COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
12-KOSH-0133

KOSHRC 4900-12

SECRETARY OF THE LABOR CABINET
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

PSC INDUSTRIAL OUTSOURCING,
LIMITED PARTNERSHIP DBA JESCO
INDUSTRIAL SERVICE, LLC — RESPONDENT

REVIEW COMMISSION ORDER
ON INTERLOCUTORY REVIEW,
REVERSING IN PART AND REMANDING

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We have before us PSC and Jesco's interlocutory appeal from our hearing officer's March 4, 2013 order. In his order the hearing officer limited requests for admission to 30 for each respondent and declined to direct complainant to answer requests for admission about the content of documents in the possession of respondents and agencies in state government other than the Cabinet. PSC and Jesco, represented by the same law firm, filed separate sets of requests for admission and, after we called this case for interlocutory review, filed a joint brief in chief and a reply.

The Labor Cabinet issued one willful serious citation with a $70,000 penalty to *PSC Industrial Outsourcing dba Jesco Industrial Service*; this willful citation is based on the general duty clause and not on a safety standard. KRS 338.031 (1) (a). This citation alleges PSC Industrial Outsourcing, a limited partnership dba Jesco

Industrial Services, LLC, did not protect employees from contact with a very high pressure water hose. This hose, operating at 20,000 pounds per square inch, was used as a water blaster.

This interlocutory appeal arose because PSC and Jesco Industrial Service submitted separate requests for admission; 138 for Jesco and 72 for PSC. PSC and Jesco wanted the Labor Cabinet to admit or deny certain facts. Requests for admission are permissible according to our rules. 803 KAR 50:0 10, section 26 (ROP 26). Our ROP 26 places no limitation on the number of requests which may be submitted. Our hearing officer, without discussion, limited PSC and Jesco to 30 requests for admission each, the same number of requests permitted by the Kentucky rules of civil procedure, CR 33.01 (3).[1]

PSC and Jesco have two complaints about the hearing officer's order. One, our hearing officer limited respondents to 30 requests for admission each even though our ROP 26 places no limitation on the number of requests they may submit to complainant. Two, the hearing officer would not compel "more complete admissions from the Secretary concerning the contents of documents in the possession of the Respondents [which are] filed with agencies of the Commonwealth of Kentucky other than the Labor Cabinet."

Our procedural rules on discovery, with the exception

[1] ROP 4 (2) says "In the absence of a specific provision, procedure shall be in accordance with the Kentucky Rules of Civil Procedure."

of CR 26,02 (1) on the scope of discovery, preempt those found in Kentucky's rules of civil procedure.

In *Elliot Electric/Kentucky, Inc,*[2] KOSHRC 4502-07, the commission held that our rules of discovery (requests for admission, depositions, interrogatories, failure to comply with orders for discovery and issuance of subpoenas) preempt those found in Kentucky's rules of civil procedure:

> When 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)[3] 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...and we so hold.
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> *Elliot Electric*, page 6

In *Emerson Masonry, Inc*, KOSHRC 4695-09, we said "we require them [our hearing officers] to adhere to our procedural rules[4] which we have laid down in our regulations and decisions." At page 7. We and our hearing officers are further constrained to abide by our rules by *Hagan v Farris,* Ky, 807 SW2d 488, 490 (1991), where the court said "An agency must be bound by the regulations it promulgates...KRS 13A.130 (1) (a) prohibits an administrative body from modifying an administrative regulation by internal policy or another form of action." This

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[2] Our interlocutory orders may be found at koshrc.ky.gov.

[3] Our commission has no rule on the scope of discovery and so Kentucky rule of civil procedure 26.02 (1) applies to our proceedings; it is the only rule of discovery from Kentucky's rules of civil procedure which do apply to our proceedings. *Elliot Electric.*

[4] We know our regulations are not rules but refer to them as such as a matter of convenience. KRS 13A.120 (5).

statute means neither we nor our hearing officers may simply ignore our procedural regulations. Our rule on requests for admission contains no numerical limitation. When our hearing officer places a limitation on the number of requests for admission a party may submit to another party, he is by internal policy modifying our procedural rule. Our hearing officer cannot simply ignore our rules. *Hagan v Farris.*

Complainant Labor Cabinet, in its brief to us, argues we are required to look to Kentucky's civil rules for a limitation on the number of requests for admission which may be submitted because of our ROP 4 (2) where it says "In the absence of a specific provision,[5] procedure shall be in accordance with the Kentucky Rules of Civil Procedure." According to Labor's argument, because our rule 26 on requests for admission contains no limitation, we must look elsewhere to Kentucky's civil rules. We have already considered and rejected this argument. In *Elliot Electric*, page 5, we 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 [or discovery] are more broadly written that the commissions, that merely means the commission considered the broad civil rule but rejected it in favor of a more limited version...
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> Perhaps Commissioner Barnako, siding with Chairman Cleary in *Brown and Root,*[6] said it best: 'there is no requirement that

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[5] In *Emerson Masonry, Inc,* we interpreted the word provision found in our ROP 4 (2) to mean a complete rule, for example our ROP 26 which is at issue. Similarly, our ROP 27 on depositions and interrogatories is a provision which is complete in its entirety. Because our rules contain provisions for discovery, they preempt the civil rules on discovery with the exception of CR 26.02 (1) on the scope of discovery.

[6] CCH OSHD 23,731, page 28,774, BNA 7 OSHC 1526, 1533 (1979).

we regulate in the same manner as the Federal rule."[7]

We hold that where we used the word "provision" in our ROP 4 (2), it referred to one of our procedural rules in its entirety.

Our rule on requests for admission, deliberately written without limits on the number permitted, is not unusual. Federal rule of civil procedure 36 contains no limits on requests for admission.[8] Respondents have brought to our attention in their joint reply brief that Virginia and Indiana's rules on requests for admission contain no limits on the number permitted: "Va R Civ Pro 34 and 36; Ind R Tr Proc 33, 34 and 36." Reply brief, page 4.

Labor also relies on *Kentucky Labor Cabinet v Graham*, Ky, 43 SW3d 247, 253 (2001), where our supreme court said "KOSHA should be interpreted consistently with federal law." Here, Labor contends we must have a limitation on the number of requests for admission that may be submitted to another party in a case because the federal review commission's rules contain a limitation on the number permitted. Our commission in *Elliot Electric, supra,* has followed federal law. We cited federal law found in *Brown and Root, supra,* a federal review commission decision, for the proposition that our rules on discovery preempt those found in the Kentucky rules of civil procedure.

It is our job to interpret our rules. We find support in our courts of appeals which have said it is the job of an agency to interpret its rules. In *Commonwealth ex rel*

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[7] Or we would add, the Kentucky rules of civil procedure.
[88] In *Panara v Hertz Penske Truck Leasing, Inc*, 122 FRD 14, 15 (ED Pa 1988), the defendant submitted 67 requests.

Stumbo v Kentucky Public Service Commission, Ky App, 243 SW3d 374, 380 (2007), the court said:

> The interpretation of a statute is a matter of law...However, while we ultimately review issues of law de novo, we afford deference to an administrative agency's interpretation of the statutes and regulations it is charged with implementing.

We reverse our hearing officer where he in his March 5, 2013 order limited PSC and Jesco to 30 requests for admission. We direct Labor to answer the 138 requests submitted by Jesco and the 72 by PSC.

A party formulating an answer to a request for admission must make reasonable inquiries. But a party is not required to make inquiries of another agency in state government which is not under its control.

Jesco's requests for admission 20 through 25, and PSC's 22 through 27, ask the Labor Cabinet to admit facts about several workers and their relationship to their employers in 2011. For example, Jesco's request 21 says "Admit that Randy York's 2011 W-2 and Earnings Summary reflects that Jesco was his employer." Labor's division of compliance through its investigating compliance officer during his OSH inspection does not inquire about the wages earned by an employee and has no reason to. So the question is whether the cabinet has a duty or even the ability to answer this request.

The law on responding to requests for admission says a lawyer answering the request for admission must perform a "Reasonable inquiry [which] includes investigation and inquiry of any of defendant's officers, administrators, agents,

employees, servants, enlisted or other personnel, who conceivably, but in realistic terms, may have information which may lead to or furnish the necessary and appropriate response." *T. Rowe Price Small-Cap Fund, Inc v Oppenheimer & Co, Inc*, 174 FRD 38, 43 (SDNY 1997).

This requirement for a reasonable inquiry is also found in the Kentucky supreme court's rules of ethics for lawyers:

> A lawyer shall not...(d) in pretrial procedure, make a frivolous discovery request or deliberately fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.
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> SCR[9] 3.130 (3.4)

But a lawyer's reasonably diligent effort is limited to those entities over which it has control; for the purposes of this case and the requests submitted by Jesco and PSC, the issue is whether the Labor Cabinet has control over an entity of government, not named in this case, which could conceivably provide the W-2 to permit Labor to admit or deny. In *Henry v Champlain Enterprises, Inc*, 212 FRD 73, 78 (ND NY 2003, the court said:

> Rule 36[10] requires the party to make a reasonable inquiry, a reasonable effort, to secure information that is readily obtainable from persons and documents within the responding party's relative control and to state fully those efforts. *T. Rowe Price*, 174 FRD at 43...Such reasonable inquiry includes an investigation and inquiry of employees, agents, and others, 'who conceivably, but in realistic terms, may have information which may lead to or furnish the necessary and appropriate response.' *T. Rowe Price*, 174 FRD at 43-44...The inquiry may require venturing beyond the parties to the litigation and include, under certain limited circumstances, non-parties, but surely not strangers.

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[9] Supreme Court Rule.
[10] Federal rule of civil procedure 36 (FRCP 36).

(emphasis added)

In *T. Rowe Price, supra*, the US district court said "The requirement of 'reasonable inquiry' does not generally extend to third parties, absent sworn deposition testimony of such third party." At 174 FRD 43-44. Our case has no such sworn depositions. In fact our hearing officer has, with the exception of requests for admission, denied respondents' efforts to conduct discovery.

A lawyer answering a request for admission, if he does not know the answer, must make reasonable inquires of employees, agents and others to obtain sufficient information to enable him to answer the request. But his inquiry is limited to those persons "within the responding party's relative control." For the Labor Cabinet, that would include all employees who work for the cabinet. It would not include, for example, employees who work for other agencies within state government such as the revenue cabinet which might have such information.

The Kentucky Secretary of Labor has statutory control of his cabinet. KRS 336.015 (1) and (2). He has no control over any other cabinets or departments in state government. PSC and Jesco in their brief have argued the Labor Cabinet has a duty to make reasonable inquiries throughout state government but has cited to no authority for this argument. We have looked but have found no such authority.

PSC and Jesco drew our attention to *Burgan v Harrison*, Ky, 413 SW2d 352, 356, (1967), where a dealership owned the car involved in an accident and employed the putative driver. *Burgan* says this was sufficient control to require an answer to a question which asked whether the car was under the control of a dealer employee

when the accident happened. *Burgan* is a far cry from a situation where PSC and Jesco expect the Labor Cabinet to answer requests for admission about information which can only be obtained from other state agencies[11] not within Labor's control. KRS 336.015 (1) and (2).

We affirm our hearing officer's decision in his March 4, 2013 order where he stated: "Respondents' request to compel more complete admissions from the Secretary concerning the contents of documents in the possession of Respondents filed with agencies of the Commonwealth of Kentucky other than the Labor Cabinet is DENIED." Page 1.

It is so ordered.

July 2, 2013.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

Joe F. Childers
Commissioner

[11] From the information supplied to us by the parties in their briefs, we are unable to ascertain if what respondents seek from other state agencies would be subject to open records requests. KRS 61.870, et seq.

Certificate of Service

I certify a copy of this order was served on the parties in the manner indicated on this July 2, 2013:

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