

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
07-KOSH-0422

KOSHRC 4502-07

COMMISSIONER
DEPARTMENT OF LABOR
ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET

COMPLAINANT

v

ELLIOT ELECTRIC/KENTUCKY, INC

RESPONDENT

REVIEW COMMISSION ORDER
DENYING PRETRIAL DISCOVERY
OF THE COMPLIANCE OFFICER'S
NOTES AND ORDER REMANDING

This commission granted the department of labor's request for special permission to appeal from the hearing officer's order directing the department to turn over to Elliot Electric, during the administrative discovery phase, the compliance officer's redacted work notes. The department of labor, in its request, says the hearing officer's order violates the procedures laid out by the commission in an order we entered in Commissioner of Department of Labor v Morel Construction Co, et al, KOSHRC 4147-04, 4151-04, 4949-04. We asked for briefs; we received an initial brief from the department of labor, a response from Elliot and a reply from the department. Our order for interlocutory appeal stayed this case; we now set aside the order staying the proceedings.

After the department of labor filed its complaint and Elliot its answer, Elliot submitted a request for production of documents, including "'personal' or 'field' notes."

While Elliot's request for production did not cite to any authority,¹ its brief to this commission said its request for documents was supported by civil rules 34.01 and 34.02. Labor submitted its complete file of the case except for Elliot's request for the notes to which labor objected. Elliot then filed a motion to compel which our hearing officer granted.

As the commission described in its Morel order, compliance officers (CO) take hand written notes during the inspection; after the physical inspection of the employer's work site but before any citations are issued, the CO prepares a typed report based in part on the notes. It is the CO's typed report which forms the basis, and justification, for any citations the department issues; when employers file notices of contest to citations, they routinely receive the report. Elliot received the report some months ago; what Elliot wants now is the notes.

In our Morel order, incorporated by reference into this order and attached as appendix A, this commission held the "department of labor will tender the notes to the hearing officer, accompanied with assertions of privilege," after the CO's testimony on direct. The hearing officer was ordered to remove from the notes anything which might reveal the identity of an employee. Should labor object to the hearing officer's redaction of the notes, cross examination of the compliance officer will proceed without the notes; labor then has the opportunity file an interlocutory appeal with the commission. If necessary after the interlocutory appeal, the CO may be subject to further cross examination based on the notes as redacted by the full commission. Morel, pages 11-13.

In 1975 this commission promulgated its own procedural rules. Our rules provide for limited discovery: depositions may be taken only with special order of the

¹ Elliot's request for production is attached to its motion to compel as exhibit A.

commission. Section 27, 803 KAR 50:010. Our rules also provide for interrogatories, requests for admission and the production of documents. Sections 26, 27 and 29.

Although discovery is not automatically afforded to litigants in administrative proceedings,² we are bound by our regulations and must enforce them as written. Hagan v Farris, Ky, 807 SW2d 488, 490 (1991). Elliot, on the other hand, argues this commission must enforce CR 34.01 and 34.02.

Elliot's demand for the notes and the department of labor's response raises the following questions: When the commission's own administrative procedures provide for limited discovery, are discovery requests before the commission controlled by the commission's procedures or the Kentucky rules of civil procedure? See sections 26, 27, 28 and 29, 803 KAR 50:010. Stated another way, when the commission has its own discovery procedures, do those procedures preempt the civil rules?

I

**With the exception of the civil rule
on the scope of discovery,
the commission's rules on
discovery preempt those found in
the Kentucky rules of civil procedure.**

This commission by statute operates under its own procedural regulations found at 803 KAR 50:010. See KRS 338.071 (4). For convenience sake, we often refer to our procedures as rules but understand they are not.³

Elliot in its brief to us says civil rules 34.01 and 34.02 apply to this case and require the commission to compel the release of the compliance officer's notes. While

² Weinberg v Commonwealth of Pennsylvania, Insurance Department, Pa, 398 A2d 1120, 1121 (1979).

³ KRS 13A.120 (5)

discovery under Kentucky's rules of civil procedure was not an issue in our Morel order, it is squarely before us now because of Elliot's reliance on the civil rules.

We have a specific rules on discovery and so does the federal review commission. See sections 26, 27, 28 and 29, 803 KAR 50:010 and 29 CFR 2200.52-57. Our commission also has a rule which says "In the absence of a specific provision, procedure shall be in accordance with the Kentucky Rules of Civil Procedure." Section 4 (2), 803 KAR 50:010. The federal commission's rule reads exactly the same as ours except it refers to the federal rules of civil procedure. 29 CFR 2200.2 (b). The question is whether we look to the Kentucky rules of civil procedure when we already have a rule on a particular subject – here discovery.

In Brown and Root, Inc.,⁴ Pennsylvania Truck Lines, Inc.⁵ and Harry Pepper and Associates, Inc.,⁶ the federal review commission held that because it has its own rule on intervention, it could not look to the federal rules of civil procedure on the intervention issue; the federal commission⁷ said its rule on intervention preempted the federal civil rules on the same subject. We agree and adopt the federal commission's reasoning on preemption as our own.

When Chairman Cleary, writing for the majority in Brown and Root, interpreted the commission's rules, he said the federal civil rules only apply "if the Commission rules lack a specific provision..." Cleary said the commission's own rule on intervention preempts the civil rules on the same subject.

⁴ CCH OSHD 23,731, BNA 7 OSHC 1526.

⁵ CCH OSHD 23,873, BNA 7 OSHC 1722

⁶ CCH OSHD 23,954, BNA 7 OSHC 1815.

⁷ In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2001), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act.

Commissioner Cottine took issue with the chairman. He said FRCP 24 (a), intervention of right, applied since the commission's intervention rule was permissive. Commissioner Cottine said the federal rules of civil procedure have a rule for intervention of right while the commission had only a permissive rule and so the commission was bound by the "of right" provision of the civil rules.

Chairman Cleary said where the commission has a rule on intervention, or discovery we would add, the commission's rule is intended to be complete as written – the existence of a commission rule preempts a rule of civil procedure on the same subject. If the civil rules on intervention are more broadly written than the commission's, that merely means the commission considered the broad civil rule but rejected it in favor of a more limited version. Under Cottine's analysis, however, the commission can never write a more narrowly defined rule even though it is an administrative agency with different, limited and more focused concerns than a constitutional court.

Perhaps Commissioner Barnako, siding with Chairman Cleary in Brown and Root, said it best: "there is no requirement that we regulate in the same manner as the Federal Rules."⁸

The federal commission's analysis of the interrogatories preemption issue, as set out in Brown and Root, Inc, Pennsylvania Truck Lines, Inc and Harry Pepper and Associates, Inc, supra, applies equally to provisions for discovery found in this commission's rules as well as those of the federal commission. Sections 26, 27, 28 and 29, 803 KAR 50:010 and 29 CFR 2200, sections 52 through 57.

In Quality Stamping Products Company, CCH OSHD 23,520 , BNA 7 OSHC 1285, the federal commission said FRCP 26 (b) (1) on the scope of discovery, ours is CR

⁸ CCH page 28,774, and BNA 7 OSHC 1533.

26.02 (1), applied to commission proceedings while the federal rules of procedure on interrogatories did not because the federal commission had its own rules on interrogatories. See footnotes 5 and 7, 7 OSHC 1287 and CCH pages 28,503 and 28,504. See also 29 CFR 2200.55.

The same is true for this commission. Our procedural regulations have provisions for admissions, depositions, interrogatories and the right to inspect or copy data. However, we, like the federal commission, have no rule on the scope of discovery and so we conclude CR 26.02 (1) applies to our proceedings by operation of section 4 of our rules which says "In the absence of a specific provision, procedure shall be in accordance with the Kentucky Rules of Civil Procedure." Where this commission has a procedural regulation on a particular topic, the civil rules on the same subject matter do not apply to these proceedings because our rules preempt the civil rules. On the issue of discovery before this commission, only CR 26.02 (1) applies to our proceedings. This means our rules on discovery, sections 26, 27, 28 and 29, 803 KAR 50:010, preempt those found in the civil rules with the exception of CR 26.02 (1); and we so hold.

Then the next question is whether the Kentucky courts of appeal will defer to our interpretation of our own procedural regulations. The court of appeals in Hughes v Kentucky Horse Racing Authority, Ky App, 179 SW3d 865 (2004), said a reviewing court will defer to an agency's interpretation of its own regulations. Then the supreme court in White v Check Holders, Inc, Ky, 996 SW2d 496, 498 (1999), said courts will defer to an agency's interpretation of its own regulations continued without interruption over a long period of time.

In Martin v OSHRC and C. F. and I. Steel Corporation, 499 US 144, 150-151, 111 SCt 1171, 1175-1176, 113 LEd2d 117 (1991), CCH OSHD 29,257, BNA 14 OSHC 2097, the US supreme court said:.

It is well established 'that an agency's construction of its own regulations is entitled to substantial deference'... Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.

At CCH p 39,222 and 14 OSHC 2098-2099.

Although the US supreme court's decision in C F and I was about deferring to the US department of labor's regulations, the same reasoning applies to regulations which this commission promulgated in 1975 and then began to enforce.

In the instant matter, this commission is entitled to deference when it interprets its own procedural regulations which it has been enforcing and interpreting since 1975. See Graham, Hughes and Check Holders, supra.

II

The informer's privilege, found in KRE 508, and this commission's interpretation of its own rules prevents the release of the compliance officer's notes until such time as his direct examination at trial is concluded.

When the compliance officer's testified in the Morel case, he defined the difference between his report, that is his typed report, and what he called his "rough work notes" which we will simply refer to as notes:

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...⁹ At page 7. (emphasis added)

During its review of the interlocutory appeal in the Morel case, the commission came to understand the CO's description of the qualitative differences between his report and his notes in the Morel case was the true state of affairs – the CO's description of his notes comports with our understanding of a walk around inspection where the CO looks for violations and talks to employees and managers, all the while endeavoring to take handwritten notes. In our Morel order, appendix A, we recognized we had no authority to tell the department of labor how its compliance officers were to write their reports. See footnote 7, Morel order.

In the Morel case Hearing Officer 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.'" Morel order, page 1. In our Morel order, given the clear testimony of the compliance officer about the differences between his report and his notes, it became obvious the CO's report and notes would not, could not, be the same since they were prepared at different times for very different reasons. Given our understanding of the qualitative differences between the report and the notes, we reversed our hearing officer who had said the two were the same, with the privileged portions removed from the report. Morel, page 8.

This commission in Morel said the CO's notes could not be released until after he testified. We said the notes were privileged because they would, one, tend to reveal the

⁹ Morel, et al, supra, Transcript of the evidence, volume VIII, page 106.

identities of employees and managers who talked with the CO during the walk around and gave useful information and, two, the notes may contain details about statements given to the CO. Employees who give the CO useful information may or may not testify at the trial depending on what the complainant needs to prove his case. We based our decision on CR 26.02 (1) which says privileged information was not discoverable and on the two statutes, KRS 338.101 (1) (a) and 338.121 (1), which say the compliance officer may question employees privately. We expressed concerns that employees whose names were revealed could be subject to discrimination. In fact KRS 338.121 (3) makes such discrimination unlawful. This commission has, on review, decided a number of cases where occupational safety and health discrimination was the issue.¹⁰ See KRS 338.121 (3). Our experience with these cases has persuaded us that employees who have spoken with the compliance officer or otherwise complained about safety and health to the department of labor are better protected from discrimination if the employer never finds out who they are, as our law was surely designed. KRS 338.101 (1) (a) and 338.121 (1).

Administrative agencies such as this commission exist, for the most part, for two reasons: one, to keep the courts from being overwhelmed with litigation and, two, to acquire expertise.

We found support for our decision to withhold the notes from the employer until the CO had testified in Quality Stamping Products Company, a federal review commission decision, CCH OSHD 23,520, BNA 7 OSHC 1285, Massman-Johnson (Luling), a federal review commission decision, CCH OSHD 24,436, BNA 8 OSHC

¹⁰ Terminix International, D-33-97 and 92 SW3d 743; Ontract, Inc. dba Blitz Builders, D-24-93; Hausner Hard-Chrome, D-23, 93; Boston Gear, D-20-92 and 25 SW3d 130; American Building, D-17-92; Universal Environment, D-15-91; Cardinal Industrial Insulation, D-7-89; Frozen Food Distributors, D-6-89; Gateway Services, D- 1-87.

1369, and Blakeslee-Midwest Prestress Concrete, also a federal commission decision, CCH OSHD 22,284, BNA 5 OSHC 2036.

In its brief to us Elliot Electric makes two arguments: the civil rules on the production of documents controls discovery in our cases. As we have held, our discovery rules preempt the civil rules. And so we find those cases on discovery which rely on the civil rules of procedure neither persuasive nor authoritative.

Elliot then argues the cited cases, Quality Stamping, Massman and Blakeslee, supra, are not about pretrial discovery and are thus inapposite. Here, Elliot is incorrect. In Quality Stamping a trial was held on May 23, 1978; that hearing was continued and on the next day, May 24, the respondent filed for leave to serve interrogatories, a discovery vehicle. Respondent's interrogatories sought the name and address of the informer. The commission denied respondent's request for the interrogatories and in doing so upheld the informer's privilege, citing to Roviaro v US, 353 US 53, 59-60 (1957). In Quality Stamping the federal commission listed two purposes for the informer's privilege: to protect employees from retribution by their employers and to encourage the free flow of information to compliance officers. The federal commission based its decision on FRCP 26 (b) (1) which says, as does our CR 26.02 (1), parties may have discovery of relevant information unless a privilege applies. In Quality Stamping, the commission said:

we hold that the privilege is applicable to any person furnishing information to governmental officials as to violations of the Act or its implementing standards and regulations, regardless of the informer's employment relationship to the cited employer.

CCH page 28,405,
7 OSHC 1288.

Quality Stamping, a discovery case where the commission issued its ruling on interlocutory appeal, expresses our concerns about releasing the compliance officer's work notes before he testifies on direct examination. We too are concerned about the free flow of information from knowledgeable employees to the inspecting compliance officer and the protection of the identity of those employees which is why we do not permit the release of the redacted notes until after the CO's direct testimony.

In Massman-Johnson (Luling), supra, prior to the scheduled hearing, respondent Massman moved for the production of documents which included the CO's notes of his inspection. In Massman, also a discovery case for our purposes, the federal commission applied the informer's privilege¹¹ and then declined to turn over statements before the hearing in the interest of preventing identification of witnesses and their intimidation. As the commission said "Generally, the respondent is entitled through discovery to all the relevant facts, not privileged," applying FRCP 26 (b) on the scope of discovery. CCH page 29,808, BNA 8 OSHC at 1376. In its Massman decision, the federal commission said the respondent would see the notes as redacted by the trial ALJ *in camera*. A respondent would be entitled to a recess to evaluate the statements found in the notes or to a continuance if necessary. CCH page 29,808, BNA 8 OSHC 1376.

While Blakeslee, supra, is not a pretrial discovery case, the commission said "Notes made by an inspector during the course of an inspection are discoverable by respondent when the inspector appears as a witness." CCH page 26,840, BNA 5 OSHC 2038.

¹¹ As we said in our Morel order, we find the term unfortunate because employees who provide information to OSHA inspectors are protecting themselves and fellow employees and also serving the public interest by reducing occupational injuries and illnesses.

This commission has never permitted discovery of the compliance officer's notes prior to his direct examination at the trial on the merits. In our Chemcentral order, KOSHRC 2943-96, the commission said the notes were not discoverable when the company sought to use them to examine the compliance officer during a deposition. In VanMeter Construction Company, KOSHRC 3450-00, this commission again said the notes were not discoverable and based the ruling on our concern for maintaining employee confidentiality. KRS 338.101 (1) (a) and KRS 338.121 (1). Then in an order for Tyson Shared Services, Inc, et al, KOSHRC 3391-00, 3397-00, 3398-00 and 3399-00, this commission revisited the issue and held a compliance officer's notes would be subject to an *in camera* review to redact any information which would tend to reveal the identity of employees who spoke with the CO. Within the Tyson Shared Services order, the commission said the notes would be turned over to the hearing officer for his *in camera* examination five days prior to the administrative hearing; this five day rule proved to be unworkable due to the press of litigation.

As a result of its experience with compliance officers' notes as well as its review of federal cases on the matter, this commission issued its Morel order which said the notes would not be turned over to the employer for cross examination until such time as the CO had already testified on direct and the notes had been redacted by the hearing officer, *in camera*, to eliminate any information which would tend to reveal employee identity. If the department of labor did not agree with the hearing officer's redaction, the cross examination would continue without the notes which would go to the commission on interlocutory appeal. Then the commission would *in camera* redact the notes. If the

employer with the redacted notes in hand wished to recross the CO, that would be arranged.

This commission has long interpreted its rules on discovery, read in concert with the statutes on employee confidentiality, to mean the compliance officer's notes would not be turned over to the employer, as redacted if necessary, until the CO had testified on direct at the trial.

We continue to adhere to our interpretation of section 29, 803 KAR 50:010, right to inspect or copy data.¹² Once the litigation is commenced with the service of the complaint and the answer, the department of labor when asked by the employer must turn over all portions of its file in the case; this usually amounts to the report, photographs and supporting documents and is regularly done voluntarily with nothing sought in return. See section 29 (1) of our rules. But release of the compliance officer's notes will not be turned over to the employer, in a redacted condition as set out in our Morel order and this order we issue today, until after the compliance officer has testified. Labor may make similar requests. We leave interpretation of our other discovery rules to another day.

We have two additional and equally valid concerns about the premature release of the compliance officer's notes. One, the notes often contain statements or facts the compliance officer learned from employees during his walk around inspection; these employees may or may not testify. If the employee does testify, then the employer under our rule announced in Morel and expanded upon here cannot learn his name before the trial and then persuade him not to testify or to change his testimony. Two, the notes may

¹² The federal occupational safety and health review commission has a very similar provision on the right to inspect or copy data. 29 CFR 2200.57 (a).

reveal information about safety or health hazards the compliance officer learned from employees during his walk around but he did not take down any statement as such. Here again, the employer with the notes in hand prior to the trial may from the circumstances of the inspection, including the walk around¹³ and the physical layout and composition of the work site, determine who the CO talked to and pressure the employee to testify and recant. In either instance, the employer may take some adverse action against the employee. The reported occupational safety and health cases, state and federal, are replete with discrimination cases. Not every employer will exercise Elliot's expressed restraint. See Donovan v Peter Zimmer America, Inc, 557 F Supp 642 (DC SC 1982), CCH OSHD 26,154, BNA 10 OSHC 1769, where the employer discriminated against three of his employees to punish the one he believed gave the inspecting compliance officer information.

Based on the informer's privilege, as applied to our own rules of discovery through CR 26.02 (1), our order in Morel, federal case law and our reasoning set out within this order, we reverse our hearing officer who had ordered the department of labor to turn over the compliance officer's notes to Elliot Electric during pre-trial discovery. We deny Elliot's motion to compel.

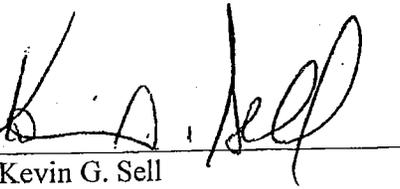
We direct our hearing officer to handle any requests for the compliance officer's notes according to our order in Morel which is attached to and incorporated within this order.

We remand this case for a trial on the merits.

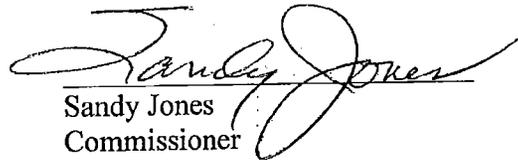
¹³ KRS 338.111 says the employer has the right to accompany the CO on his walk around inspection and usually does. As we said in Morel, the employer learns about the department of labor's case during the walk around inspection simply by observing what the CO saw and who he talked to about the inspection, if not necessarily the details of the conversations.

It is so ordered.

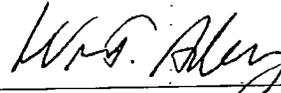
September 8, 2008.



Kevin G. Sell
Chairman



Sandy Jones
Commissioner



William T. Adams, Jr.
Commissioner

Certificate of Service

I certify a copy of the foregoing order for Elliot Electric, KOSHRC 4502-07, was on September 8, 2008 sent to the following in the manner indicated:

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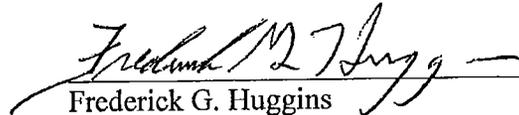
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