

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
13-KOSH-0217

KOSHRC 5061-13

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v

ELITE ROOFING, LLC

RESPONDENT

* * * * *

COMMISSION ORDER
DENYING ELITE ROOFING'S
INTERLOCUTORY APPEAL
AND ORDER OF REMAND
FOR A HEARING

We have before us respondent's interlocutory appeal of Hearing Officer Stuart Cobb's pretrial order where he denied "Respondent's motion to dismiss or in the alternative motion for summary judgment..." For reasons we shall state, we deny Elite Roofing's interlocutory appeal and remand this case to Mr. Cobb for a hearing.

Hearing Officer Cobb, in his opinion dismissing, rejected Elite Roofing's argument the Cabinet's failure to file a complaint, within the 20 days of the date of the Franklin Circuit Court agreed order, was jurisdictional. Mr. Cobb stated "The language of the Remand Order was that of an agreement of the parties, and the purpose of it was to get the matter back on the administrative track in the same posture that it would have been on if Elite Roofing had been served the Citation and filed its Notice of Contest." Opinion dated April 22, 2014, page 2. We agree with Mr.

Cobb's reasoning and adopt it as our own. We would add that while Judge Wingate ordered the circuit court action dismissed and returned "the matter to the Review Commission for a hearing," this is the only direction by the court. The remainder of the agreed order is a recitation of several agreements between the parties which resolved all issues before Franklin Circuit Court. Based on those agreements between the parties, the court simply dismissed the action and remanded to this commission.

Elite Roofing has cited to no case law, Kentucky or federal, which would authorize us to view Judge Wingate's agreed order as a vehicle creating a jurisdictional requirement where none exists, either in law or in fact. Our *Black's Law Dictionary*, Revised Fourth Edition, 1968, page 991 says jurisdiction "is the authority by which courts and judicial officers take cognizance of and decide cases." For example, KRS 338.071 (4) confers jurisdiction on this commission when it says "The review commission shall hear and rule on appeals from citations..." KRS 338.091 (1) confers jurisdiction in Franklin Circuit Court to hear appeals from final orders of this commission. An agreement between the Cabinet and Elite Roofing to file a complaint with our Commission is not jurisdictional. Jurisdiction to decide a case is a process conferred by statute or by constitution; it cannot be created by an agreement of the parties. The most we could say of this order is the court was advised and was therefore mindful of the agreements of the parties which led to the order of dismissal of the action.

Elite Roofing's jurisdictional argument is based in part on a law of the case theory. Elite contends the 20 day period of time to file a complaint with the Commission was jurisdictional because it was the law of the case. Elite's law of the case theory can be disposed of very quickly.

In the agreed order Franklin circuit remanded the case to the Commission and directed it to hold a hearing on the merits of the case; this was the remedy Elite Roofing sought in Franklin Circuit Court. This remand for further proceedings "is not a final judgment or order within the meaning of CR 54.01 in that it did not adjudicate the rights of any of the parties." *Wagoner v Mills*, Ky App, 566 SW2d 159 (1977). What Elite Roofing wants is a hearing before the Commission which results in a dismissal of all citations; conversely, the Cabinet wants our Commission, after a hearing, to issue an order affirming all citations.

This case will be adjudicated before our Review Commission and then be subject to appeal. The final judgment of the highest court in Kentucky will be the law of the case. *Black's Law Dictionary*, page 1030. An order of remand is not that final judgment. *Wagoner v Mills*.

Elite Roofing says the agreed order was a mandate from the court directing the Cabinet to file its complaint within 20 days of the date of the agreed order. Once again we refer to our *Black's Law Dictionary*, page 1114, where it says a mandate is an order from the court which a party or person "is bound to obey." We see no language in the agreed order directing the Cabinet to file the complaint in 20 days from the date of the order. What we see is an agreement between Elite Roofing and

the Cabinet where the cabinet will accept Elite's notice of contest as timely filed and Elite agrees the Cabinet shall file a complaint with the Commission. Franklin circuit's order dismissing and remanding, as we said, issues no orders to the parties except perhaps to the review commission to hold a hearing and we are already under a statutory directive to do exactly that where the parties have agreed the notice of contest was timely filed. KRS 338.141 (3).

Franklin circuit has remanded this case to our Commission for a hearing. While the Cabinet has filed a complaint, it is some 28 days late according to the agreement between Elite and the Cabinet. Now that this case is before the Commission on interlocutory review, we must resolve this matter.¹ Because this Commission has not ruled on this issue, we must look to the federal courts and the federal Occupational Safety and Health Review Commission for guidance. In *Kentucky Labor Cabinet v Graham*, Ky, 43 SW3d 247, 253 (2001), CCH OSHD 32,182, the supreme court said because our occupational safety and health law is patterned after the federal act, it "should be interpreted consistently with federal law." *Graham* was abrogated on other grounds by *Hoskins v Maricle*, Ky, 150 SW3d 1 (2004).

In *Pitt-Des Moines, Inc*, CCH OSHD 30,225, pages 41,604 – 41,605, BNA 16 OSHC 1429, 1430 (1993), the federal review commission rejected the company's affirmative defense which argued the complaint must be dismissed because it was filed six days late. In its decision the federal commission found the company had not been prejudiced by a six day delay. On the issue of a late filed complaint, the

¹ Section 23 of our rules of procedure, failure to file, 803 KAR 50:010.

commission said other factors may be considered as well: willful or contumacious conduct or a record of substantial delay.

Then in *Jenson Construction Company of Oklahoma, Inc v OSHRC and Marshall*, 597 F2d 246 (CA10 1979), CCH OSHD 23,514, BNA 7 OSHC 1283, the court cited to the federal review commission's rules which required the secretary to file a complaint 20 days after receiving the company's notice of contest.² Citing "an extraordinary caseload," the secretary filed his complaint 28 days late. In its decision the tenth circuit said while Jenson claimed it was unable to secure the necessary witnesses, the court said the company had not requested subpoenas and otherwise "had made no effort to secure the attendance of such witnesses." Here the court upheld the "Judge's³ finding that Jenson did not demonstrate actual prejudice..." At 597 F2d 248, CCH page 28,496, 7 OSHC 1284.

According to our hearing officer, the Cabinet misplaced the executed agreed order and so no lawyer was assigned to file a complaint until after the 20 day period had run. This, we find, is similar to the federal secretary's "extraordinary caseload" justification for filing a complaint 28 days late. *Jenson Construction Company of Oklahoma*.

Elite argues it was prejudiced by the secretary's inability to file the complaint with this Commission in 20 days; we reject this argument as well. Elite Roofing's owner and manager, in the company's supplemental filing with our Commission which we have accepted without objection, said the late filed complaint prevented

² 29 CFR 2202.33 (a) (1).

³ Administrative law judge.

him from identifying employee witnesses to assist in his defense against the citations. But in the same affidavit, the owner admitted he had taken steps to cut off all contact with Castle Construction, the subcontractor that failed to inform him of the citations. We find Elite has by its own actions to cut off communications with Castle Construction impeded its ability to discover potential witnesses.

Finally, we find Elite Roofing had apparently taken no steps to identify potential witnesses⁴ between the time it first heard of the citations, the Tony Long letter dated March 19, 2013, and the agreed order signed by Judge Wingate on May 23, 2013, some two months and some four days.

Elite Roofing in a response it filed on July 28 argues we must dismiss the secretary's complaint because he did not claim the late filing would be permitted upon a showing of excusable neglect. For this proposition, Elite has drawn our attention to a court of appeals opinion: *Jazette Enterprises Limited v Commonwealth of Kentucky ex rel J. Michael Brown, Secretary Justice and Public Protection Cabinet*, 2012-CA-001366, February 21, 2014, an unpublished opinion. In that opinion the court of appeals upheld a circuit court decision to dismiss Jazette as a defendant in an action for its failure to file an answer in 30 days. In *Jazette* the Commonwealth brought an in rem action seeking forfeiture of internet domain names, a matter far removed from the administrative action before us. We are

⁴ Jeremy Bosco, Elite's manager and owner, in his affidavit states complainant has not provided any names of employees present on the construction site on the date of the inspection. Bosco affidavit, paragraph 16. The names of employees contacted by a compliance officer during his inspection are privileged. *Morel Construction Co, et al*, KOSHRC 4147-04, 4151-04, 4949-04, and *Elliot Electric/Kentucky, Inc*, KOSHRC 4502-07.

frankly puzzled by Elite Roofing's reliance on this case for authority; perhaps a brief quote from the opinion will suffice:

...the trial court's April 20, 2012, order [dismissing Jazette] related back to a prior order requiring the domain defendants to present evidence of geo-blocking in order to prevent forfeiture. Jazette did not even mention geo-blocking in its answer.

We have no way of interpreting the relationship expressed in the court of appeals' *Jazette Enterprises* opinion between the trial court's previous order requiring evidence of geo-blocking, the trial court ordered 30 day period of time permitted for a defendant to file an answer or the trial court's decision to dismiss Jazette from the action. We cannot tell, from this opinion, whether Jazette had, one, been under a duty to produce evidence of geo-blocking or, two, whether Jazette had elected not to so participate. In short, this opinion is easily distinguishable. We do not find it persuasive.

Because of the constraints found in *Graham, supra*, we will follow persuasive federal case law which requires a showing of prejudice when a respondent in occupational safety and health litigation argues the secretary's administrative complaint was not timely filed.

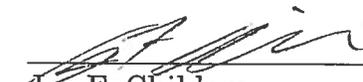
For the reasons stated, we deny Elite Roofing's interlocutory appeal of Hearing Officer Cobb's order which in turn denied Elite's motion to dismiss or in the alternative a motion for summary judgment. We remand this case to the hearing officer for a trial on the merits.

It is so ordered.

August 5, 2014.


Faye S. Liebermann
Chair


Paul Cecil Green
Commissioner


Joe F. Childers
Commissioner

Certificate of Service

I certify this order has been served on the following in the manner indicated on August 5, 2014:

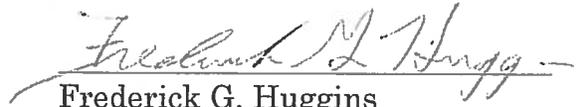
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