

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
ADMINISTRATIVE ACTION NO. 14-KOSH-0139

KOSHRC #5131-14

SECRETARY OF THE LABOR CABINET
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v

BROWN-FORMAN CORPORATION
dba BROWN-FORMAN COOPERAGE

RESPONDENT

**COMMISSION ORDER ON
INTERLOCUTORY REVIEW**

We have before us the Cabinet's interlocutory appeal as of right of the hearing officer's redaction of the compliance officer's notes¹ and our special permission for the Cabinet to appeal the hearing officer's order denying the Cabinet's attempt to call a Brown-Forman employee as its witness. Section 45 (1) and (3), 803 KAR 50:010 (ROP 45 (1) and (3)).

**Redaction of the Compliance
Officer's Work Notes**

Respondent during the trial gave notice it wanted to cross examine the compliance officer on the notes he took during his walk around inspection of the Brown-Forman premises. Our hearing officer then flawlessly followed the instructions this Commission had laid down in its interlocutory order for *Morel Construction Co, Inc, East Iowa Decks Support, Inc, Midwest Steel, Inc*, KOSHRC

¹ Hearing Officer Dickinson on December 18 filed an order certifying the Cabinet's interlocutory appeal of right.

4147-04, 4151-04, 4149-04 (2006). In *Morel* we expressed our understanding that a respondent was entitled to cross examine the compliance officer on the notes he took during his inspection. But we were also concerned the CO's notes would reveal the identities of employees who gave information to the compliance officer; KRE 508 (a) states the Commonwealth has a privilege not to disclose the names of persons who have "furnished information relating to or assisting in an investigation of a possible violation of a law..." In *Morel*, page 11, citing to federal law, we set down rules for redacting the compliance officer's work notes to permit cross examination of the CO while at the same time protecting the identity of employees who have provided information during the inspection:

Because material contained in the notes may lead to employees who provided the information, the review commission in *Massman...* said the appropriate time, upon motion by the respondent, for the hearing officer to perform the *in camera* review of the notes to select out privileged matter is after the witness, here the compliance officer, has completed his testimony on direct. *Massman...*² quoting with approval the US supreme court case *NLRB v Robbins Tire and Rubber Co*, 437 US 214, 98 SCt 2311, 57 LEd2d 159 (1978). We agree and adopt this reasoning as our own. When the compliance officer's direct testimony is concluded, the department of labor will tender the notes to the hearing officer, accompanied with assertions of privilege.

The hearing officer while reviewing the notes to excise the privileged portions shall keep in mind the respondent, without the notes, generally has all information necessary to cross examine the compliance officer.

To begin the process, the Cabinet submitted to the hearing officer, *in camera*, its version of redacted notes using a black marker to blot out names and factual

² *Massman-Johnson (Luling), Massman Construction Co, and Al Johnson Construction Co*, a federal review commission decision, CCH OSHD 24,436, p. 29,808, BNA 8 OSHC 1369, 1376 (1980).

situations the Cabinet believed would reveal the names of employees who provided information to the compliance officer. Then the hearing officer, on a separate copy, redacted the CO's notes to remove, in his estimation, the privileged portions of the notes and then submitted them to Cabinet for its assent according to *Morel*. Because the Cabinet objected to the hearing officer's redaction efforts, the Cabinet, with the approval of the hearing officer, asked for an appeal of right from his redaction of the notes which we granted. ROP 45 (3).

On interlocutory review we have before us, under seal, several sets of the compliance officer's notes³ for our *in camera* review. We have the CO's notes which have not been redacted. For lack of a better phrase, we refer to them as the white notes. We have the CO's notes which the Cabinet initially redacted using a black marker – the black notes. We have a set of red highlighted notes prepared by our hearing officer – the red notes. Finally, when the Cabinet submitted its brief to us, it also sent, for our *in camera* review, a set of notes with the hearing officer's redactions in red highlight (so we could read the words redacted) and several redactions in green highlight which, the Cabinet said contained "statements of particular concern..." We will refer to these notes as the green notes. Complainant's brief, page 7.

We have examined the four sets of notes to determine what portion of the notes should be redacted to protect the identity of employees. We are guided by the

³ Because the compliance officer, when he hurriedly wrote his notes during his walk around inspection, did not consecutively number his pages from one to thirty, we have taken the liberty of numbering each page of the four sets of notes, at the bottom of each page; we have done so to facilitate a precise comparison of, say, page 5 of the red notes with page 5 of the white notes.

federal commission which in *Pratt and Whitney Aircraft*,⁴ CCH OSHD 25,359, page 31,504, BNA 9 OSHC 1653, 1657 (1981), stated:

...any material in the statements that would reveal the identity of confidential informants need not be produced.

In *Pratt and Whitney* the federal commission examined the compliance officer's notes as have we for *Brown-Forman* now before us.

With our duty to protect the identities of employees firmly in mind, *Morel, Pratt and Whitney and Massman, supra*, we have examined four sets of the compliance officer's notes, the white, black, red and green notes. We first turn to Brown-Forman's brief where it expressed the need, using the CO's notes, to cross examine him about alleged hazards of "flying chips⁵ and debris from breaking barrels." According to the company, the compliance officer testified he learned about these hazards "through his communications with Respondent's employees." Brown-Forman brief, page 6.

We are not at this time examining the record to rule on Brown-Forman's appeal from the citations; rather, this is a cross examination issue. Although we have examined the notes and found no reference to flying chips, debris or broken barrels, we cannot take a position on the validity of any of the citations and will not take such a position unless or until this case comes before us on discretionary review.

ROP 47 (3). At such time we would, as always, review the record (consisting of the

⁴ 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).

⁵ The term "flying chips" is found in Brown-Forman's repeat serious citation which alleges a machine guarding violation, citing to 29 CFR 1910.212 (a) (1).

transcript, the citations, the exhibits and the recommended order), the briefs of the parties and the law before making a decision whether to affirm or to deny the machine guarding repeat serious citation. As we have said, this order is confined to interlocutory issues.

While we do not see in the notes any reference to flying chips, debris or breaking barrels, we understand Brown-Forman may still wish to cross examine the compliance officer on his notes, shorn of any information which may reveal the identity of cooperating employees. *Morel, Pratt and Whitney and Massman, supra*. Our hearing officer has, in his red notes, done an admirable job of redacting the notes to protect the identity of Brown-Forman employees who spoke to the compliance officer to assist him during his inspection. Accordingly, we adopt his reasoning as our own.

In its brief to our Commission, however, the Cabinet has focused our attention on five pages where it has “elevated concerns” about employee identity, limited as the inspection was to “one area of the facility.” Cabinet’s brief, pages 6 and 7. This means the company knows the names of employees who talked with the compliance officer during his inspection; we understand from our experience that the limited nature of the inspection will enhance the ability of the company to identify employees who cooperated with the compliance officer.

The Cabinet in its brief described five pages of the notes which it argues needs redacting; these suggested redactions are outlined in green – the green notes. They are page 8, eight lines, page 10, two lines, page 11, two lines, page 17, two lines and

page 30, three lines. We have analyzed each line. Our review persuades us these lines of text refer to specific, unnamed employees performing readily identifiable tasks. Accordingly, we adopt the Cabinet's suggestions found on the green notes.

This takes us to a consideration of the redacting performed by our hearing officer – his red notes. Hearing Officer Dickinson redacted names and job titles, specific jobs and functions, specific work shifts linked to jobs, conversations with management and seven addresses and phone numbers. We adopt our hearing officer's redactions.

We then turned our attention to the Cabinet's initial redaction which it submitted to the hearing officer prior to his red highlight redactions, the black notes. We have reviewed the black notes and compared them to the red and green notes. We find the red and green notes, without the addition of the redactions found on the black notes, protect the identities of the employees who were present during the CO's inspection of the Brown-Forman work site.

We here adopt our hearing officer's red highlight redactions and the Cabinet's green redactions.

We find the red and green redactions described above protect the identities of participating employees and thus are in accordance with the rules set out in *Morel, Pratt and Whitney* and *Massman, supra*. Accordingly, we have taken a copy of the white notes and redacted, in black marker, those lines redacted in the red notes and the green notes; this we will call the "Commission's redaction."

With this order, we are attaching a copy of the Commission's redaction.

Witness Lists

The parties simultaneously submitted witness lists some six weeks before commencement of the trial. Both sides listed named individuals and then made the following statements by which the parties, we infer, reserved the right to call as their own witnesses persons found on the other party's witness list:

Complainant stated: "Any and all witnesses identified by the Respondent in its List of Witnesses."

Similarly respondent stated: "Any witnesses listed in Complainant's Witness List."

Brown-Forman listed Mr. Trever Lindemier as one of its witnesses. When the Cabinet called Mr. Lindemier as its first witness, Brown-Forman objected. Our hearing officer sustained Brown-Forman's objection. Hearing Officer Dickinson, in support of his ruling, stated:

People identify the witnesses they are going to bring for their case so that there is no surprises with respect to the witnesses being called. It is, however, a surprise to them for you to elect to call one of their witnesses on direct."

Transcript of the evidence, volume I, December 10, 2015,
page 9 (TEI 9)

We find that both parties, as the trial began, knew the names of those persons who could be called to give evidence. Similarly, both parties had notice the other side had reserved the right to call its witnesses as their own. We find Brown-Forman was not surprised when the Cabinet called Mr. Lindemier as its first witness; we reverse our hearing officer on this point. We find *Niemeyer v Ford*

Motor Company, et al, 09-CV-2091, U.S. District Court, District of Nevada (2012), WL 845668, persuasive.


We direct our hearing officers to defer to the positions of the litigating parties who have, in their simultaneously filed witness lists, reserved the right to call the other sides witnesses as their own. We take this step to prevent the development of a witness list motion practice.

We lift the stay of the proceedings before the hearing officer. ROP 45 (4).


We remand this case to our hearing officer for further proceedings consistent with this order.

It is so ordered.

May 10, 2016.


Faye S. Liebermann
Chair


Paul Cecil Green
Commissioner


Joe F. Childers
Commissioner

Certificate of Service

I certify that a true and accurate copy of the foregoing response was served upon the following in the manner indicated on this May 10, 2016:


By U.S. Mail:

Hon. Todd B. Logsdon
Hon. Mark Gomsak
Fisher & Phillips
220 West Main Street, Suite 2000
Louisville, Kentucky 40202

By messenger mail:

James L. Dickinson
Hearing Officer
Administrative Hearings Branch
Office of the Attorney General
1024 Capital Center Drive, Suite 200
Frankfort, Kentucky 40601-8204

Steven Fields
Office of General Counsel
Kentucky Labor Cabinet
1047 U.S. 127 South, Suite 4
Frankfort, Kentucky 40601


Frederick G. Huggins
#4 Mill Creek Park
Frankfort, Kentucky 40601
(502) 573-6892

Counsel for the Review Commission

brown-foreman5131C