employer could plausibly argue he does not have the information he needs for cross examination of the compliance officer. CR 26.02 (1) and Massman. We do not find such a situation here.

¹⁰ In a criminal case the detective and the perpetrator perform their duties separately from one another. Disclosure of what the police know is vitally important to a defendant who has no idea what they have been up to. An employer in an OSHA case, on the other hand, knows exactly what the compliance officer did during the inspection because he was there. The only thing the employer does not know is the substance of the compliance officer's discussions with employers and employees - and that is privileged. KRE 508, KRS 338.101 (1) (a), KRS 338.121 (1) and Massman.

¹¹ The scope of information available to an employer in an OSHA case is as good an explanation as any for our rule which says depositions are not permitted "Except by special order." Section 27 (1), 803 KAR 50:010.

Having said that, however, we are mindful of Massman and Blakeslee-Midwest Prestressed Concrete Co, a federal commission decision, CCH OSHD 22,284, which say "Notes made by an inspector during the course of an inspection are discoverable¹² by a respondent when the inspector appears as a witness." Blakeslee at page 26,840. But this discovery must be relevant and in any event is subject to the privileges set out in KRE 508, KRS 338.101 (1) (a) and KRS 338.121 (1). CR 26.02 (1). Because material contained in the notes may lead to employees who provided the information, the review commission in Massman, supra, said the appropriate time, upon motion by the respondent, for the hearing officer to perform the *in camera* review of the notes to select out privileged matter is after the witness, here the compliance officer, has completed his testimony on direct. Massman at page 29,807, quoting with approval the US supreme court case NLRB v Robbins Tire and Rubber Co, 437 US 214, 98 SCt 2311, 57 LEd2d 159(1978). We agree and adopt this reasoning as our own. When the compliance officer's direct testimony is concluded¹³, the department of labor will tender the notes to the hearing officer, accompanied with assertions of privilege.

The hearing officer while reviewing the notes to excise the privileged portions shall keep in mind the respondent, without the notes, generally has all information necessary to cross examine the compliance officer.

"Under no circumstances should the judge [in our cases the hearing officer] reveal the identities of persons who have given such statements to the government, or the

¹² We use the word discoverable here as it applies to the notes after the compliance officer's testimony on direct. Recall our rules of procedure limit discovery in our cases. Section 27 (1), 803 KAR 50:010.

¹³ Our analysis of the facts of this case, as well as Massman and Robbins Tire, leads us to the conclusion this is the appropriate time for the hearing officer to perform his *in camera* review of the notes. To the extent our prior rulings say otherwise, they are overruled.

In any event, our five day rule appears to be unworkable; in the case at bar the employer moved to see the notes during the trial and the hearing officer agreed.

contents of any such statements, over the Secretary's objection." Massman at page 29,810. We hold when the hearing officer performs the *in camera* review with complainant's assertions of privilege in hand, he will take care to remove from the notes anything which might arguably tend to reveal the identity of an employee or employer whether by name, situation, context or inference. When it is a close question whether an item in the notes is privileged, the hearing officer will resolve the matter in favor of the privilege because of the information available to the employer from other sources and because of the irreparable damage which can be done to an employee's relationship with his employer if his identity is revealed. Our hearing officers shall focus on the "issue of protecting ...the informers' identities rather than the nature of the information itself." Massman at page 29,805.

Our analysis of the privilege and our understanding of the potentially disastrous consequences when an employee's identity is revealed leads us to the conclusion the application of the privilege to the compliance officer's notes is too important to leave to the unfettered discretion of the hearing officer. Rather, once the hearing officer has reviewed the notes with the assertions of privilege and has made a decision about what may be released to the respondent, complainant has the option should a dispute arise (before the notes are released to respondent) to file a motion for interlocutory review with the commission. That motion will ask the commission to review *in camera*¹⁴ the hearing officer's decision about release of the notes. But while the complainant may file an interlocutory appeal¹⁵ on the privilege issue, the cross examination of the compliance

¹⁴ KRE 508 (c) (2).

¹⁵ When labor files an interlocutory appeal of the hearing officer's decision to release notes or parts of the notes, the hearing officer will seal the notes and forward them to the commission. When the hearing officer receives the trial transcript of the hearing, the hearing officer in this instance will forward the transcript to

officer will be completed, albeit without use of the notes in dispute, and the hearing brought to a conclusion. If the commission should release any portion of the disputed notes, the respondent has the option to resume cross examination of the compliance officer on issues raised in the notes released by the commission. After cross examination of the compliance officer, and any redirect, the trial is at an end; no other witnesses may be called.

When we remand this case to the hearing officer, he will examine the notes, accompanied by complainant's assertions of privilege. Statements of all employees slated to testify for the employer are privileged as well as any summaries of statements from those same employees. All material found within the notes which tends to reveal the identity of any employee is privileged. To repeat as the commission in Massman said: "The judge should...[center] his analysis on the issue of protecting the informers' identities rather than the nature of the information itself." At page 29,805. Given what we have said, we conclude the balance between the right to cross examine and the privilege shall be in favor of protecting the identity of employees:

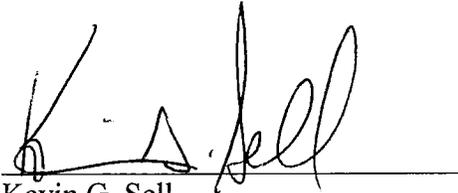
...the identity of an informer might be revealed from the disclosure of even a basically factual statement relevant to an investigation...
Massman at page 29,805.

We remand this case to the hearing officer with directions to examine and manage the notes in a manner consistent with this order.

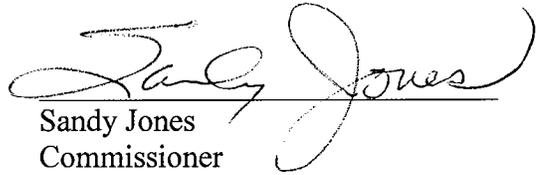
It is so ordered.

Entered this July 5, 2006.

the commission so we may appreciate the compliance officer's testimony. When the commission reaches a decision on the interlocutory appeal, we will issue our order and send the sealed notes and the transcript to the hearing officer. The sealed notes shall then become a part of the record. KRE 508 (d).

A handwritten signature in black ink, appearing to read "Kevin G. Sell", written over a horizontal line.

Kevin G. Sell
Chairman

A handwritten signature in black ink, appearing to read "Sandy Jones", written over a horizontal line.

Sandy Jones
Commissioner

CERTIFICATE OF SERVICE

I certify a true and correct copy of the foregoing order has been served in the following manner:

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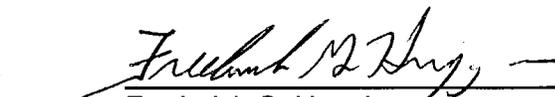
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This 5th day of July, 2006.



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