

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
10-KOSH-00092

KOSHRC 4734-10

SECRETARY OF THE LABOR CABINET
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v

THE OKONITE COMPANY

and

THE INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL UNION 2356,
TOM GRIMES

RESPONDENTS

ORDER OF THIS COMMISSION
DENYING THE OKONITE COMPANY'S
MOTION TO RECONSIDER THE
REVIEW COMMISSION'S
MAY 4, 2010 ORDER

On May 4, 2010 this commission entered an interlocutory order resolving discovery issues raised by the complainant secretary. In part our order said " Neither depositions nor interrogatories will be permitted in this case."

On April 16, 2010 complainant had filed a request for interlocutory relief. Then on April 20 the International Brotherhood of Electrical Workers, the employee representative in this case, filed its own motion for interlocutory review. Our rules,¹ section 22, give a party ten days to file its response to a motion. Okonite had ten days, plus three more permitted by our rule 6 (2), to file a response. Since we received two motions for interlocutory review, we will measure the

¹ Our procedural regulations can be found at 803 KAR 50:010.

thirteen days from the second motion, filed by the union. April 20 plus thirteen days is May 3. When the commission met on May 4 to consider the two motions for interlocutory review, we had not received a timely response from Okonite and so we issued our order denying discovery.

From Okonite we received, first, an untimely response to the motions for interlocutory review on May 10. Thereafter on May 20, Okonite filed a motion for reconsideration of our May 4 order reversing our hearing officer who had given the company permission to take a deposition; we had cited to our rule 27 (1) which discourages discovery. On May 20 we received labor's response to Okonite's motion for reconsideration. We have not received a response from the union.

Okonite urges us to reconsider our May 4 order and cites us to arguments it made in its untimely response filed on May 10. Labor in turn asks us to deny the motion for reconsideration because, among other reasons advanced, Okonite failed to file its response when it was due by May 3.

Although we deny respondent Okonite's motion for reconsideration of our May 4 order because the company failed to tender, by May 3, a timely response to labor's motion for review, we will address several important issues raised by our hearing officer's discovery order and Okonite's untimely submission.

From the time we promulgated our rules of procedure and they became effective in 1975, they have contained the following section about discovery:

Section 27. Discovery, Depositions and Interrogatories.

(1) Except by special order of the commission or the hearing officer, discovery depositions of parties, intervenors or witnesses and interrogatories directed to parties, intervenors or witnesses shall not be allowed.

803 KAR 50:010, section 27 (1) (emphasis added)

We have always interpreted our rules to discourage depositions and interrogatories. In Chemcentral Corporation,² KOSHRC 2943-96, August 5, 1997, we said:

...our rules of procedure (ROP) discourage discovery... We have historically limited discovery in occupational safety and health cases, under the authority of our rules, to insure that they move along expeditiously from contest of citations to a final decision of this commission...Lengthy and unnecessary discovery draws out a case and lengthens the time between disclosure of a hazard and its resolution...

In Elliot Electric/Kentucky, Inc., KOSHRC 4502-07, September 8, 2008, a case before this commission on interlocutory appeal, we issued an order which said our rules on discovery, sections 26, 27, 28 and 29, preempt those rules on the same subjects found in Kentucky's rules of civil procedure.

From our administrative experience with the cases which come before us, we have found complainant secretary does not ordinarily need discovery because any citations issued are the result of an inspection conducted by an occupational safety and health compliance officer (CO). Similarly the employer does not need discovery because he has exercised his right to participate in the inspection by accompanying the compliance officer as he makes his rounds of the employer's premises. KRS 338.111. In other words, the employer saw what the compliance officer saw. Similarly, the employer knows which of his employees spoke to the compliance officer even though he will not know of the substance of those conversations. KRS 338.101 (1) (a) and 338.121 (1). This process focuses the employer's attention to those areas where the compliance officer sought the assistance of employees.

If citations are issued, they put the employer on notice of what the secretary will seek to prove if the citations are contested. KRS 338.141 (1). Because many of the safety and health

² To view this decision, and all of our commission decisions, on line, go to koshrc.ky.gov; select commission decisions, discrimination decisions or interlocutory orders as appropriate.

standards, upon which citations are based, have been in existence since 1970, there is considerable case law to assist the employer in the preparation of his defense.

If a citation is issued and then contested, the employer may request and receive the compliance officer's report of his inspection. This report, along with photographs taken by the CO, documents the compliance officer's observations and conclusions he has drawn from his inspection and records information about the alleged violation and the standards, obtained through research, after the walk around.

As important as any other information the employer has available to prepare his defense, is the employer's knowledge of his own business: an employer knows far more about his enterprise, his industry, his employees, his production processes and his machinery and equipment than any compliance officer can ever learn from a brief inspection.

In short, because of what the employer knows about the inspection, it is the rare case where discovery beyond the permitted requests for admission is necessary, hence our rule limiting discovery. Sections 26 (1) and 27 (1).

In its untimely response Okonite says the commission's interlocutory review process should be used "sparingly." We agree but would add the same logic applies to section 27 (1) of our rules which says in part "Except by special order...discovery depositions...and interrogatories...shall not be allowed." (emphasis added) What do the words special order mean for the case now before us? As we said in our May 4 order, neither the hearing officer nor the respondent attempted to justify the deposition in terms of the limits our regulations place on the practice of discovery in the cases which come before us. We interpret the phrase "special order" to be a high threshold a successful party seeking discovery must cross.

In its untimely response Okonite says it needs the deposition "to gain Mr. Sparks' sworn testimony regarding his firsthand knowledge of the circumstances of the accident." Anticipating that argument, both the secretary of labor and the International Brotherhood of Electrical Workers attached a copy of Okonite's accident reporting and treatment form to their motions for interlocutory review. Within its accident investigation process, Okonite asked the following questions and then answered them:

Did any defects or change in equipment/material contribute to hazardous condition? No

Was the correct equipment readily available...being used? Yes

Did the equipment contribute to operator error or confusion?
Do not know.

Could the equipment be changed/modified to prevent recurrence?
Yes.

Did the employee understand the procedure? Yes.

Were the behaviors which caused the accident observed before? Yes.

These questions, among others, suggest an intelligent inquiry into the circumstances of the accident involving Mr. Sparks.

In their motions for interlocutory review, the union asserted the scheduled deposition of respondent's employee was coercive while labor said it suggested the company was harassing and intimidating its employee.

In Morel Construction Co, Inc, et al, KOSHRC 4147-04, 4151-04, 4149-04, July 5, 2006, an order on interlocutory review, our commission denied the company's request to obtain the compliance officers "notes 'concerning statements by employees who allegedly will voluntarily

testify for respondent.'" Page 2. In our order we observed that "Mr. Head found a 'presumption of coercion' when an employer calls employees to testify on its behalf." Page 3.

If Okonite's purpose scheduling the deposition is in preparation for calling him as a witness or instead preparing for his cross examination, then we agree with Mr. Head's reasoning. We find when an employer calls his employee as a witness in one of our cases or takes his deposition, his job is on the line.

For the reasons we have stated, we find Okonite, from the time it first made an oral motion for discovery and up to the present, has failed to demonstrate a special need for a deposition from Mr. Sparks.

Okonite's motion for reconsideration is denied.

It is so ordered.

June 1, 2010.³


Faye S. Liebermann
Chair


Michael L. Mulfins
Commissioner

Certificate of Service

A copy of this order denying respondent's motion to reconsider our May 4 order has been served this June 1, 2010 on the following individuals in the manner indicated:

By messenger mail:

Mark F. Bizzell
Office of Legal Services
Kentucky Labor Cabinet

³ Commissioner Green took no part in this decision.

1047 US Highway 127 South, Suite 2
Frankfort, Kentucky 40601

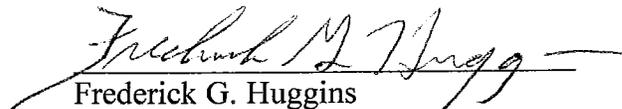
Michael Head
Hearing Officer
Division of Administrative Hearings
1024 Capital Center Drive, Suite 200
Frankfort, Kentucky 40601-8204

By US mail:

Kevin G. Henry
Patsey Ely Jacobs
Sturgill Turner
333 West Vine Street – Suite 1400
Lexington, Kentucky 40507

Tom Grimes
International Brotherhood of
Electrical Workers
Local Union 2356
124 Upper Dry Fork
McKee, Kentucky 40447

Thomas J. Schultz
Irwin H. Cutler, Jr.
Priddy Cutler
800 Republic Building
429 West Muhammad Ali Boulevard
Louisville, Kentucky 40202-2346


Frederick G. Huggins
General Counsel
Kentucky Occupational Safety and Health
Review Commission
4 Millcreek Park
Frankfort, Kentucky 40601
(502) 573-6892