COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
ADMINISTRATIVE ACTION NO. 96-KOSH-0311

KOSHRC NO. 2943-96

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

CHEMCENTRAL CORPORATION
D/B/A CHEMCENTRAL/LOUISVILLE — RESPONDENT

* * * * * * * * * *

ORDER OF THIS
REVIEW COMMISSION

We have before us two issues brought to this commission on interlocutory appeal "as of right." ROP 45 (3)[1]. In the order granting the interlocutory appeal, we asked for briefs and sought answers to several questions. The parties submitted simultaneous briefs and then reply briefs, all of which we found to be of excellent quality. We then granted the secretary of labor's motion for oral argument which was held on July 1. Although the commission does not often entertain oral argument (ROP 50 (1)), we found it very helpful to a resolution of the two complex issues presented by this case.

While the two issues we resolve today deal with discovery, the underlying legal principles are unrelated. We shall begin, then, with the question whether the compliance officer's work notes, taken contemporaneously with his inspection of Chemcentral's premises, are discoverable.

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[1] Enacted as section 45 (3), 803 KAR 50:010.

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Chemcentral learned, while taking his deposition, the compliance officer made notes during his inspection. But the compliance officer refused to turn those notes, commonly referred to in the trade as work notes, over to respondent on advise of counsel. Counsel for the secretary argued the notes could not be turned over to Chemcentral without revealing the identity of employees interviewed by the compliance officer during his inspection. KRS 338.101 (1) (a) says the secretary, here the compliance officer, may "question privately" employees during his inspection. Then KRS 338.121 (1) says an employee may make a safety and health complaint to the secretary without revealing his name.

Before hearing officer Michael Head ruled on the matter, and during the course of the litigation, Chemcentral obtained waivers from five of its employees who stated they did not object to having their interviews, if any, revealed when the work notes were turned over to Chemcentral as part of its discovery effort. Chemcentral moved the hearing officer for an order requiring the production of the work notes. Hearing officer Michael Head ordered the secretary to "release" to Chemcentral "a complete copy of all notes...with the redaction of the name of any employee who did not sign a Waiver of Confidentiality."

In his order, Mr. Head concluded the decision whether to release the work notes hinges upon a balancing test. That is, balancing the privilege the secretary enjoys to question employees in private and an employee's privilege to complain anonymously

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against a respondent's rights to "...discover 'any matter, not privileged, which is relevant to the subject matter involved in the pending action...'" Employing the balancing test, the hearing officer concluded Chemcentral may review the work notes with the names of those employees who did not sign waivers redacted.

Labor argued, to the hearing officer and to this commission, that while employees enjoyed the right to complain confidentially about safety and health (KRS 338.121), the secretary himself enjoyed a statutory right to question employees privately. KRS 338.101 (1) (a). But our hearing officer, in his analysis, concluded that "...the Secretary is merely restating the right which the employee possesses." We do not agree. Employees collectively possess a great fund of information about their occupational safety and health. In Kentucky the general assembly took advantage of that fund of employee knowledge when it passed KRS chapter 338. The general assembly could have simply provided for the protection of employees who exercise their rights to complain, in writing or orally, about occupational safety and health as it did in KRS 338.121 (1). The statute states in part:

> Any employee...who believes that a violation of any occupational safety and health standard exists that threatens physical harm...may request an inspection by giving notice to the commissioner [the secretary[2]]...
> ...upon the request of the person giving such notice, his name...shall not appear...
> (emphasis added)

An employee may complain and complain anonymously, either in

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[2] KRS 338.015 (7).

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writing or during an inspection. KRS 338.121 (1) and Martin v. Anslinger, Inc., 794 F. Supp. 640 (DC, SD Tex. 1992), CCH OSHD 29,720. Discrimination against an employee who has exercised his rights to complain is prohibited by KRS 338.121 (3).

Were KRS 338.121 the only provision allowing an employee to provide the secretary with information on safety and health conditions at his place of employment, then the secretary or his inspecting compliance officer would have to sit back and wait for an employee to approach him. Employers would issue rules prohibiting their employees from talking with any visitors to their work sites, including compliance officers. So a compliance officer conducting an inspection would be on his own to discover safety and health hazards. But that did not happen.

The general assembly, instead, went further. In addition to an employee's right to complain, the legislature, by statute, authorized the secretary and his compliance officer to seek out employees during an inspection in order to benefit from the wealth of knowledge they possess about job safety. KRS 338.101 (1) says, in part:

> In order to carry out the purposes of this chapter, the commissioner [the secretary]... shall have the authority:
> (a) To...question privately any such... employee...and investigate such facts, conditions, practices, or matters deemed appropriate to determine the cause of, or to prevent the occurrence of any occupational injury or illness. (emphasis added)

Of course, the general assembly could have passed 338.101 and not 338.121 but again chose not to.

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So employees possess the right to complain confidentially and the secretary possesses the right to seek out employees to question them about job safety during an inspection. This dual system of rights insures that the maximum benefit from employee knowledge will be achieved. Employees may seek out the secretary and he them.

Chemcentral argues that the secretary of labor, by not promptly objecting to its subpoena for information on the inspection, waived its rights. But, as our hearing office observed, the secretary has not the authority to waive employee rights to confidentiality and, the one right cannot be separated from the other.

Then Chemcentral argues that waivers signed by five of their employees who relinquished their rights to confidentiality overcomes any prohibition against revealing who complained to the inspecting compliance officer. But these waivers, dated April 7 or 8, 1997, were obtained by Chemcentral during trial preparation.

In its briefs and oral argument, the secretary of labor urges that obtaining those waivers is coercive. We agree

Chemcentral, in oral argument conceded that a company could not obtain blanket waivers from all employees and thus exempt itself from KRS 338.121. But neither could an employer order any or all employees not to discuss safety matters with the secretary as that would violate KRS 338.101.

We find, based on the waivers submitted by Chemcentral, that calling in work related sections of employees or other groups of

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calling in work related sections of employees or other groups of employees (here employees observed talking with the compliance officer) is coercive[3], especially in the context of litigation. Donovan v. Peter Zimmer America, Inc[4]., 557 F. Supp. 642 (D.C. S.C 1982), CCH OSHD 26,154.

All five waiver forms are identical. Four were signed April 7 and one April 8. We infer the company drafted these waiver forms. At the bottom of each there is a computer file reference. One file reference, to cite an example, reads "\34269\031\ROGERS.001." Another document of record, a letter dated May 22, 1997 from Mark Dreux, counsel to Chemcentral to Ms. Michals, our director at the time, contains a similar computer file reference: "34269\031\50 CORMSD.053." (emphasis added)

It appears waivers were procured en masse while preparing for litigation and that Chemcentral drafted them.[5] In Peter Zimmer, supra, the employer could not fire three employees to punish one for complaining when the company did not know which one complained.

In the case at bar Chemcentral has taken lengthy depositions of the compliance officers; the company has received typed work notes from the secretary about the subject inspection which run to

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[3] Chemcentral tendered the waivers to prove its point. We accept the proffered waivers but reach a different conclusion.

[4] We often find federal OSH cases persuasive as we do here.

[5] We don't see any indication the five employees appeared spontaneously with hand written waivers. Instead we discern from the face of the waivers an orchestrated attempt to overcome the provisions of KRS 338.101 and .121.

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113 pages. The company continues to pursue the work notes, after obtaining depositions and typed work notes from the compliance officers, by procuring the five waivers during the litigation process.

Our hearing officer would turn over the redacted work notes to Chemcentral, that is remove all names or (as the hearing officer ordered) at least those who did not sign waivers. At first blush this appears a way out of the dilemma but it is not. Twenty employees work at Chemcentral's facility in Louisville. Simply removing names from the work notes will not prevent employers from reading them and deciding who talked. Work notes often contain references to machines operated by employees and processes or plant locations where employees work. Thus by reasoning backward from descriptions in the work notes describing machines, locations and processes, a company can determine who talked.

Chemcentral would argue that its rights to discovery overcome any objections to revealing the names of employees who complained or to whom the secretary spoke. But the rights to discovery contained in the civil rules of procedure, made applicable to commission proceedings by our rule 4 (2), are general rules. In any event our rules of procedure (ROP)[6] discourage discovery. ROP 27. 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 by this commission. When a case is resolved quickly, when

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[6] Enacted as 803 KAR 50:010.

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a citation is affirmed for example, hazards will also be quickly abated.[7] Lengthy and unnecessary discovery draws out a case and lengthens the time between disclosure of a hazard and its resolution. Discovery, after all, is not automatically afforded to litigants in administrative proceedings. Weinberg v. Commonwealth of Pennsylvania, Insurance Department, Pa., 398 A.2d 1120 (1979). In proceedings before this commission we have limited discovery in accordance with our regulation. 803 KAR 50:010, section 27.

Balanced against a litigant's limited right to discovery in occupational safety and health cases in Kentucky is the right of the secretary to question witnesses privately (KRS 338.101) and an employee's right to complain confidentially. KRS 338.121.[8] These specific statutes (KRS 338.101 and .121), together with our regulation limiting discovery, make plain the general assembly's intent that employee confidences shall not be revealed.[9] Specific laws preserving employee confidences (KRS 338.101 and .121) overcome the general, and in our case limited, rules on discovery in administrative cases. Williams V. Commonwealth, Ky. App., 829

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[7] A citation specifies the time in which the hazard must be corrected. KRS 338.141 (1).
The law specifies a harsh penalty for failure to correct a violation. KRS 338.991 (4).

[8] This commission obtained an exemption from KRS 13B (13B.020 (3) (g)) and continues to use its own regulations on procedure (803 KAR 50:010) because the confidentiality provisions of KRS 338.101 and 338.121 conflict with the requirement to exchange exculpatory information (which may reveal employee identity) found in KRS 13B.090 (3).

[9] The attorney general, not our hearing officer section, has ruled from time to time that the rough work notes are not subject to the open records law. KRS 61.870 et. seq.

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S.W.2d 942, 945 (1992).

In Kentucky the civil rules on discovery have been in place since at least 1957. Armstrong v. Biggs, Ky., 302 S.W.2d 565 (1957).[10] KRS 338.101 and .121 were passed in 1972. While the later provision is controlling, Williams, supra, the better rule is that conflicting provisions should be harmonized where possible. Commonwealth v. Halsell, Ky., 934 S.W.2d 552, 555 (1996). We believe there is room for such harmonization in this case. Chemcentral has deposed the two compliance officers and received a lengthy, typed account of the secretary's inspection. Chemcentral has received discovery, and the confidentiality of employee complaints has been preserved by this order denying Chemcentral the rough work notes.

We have no objection to depositions where appropriate and similarly no objection to discovery (where appropriate) of the typed, finished work notes of the inspection provided by the secretary. After all, the secretary enforces the act. When the secretary has prepared these finished notes, we infer all traces of employee identity have been removed.[11] Then these notes where appropriate will be released and depositions taken.

We conclude that Chemcentral's procurement of waivers in this case from five employees was coercive. We conclude that providing

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[10] According to 6 Kentucky Practice, p. 550, the rules on discovery were adopted on 7-1-53.

[11] On the other hand removing employee names and facts pointing to employees would result in precious few work notes for discovery.

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Chemcentral with the rough work notes of the compliance officer taken during his inspection, redacted or not, would violate the confidentiality provisions of KRS 338.101 (1) (a) and 338.121 (1). We conclude the rough work notes are not discoverable in an occupational safety and health case tried under the provisions of KRS chapter 338. Our holding in this case does not affect the depositions already taken; nor does it affect the discovery of the typed work notes already in Chemcentral's possession.

We reverse our hearing officer who ordered the secretary to release a set of redacted work notes to Chemcentral. We deny respondent Chemcentral's motion to produce the work notes and remand the rough work notes to the hearing officer with instructions that he return them to the secretary.

We now take up the question whether respondent Chemcentral may have discovery on the promulgation of 29 CFR 1910.119.[12] On April 18, 1997, the hearing officer denied the secretary's motion for a protective order sought to prevent Chemcentral from taking the depositions of labor cabinet personnel the company believed responsible for the promulgation of 29 CFR 1910.119. The secretary brought this appeal. The question, simply put, is whether this commission holds the right to declare a regulation, not its own but the secretary's, invalid? In Harrison's Sanitorium Inc. v. Commonwealth, Department of Health, Ky. 417 S.W.2d 137, 138 (1967), Judge Palmore wrote "Presumably an agency could find its own regulation invalid..." But the case does not say this agency may

[12] Adopted in Kentucky by 803 KAR 2:307.

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find the secretary's regulations invalid.

Administrative agencies, creatures of the legislature, possess whatever power conveyed by their statutes and regulations and no more. Flying J. Travel Plaza v. Transportation Cabinet, Department of Highways, Ky., 928 S.W.2d 344, 347 (1996). An examination of our statutes, KRS 338.071, 338.081, 338.141 and 338.991, and our regulations, 803 KAR 50:010, reveals no express authority to declare regulations invalid. Mr. Head and Chemcentral argue that such power is inherent in KRS 338.071 (4) which says, in part, this commission "...shall hear and rule on appeals from citations..."

If no other statute in Kentucky spoke to the issue when a regulation may be declared invalid, we might be persuaded by Mr. Head. We are impressed with his arguments that judicial economy would be served by this commission trying the regulation validity issue but are not seduced by them.

KRS 13A.140 (1) is a statute which directly speaks to the question at hand.. It is titled "Administrative regulations presumed valid" and reads as follows:

> Administrative regulations are presumed to be valid until declared otherwise by a court but when an administrative regulation is challenged in the courts it shall be the duty of the promulgating administrative body to show and bear the burden of proof... (emphasis added)

Analysis of the question by Mr. Head and the parties focused on cases from foreign jurisdictions and on the question whether an administrative agency could be considered a court for some purposes. But if this commission's ability to declare a regulation invalid is controlled by a Kentucky statute, then it is incumbent

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upon us to construe the statute. If the words of the statute can be understood and interpreted according to their plain meaning, then our inquiry has ended. Resort to caselaw of other jurisdictions, quoted so liberally by Mr. Head and Chemcentral, is rendered unnecessary.

In Gateway Construction Company v. Wallbaum, Ky., 356 S.W.2d 247, 249 (1962), the high court laid down some specific rules on interpreting statutes in Kentucky:

> Statutory law has been held to be an expression of the intention of the Legislature. To interpret a statute, the common rule is to ascertain and determine the legislative intent.
>
> The best way in most cases to ascertain such intent or to determine the meaning of a statute is to look to the language used, but no intention must be read into the statute not justified by the language. [cite omitted] The primary rule is to ascertain the intention from the words employed in enacting the statute and not to guess what the Legislature may have intended but did not express....The words of the statute are to be given their usual, ordinary, and everyday meaning.

Taking the instructions of Gateway to heart, we shall interpret KRS 13A.140 (1) mindful that we will not have the final say in this matter. As we read Gateway, our interpretation of the statute is guided by the words, and the words must be given their "usual, ordinary, and everyday meaning."

Focusing on KRS 13A.140 (1), we find three words or phrases which require some analysis to understand their everyday meaning: presumed, court and administrative body. Let's take presumed first. Notice the legislature did not use phrases like "presumption," "rebuttable presumption" or "irrebuttable presumption" but merely "presumed." We take that to mean the

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legislature wanted presumed to be used in its ordinary sense which means to take for granted or to accept as true. Websters Third New International Dictionary, 1966, p. 1796.

Next, the phrase "administrative body" is defined by the statute as:

> ...each state board, bureau, cabinet, commission, department, authority, officer or other entity, except the General Assembly and the Court of Justice, authorized by law to promulgate administrative regulations;
> KRS 13A.010 (1)

We learn two things from this definition. An administrative body (here the commission) is not a Court of Justice within KRS chapter 13A and, second, a Court of Justice is not an administrative body. That leads us to consider the word court.

Does court in KRS 13A.140 (1) mean court of justice alone or, as Mr. Head and Chemcentral would urge, include the phrase "administrative body?" If "administrative body" can be read into KRS 13A.140 (1) following the words "court" and "courts," then Mr. Head and Chemcentral are correct. But Gateway cautions us not to read something into a statute that is not there. The definitions section of KRS 13A strongly suggests the general assembly knew the difference between an administrative body and a court of justice. If the legislature meant to say "court and administrative body," why did it not say so, especially since it so obviously understood the difference between the two.

In our search for the meaning of the word "court" in Kentucky, we found several sources; we are sure there are others. KRS 13A.140 (1) was passed by the legislature in 1984. In 1975 the

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judicial article of Kentucky's constitution was amended. Generally, throughout the 1975 judicial article the phrase "Court of Justice" is used. But in section 115, the constitution uses the word "court" in a context which means "Court of Justice." That section says, in part:

> In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court...

There can be no doubt that in this context the word "court" in section 115 means "Court of Justice." Because KRS 13A.140 was passed in 1984, we must presume the general assembly understood the use of the word "court" encompassed "Court of Justice" alone.

Section 115 of the constitution led us to Vessels v. Brown-Forman Distillers Corp., Ky., 793 S.W.2d 795 (1990). In that case the supreme court held CR 76.25 (12) unconstitutional. The rule had directed that appeals of decisions of the workers' compensation board be taken directly to the court of appeals with discretionary review before the Supreme Court of Kentucky. But the supreme court said that violated section 115 of the constitution of Kentucky which requires an appeal as a matter of right to two Kentucky courts. In effect CR 76.25 (12) attempted to either ignore section 115 of the constitution or treat the workers' compensation board as a court. That, the Supreme Court of Kentucky said, was unconstitutional. Vessels stands for the proposition that an administrative board is not a court of justice.

Taken by themselves, KRS 13A.010 (1), section 115 of the constitution of Kentucky and the Vessels case might not provide a

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definitive answer to the question whether the general assembly meant "court" or "court and administrative body" in KRS 13A.140. But together they make a powerful argument, which we accept, that the legislature in KRS 13A.140 (1) used "court" to mean "Court of Justice."

That said, KRS 13A.140 (1) is easily read to say 'Administrative regulations are accepted as true until declared otherwise by a court of justice...' Based on our analysis of KRS 13A.140, we see no statutory authority for this commission to declare on the subject whether an administrative regulation, in this case a Kentucky occupational safety and health standard, is valid; instead we see a prohibition. While we may interpret safety standards, and do so on a regular basis, we are without power to entertain a defense to a citation that argues the underlying standard is invalid.

We reverse our hearing officer's order denying complainant secretary of labor's motion for a protective order. We order that Chemcentral shall not be permitted to question by deposition Kembra Sexton Taylor, Bill Ralston, Timothy Chancellor, Clayton McNew, Michael Hutcherson, Charles S. Sparrow and George Schauberger on the adoption of 29 CFR 1910.119.

If discovery on the issue whether 1910.119 applies to Chemcentral is not complete, we order that it be completed expeditiously.

Because this order merely resolves the two questions brought to us on interlocutory appeal, it is not a final order; a trial on

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the merits must first be had before the hearing officer may render his recommended order. ROP 3. Accordingly, we remand this case to our hearing officer to complete necessary discovery, according to the terms of this order, and schedule a hearing on the merits.

It is so ordered.

Entered August 5, 1997.

Robert M. Winstead
Chairman

Thomas M. Bovitz
Member

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Copy of the foregoing Order has been served upon the following by facsimile on 8/5/97 and by Messenger Mail 8/6/97 upon:

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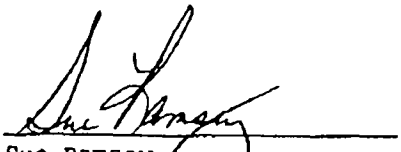

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