

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
07-KOSH-0476

KOSHRC 4519-07

COMMISSIONER
DEPARTMENT OF LABOR
ENVIRONMENTAL AND PUBLIC PROTECTION CABINET

COMPLAINANT

v

CHERNE CONTRACTING CORPORATION

RESPONDENT

ORDER AFFIRMING
INTERLOCUTORY APPEAL IN PART
AND DENYING IN PART
AND ORDER OF REMAND

This case is before us on interlocutory appeal. We asked for briefs.

Labor had appealed from the hearing officer's June 18, 2008 order granting respondent's motion to compel discovery.¹ In her order the hearing officer directed the department of labor to answer Cherne's requests for admission 1 through 4, "provide more particular information" about its request for production of documents, items 1 through 4, 6, 11 and 12, and produce copies of interpretations and directives about the cited standard. Labor said the disputed requests for admission and documents were irrelevant to the instant action. We asked the parties whether Cherne should prevail if documents requested were irrelevant and whether certain requested documents were equally available to both parties. We directed labor to explain in detail why it could or could not comply with requests for documents due to the limitations of its computerized storage system.

¹ In *Primm v Isaac*, Ky, 127 SW3d 630, 634 (2004), the court said "control of discovery is a matter of judicial discretion." In an administrative action, that means this commission which is charged with the responsibility to "hear and rule on appeals from citations." KRS 338.071 (4).

On August 21, 2008 labor filed its brief to the commission on interlocutory appeal. Cherne filed its brief on October 7; Cherne says the documents requested are relevant. Cherne cites to Raisor v Raisor, Ky App, 245 SW3d 807, 809 (2008), which it says prohibits complainant from raising to the commission, for the first time, its argument that Cherne's request for documents is burdensome. Raisor is inapposite. In Raisor a party appealed from a final circuit court judgment. In the case at bar the commission is the ultimate decision maker; after we resolve the interlocutory appeal, we will in this order remand for a hearing on the merits. Once the hearing officer issues her recommended order, an aggrieved party may then file a petition for discretionary review. Should the commission take the case on review, it would issue a final decision on the merits. KRS 338.071 (4). Our interlocutory appeals process, which we have used sparingly over the years, is designed so complex and troublesome issues can be fully developed and analyzed before a case comes to the commission on discretionary review. Section 47 (3), 803 KAR 50:010. Administrative agencies such as ours function best when they resolve issues which then do not require an appeal to a constitutional court.

Cherne cites to Frazee Construction Company, an early federal review commission decision, CCH OSHD 16,409, BNA 1 OSHC 1270 (1973). In Frazee, the commission held the US department of labor had to turn over a compliance officer's inspection file after he had testified on direct; the commission in Frazee dismissed the citation because complainant refused to relinquish the file. Since the mid 1970s, a respondent in one of our cases has received, well before the trial, the inspecting compliance officer's typed report about his inspection, any photographs he took and other supporting documents. What is withheld from the respondent is the compliance officer's hand written notes taken during his inspection. Those notes are turned over, in a redacted form to remove any privileged material, after the CO testifies on direct

examination. See Quality Stamping Products Company,² CCH OSHD 23,520, BNA 7 OSHC 1285, Massman-Johnson (Luling), CCH OSHD 24,436, BNA 8 OSHC 1369, and Blakeslee-Midwest Prestressed Concrete, CCH OSHD 22,284, BNA 5 OSHC 2036. See also our orders in Commissioner of Department of Labor v Morel Construction Co, et al,³ KOSHRC 4147-04, 4151-04, 4949-04, and Elliot Electric, KOSHRC 4502-07.

In its reply brief⁴ filed on October 13, the commissioner explained the functioning of the computer he uses to store inspection data. According to the commissioner the computer system, administered by the US occupational safety and health administration, contains no information about inspections which did not result in citations issued; for that information the complainant commissioner would have to resort to his physical inspection files. Complainant says its inspection files are recorded on microfiche sheets which would take 18 years for a worker to read.

This commission has its own rules on discovery: section 26 on requests for admission, section 27 on depositions and interrogatories, section 28 on failure to comply with orders for discovery and section 29 on issuance of subpoenas...right to inspect or copy data. 803 KAR 50:010. In Elliot Electric/Kentucky, Inc, supra, 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. Within our Elliot order, we said we agreed with the federal review commission's reasoning in Quality Stamping

² 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.

³ Go to: www.koshrc.ky.gov. Select interlocutory orders.

⁴ On October 23 Cherne filed a motion to strike labor's reply brief. Then we received labor's response to Cherne's motion to strike on November 24. We sustain the motion to strike in part and deny it in part. We asked for and belatedly received from complainant the computer information; we did not ask for the Industrial Tech documents and they are not part of the record. We strike the two Industrial Tech documents from labor's reply brief. Neither the affidavit nor the two Industrial Tech documents played any part in our conclusion that prior inspections were irrelevant and thus not subject to discovery.

Products Company, supra, where the commission said it would apply FRCP 26 (b) (1) on the scope of discovery to cases before it. In Kentucky we look to CR 26.02 (1).

Section 29 of our discovery rules allows a party to obtain copies of data (documents) from the other party. Section 29, 803 KAR 50:010. Because section 29 is primarily about the subpoenaing of documents, not an issue in the case before us, our hearing officers have often, and properly so, looked to CR 34.01 for guidance. See section 4 (2) of our rules which permits resort to Kentucky's rules of civil procedure where they are applicable.

CR 26.02 (1) says in part "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." Quality Stamping, et al, dealt with privilege which is not an issue before us today. Rather, the issue is whether the discovery sought by Cherne is relevant to the instant matter before us or whether "the information sought appears reasonably calculated to lead to the discovery of admissible evidence."⁵

Cherne filed requests for production of documents and requests for admission; labor has complied in part with Cherne's requests and denied others. Cherne has already received the inspecting compliance officer's report and photographs. Cherne has also had the considerable benefit afforded by KRS 338.111 which says the employer may accompany the compliance officer during his inspection. Cherne saw what the compliance officer saw during the inspection.

We will now turn to the disputed portion's of the hearing officer's June 18 order.

**Federal Interpretations
and Directives for
29 CFR 1926.451 (c) (1) (iii)**

In her order the hearing officer directed the department of labor to provide Cherne with any directives or interpretations about 29 CFR 1926.451 (c) (1) (iii) it has in its possession.

⁵ CR 26.02 (1).

Labor objected and on appeal to this commission says it has no such documents "which are not available to the public on osha.gov." From its answer to this inquiry, we infer labor does have in its possession some or perhaps all of these documents sought by Cherne.

Section 29 of our rules says the commission may, upon application, direct a party to produce "documents in his possession or under his control..." CR 34.01 says the "other party" shall permit the inspecting and copying of documents "which are in the possession, custody or control of the party..."

We order the department of labor to produce for inspection or copying any interpretations or directives for 29 CFR 1926.451 (c) (1) (iii) which are in its possession, custody or control. If these interpretations and directions are produced and retained elsewhere, for example the occupational safety and health administration within the US department of labor, the Kentucky department of labor will so state, providing sufficient information and guidance to enable respondent to locate the documents at osha.gov. If, however, the complainant, by virtue of its enforcement duties or otherwise, has any of these federal interpretations and directives in its files, that is, within its possession and control, it will provide those directly to respondent. For those interpretations and directives in its possession and control, complainant shall not, in an attempt to avoid compliance with this order, simply state those documents can be found elsewhere.

For the purposes of this order only, we assume any federal interpretations and directives about the cited standard are relevant. This order, however, cannot be used as a basis for denying labor's objection to any of these federal documents at the trial on the merits should Cherne offer them as exhibits; rather, the decision whether to admit a tendered interpretation or directive will

be determined, by the hearing officer, in the context of the trial and what the document tends, or does not tend, to prove.

**Relevance of the
Disputed Requests for
Admission and Production**

Cherne's requests for documents and admissions which are before us on interlocutory appeal can be divided into two main groups: one, prior inspections of entities where labor issued no citations and, two, prior inspections where labor did issue citations. Within the second category where labor issued citations as a result of an inspection, Cherne asks for information about inspections where an employer was cited for a violation of 29 CFR 1926.451 (c) (1) (iii), the cited standard in the case before us, as well as other inspections for scaffolding falls or tipping. As we shall explain, we conclude the information Cherne seeks in its disputed requests for admission and production is irrelevant, according to the terms of CR 26.02 (1), and so cannot be discovered.

For the matter before us, here are the essential elements of CR 26.02 (1):

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery...including the existence of...documents... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

KRE 401 says:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

KRE 402 then says in part "All relevant evidence is admissible...Evidence which is not relevant is not admissible." Kentucky's rules of evidence are about "proceedings in the courts of the Commonwealth." KRE 101. CR 26.02 (1), on the other hand, specifies the scope of discovery during pretrial proceedings; the rule says parties may discover evidence "which is relevant to the subject matter;" We understand "Relevance is construed more loosely for purposes of discovery than for trial." 6 Kentucky Practice, Rule 26.02, author's comments, 4. Section (1), page 604. Our decision on interlocutory appeal is based on our interpretation of section 29 of our rules as well as CR 26.02 (1) and the cited authorities.

Because CR 26.02 (1) says discovery may be had "which is relevant to the subject matter," we must first ask the following question: what is the subject matter of these cases? Litigation before the commission is quite limited and stylized. We are not a court of general jurisdiction; we are by statute empowered to "hear and rule on appeals from citations." KRS 338.071 (4). Except for the occasional intervention by an affected employee or union, these cases consist of two parties: the commissioner who issues the citation and the employer alleged to be in violation of the act or a standard. KRS 338.141 (1) and section 14, 803 KAR 50:010. For the review commission to sustain a citation, the commissioner of labor must prove the standard applies, the employer failed to comply with the terms of the standard, an employee had access to the cited condition and the employer knew of the violation or could have with the exercise of reasonable diligence. Ormet Corporation, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135. Respondent then may assert any affirmative defenses it has; Cherne in its answer⁶ did not raise an affirmative defense. As the agency charged with the duty to decide

⁶ The company filed its answer on November 12, 2007. Respondent counsel entered his appearance on December 17.

these cases, we are not in a position to speculate about what affirmative defenses might have been raised.

In our cases the department of labor has the burden of proof. Section 43, 803 KAR 50:010. For its case in chief, the department must prove the elements of its case outlined in Ormet. Then the burden of persuasion shifts to respondent who may put on evidence tending to support any affirmative defenses raised or to prove he was in compliance or to discredit labor's account. Of course, the respondent may elect not to offer any evidence since the burden is on the department of labor. All trials tell a story. For our cases, the story is about the alleged violation, the citation, the standard underlying the citation and the facts of the case tending to support or to detract from the citation; taken together, these details are "the subject matter involved in the pending action." CR 26.02 (1). Like us, the federal review commission is limited by statute to providing a forum for a hearing on the merits of the case before it. 29 USC 659 (c) and KRS 338.071 (4).

In Newport News Shipbuilding and Drydock, CCH OSHD 24,974, pages 30,837, BNA 9 OSHC 1120, 1123, the federal commission said:

In order to obtain discovery, the party seeking the discovery must demonstrate that the information sought is relevant to a material issue in the case. Quality Stamping Products Co... 7 BNA OSHC 1285, 1287...CCH OSHD 23,520 at 28,508... It is not a ground for denial of discovery that the information sought would be inadmissible at the hearing if the information appears reasonably calculated to lead to the discovery of admissible evidence.

In the above Newport News case, the commission in footnote 7 of its opinion referred to an earlier Newport News⁷ decision. In that earlier decision Newport News said it wanted discovery because it had questions about the validity of the cited standards; Newport wanted to discover

⁷ Newport News Shipbuilding and Drydock Company, a federal review commission decision, CCH OSHD 25,003, BNA 9 OSHC 1085.

whether its industry had taken part in developing the consensus standard which formed the basis of its citation. The cited standard had been adopted by section 6 (a)⁸ of the occupational safety and health act. 29 USC 655 (a). Newport argued the standard could not apply to it because its industry did not take part in drafting the consensus standard. In the earlier Newport case, the commission cited to a decision of the US court of appeals for the ninth circuit which ruled that Congress, when it passed the act, had provided safeguards for inappropriate applications of a particular standard adopted under the authority of section 6 (a); and so the 6 (a) promulgation issue could not be raised at the trial. See Noblecraft Industries v Secretary of Labor, 614 F2d 199 (CA9 1980), CCH OSHD 24,135, BNA 7 OSHC 2059. Because Newport in the earlier case could not, before the commission, legally challenge the adoption of the standards under section 6 (a), the commission said the discovery requests about whether the industry had taken part in writing the cited consensus standard were irrelevant and would not lead to relevant information, thereby denying Newport's discovery request because the issue could not be used at trial. CCH page 30,890, 9 OSHC 1089.

Then in Seibel Modern Manufacturing and Welding Corp, CCH OSHD 29,442, pages 39,679-39,680, BNA 15 OSHC 1218, 1223-1224, the company argued it could not be cited for an alleged violation because it had previously been inspected and received no citation. Citing to Columbian Art Works, the commission said "Seibel infers from the uneventful prior inspections that there must have been no hazard...and asks us to draw the same inference." Then the commission drew the following conclusion:

'OSHA's failure to issue a citation following an inspection does not grant an employer immunity from enforcement of applicable occupational safety and health standards'...These cases implicitly rule against deducing from uneventful prior

⁸ Section 6 (a) of the occupational safety and health act gave the federal department of labor two years to adopt consensus standards without notice and comment rule making; that window closed in 1973. 29 CFR 651 et seq.

inspections that particular operations are nonhazardous.
(citations omitted)

Seibel says a company cannot defend against a citation by proving it was inspected before but received no citation. If a prior, uneventful inspection resulting in no citation cannot be a defense to the instant citation, then the prior inspection is irrelevant and can prove nothing, either for or against the instant citation. KRE 401 and 402. Cherne's requests for admissions and documents take this idea one step further afield. Cherne not only wants to use prior inspections where no citation was issued to prove some point in the instant litigation, it wants to use inspections which did not concern Cherne in any way.

If labor issues a citation in one case and characterizes it as serious, it may still issue a citation in another case under the same standard and characterize it as nonserious: "the Secretary's characterization of a violation in another case is not controlling in a case before the Commission." See George C. Christopher and Son, Inc., CCH OSHD 25,956, page 32,533, BNA 10 OSHC 1436, 1445. citing to Fleming Foods of Nebraska, CCH 22,889, page 27,689, BNA 6 OSHC 1233, 1236, where the commission said "the Commission's function is to decide this case and not rule upon the propriety of the complainant's actions in other cases." Similarly, the US Supreme Court in Butz v Glover Livestock Commission, 411 US 182, 187, 93 SCt 1455, 1459, 36 LEd2d 142, 147-148 (1973), said "The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." In its decisions the federal courts and the review commission have in effect struck prior inspections as a defense.

If in Newport News, supra, the employer could not obtain discovery about the creation of a national consensus standard because he could not litigate the issue before the commission, then Cherne cannot have discovery of prior inspections of companies not related in any way to

Cherne or to the case before us today. Newport News and Seibel, *supra*. The reason for this is the prior inspections cannot be used as a defense and thus are not relevant to the issue of the citation currently under contest; each case stands on its own legs.

The US Supreme Court in Oppenheimer Fund, Inc, v Sanders,⁹ 437 US 340, 351-352, 98 SCt 2380, 2390, 57 LEd2d 253 (1978) said:

Discovery of matter not 'reasonably calculated to lead to the discovery of admissible evidence' is not within the scope of Rule 26 (b) (1). Thus, it is proper to deny discovery of matter that is relevant only to claims or defenses that have been stricken.

The US district court for Delaware in Pierson v United States, 428 FSupp 384, 387 (1977), said "Since the touchstone of any discovery motion is relevance, the primary issue for decision is whether the documents and information sought relate to any of the legal or factual issues in dispute." Because the details of the prior inspections of other entities shed no light on the issue whether Cherne was in violation of 29 CFR 1926.451 (c) (1) (iii) on June 29, 2007, Cherne's motion to compel is denied, as we said with one exception.

Given the federal commission's decisions in Newport News, Seibel and George C. Christopher, as well as decisions by the federal judiciary in Glover Livestock, Sanders and Pierson, *supra*, and our statutory duty to try the case before us, we will not be drawn into an analysis of prior, irrelevant inspections. KRS 338.071 (4).

We hold Cherne's disputed requests for admission and for documents are not relevant to the instant case because they seek information about prior inspections: the defense of prior inspections is not available to Cherne. With one exception, we direct our hearing officer to issue an order protecting the department of labor from Cherne's requests for admission 1 through 4 and its requests for documents 1 through 4, 6, 11 and 12.

⁹ Cited in Wright and Miller, *8 Federal Practice and Procedure*, section 2008, note 16, page 104.

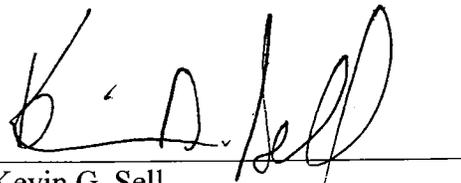
A different result might obtain where respondent raises the affirmative defense of res judicata, based on one of his prior inspections. In several cases the federal commission said the defense of res judicata may lie but only if the factual situations were identical, including the parties. Kaiser Engineers, Inc, a federal review commission decision, CCH OSHD 22,845, BNA 6 OSHC 1845, and Georgia Power Company, CCH OSHD 21,199, BNA 4 OSHC 1497. And even in those situations the secretary would be permitted to offer evidence the facts of the two inspections were different in some respect. For the case at bar, respondent has not raised res judicata as an affirmative defense and has not argued the issue to this commission on interlocutory appeal of the hearing officer's order.

We set aside those portions of the hearing officer's June 18 order which directed complainant to answer requests for admission 1, 2, 3 and 4 and to submit documents for requests numbered 1, 2, 3, 4, 6, 11 and 12. We direct our hearing officer to issue an order protecting complainant from respondent's requests for admission 1, 2, 3 and 4 and requests for documents 1, 2, 3, 4, 6, 11 and 12, excepting out those interpretations and directives under the custody and control of complainant.

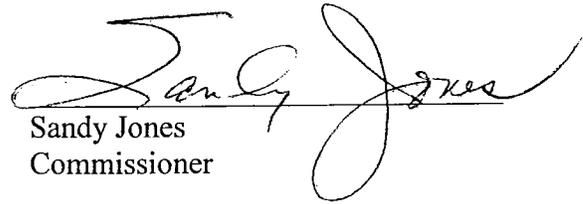
We set aside our order of stay and remand for a hearing on the merits.

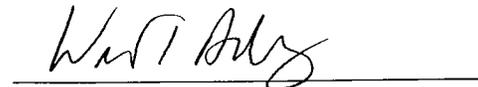
It is so ordered.

December 3, 2008.

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

Kevin G. Sell
Chairman


Sandy Jones
Commissioner


William T. Adams, Jr.
Commissioner

Certificate of Service

I certify a copy of the above interlocutory order for Cherne Contracting Corporation, KOSHRC 4519-07, was served this December 3, 2008 on the following in the manner indicated:

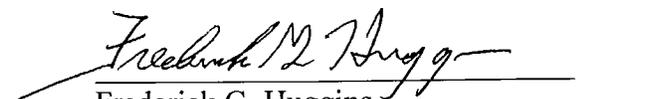
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