COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
07-KOSH-0306, 0384 AND 0385

KOSHRC 4463-07, 4499-07 AND 4490-07

COMMISSIONER
DEPARTMENT OF LABOR
ENVIRONMENTAL AND PUBLIC PROTECTION CABINET — COMPLAINANT

v

STEVE PEARMAN FRAMING, LLC
and
AMOS MARTIN CONSTRUCTION COMPANY, INC — RESPONDENTS

HOME BUILDERS ASSOCIATION OF KENTUCKY — INTERVENOR

REVIEW COMMISSION ORDER DISMISSING THE HOME BUILDERS ASSOCIATION AS A PARTY AND ORDER OF REMAND.

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Our hearing officer on February 4, 2008 granted, over the department of labor's objection, the Home Builders Association's motion to intervene. Section 14, 803 KAR 50:010. We granted labor's motion for interlocutory appeal on the intervention issue and asked for briefs. Section 45.

While this case was in the pretrial stage before the hearing officer, Amos Martin on January 2, 2008 filed a motion for a stay of proceedings; Amos Martin's motion said the case should be stayed because the federal occupational safety and health review commission had in April of last year issued Summit Contractors,[1] OSHRC, 03-1622. In a two to one decision the commission in Summit said the US department of labor could not

[1] Go to oshrc.com. Select decisions and click on final commission decisions for 2007.

issue a citation to a general contractor who exercised control over the construction work site but had no employees exposed to the cited hazard. Summit is now on appeal to the US court of appeals for the eighth circuit. The Summit case involves the same multi employer work site issue present in our case. Also on January 2, the Home Builders Association of Kentucky filed a motion, with the hearing officer, to intervene as a party in the instant matter. Our hearing officer denied Amos Martin's motion for a stay and then ordered the association to be admitted to the case as an intervenor. When our hearing officer denied the motion for a stay of proceedings, he made the correct decision. If cases filed in court or before administrative agencies were routinely stayed because a court somewhere was poised to make a decision on the same issue, our judicial system would quickly come to a halt. No party appealed the hearing officer's order denying the motion for a stay.

The Kentucky department of labor, however, did file with our review commission its petition for interlocutory review of the hearing officer's order admitting the home owners association as a party. Our rules permit, in certain circumstances, an interlocutory appeal to the full commission from an order issued by the hearing officer. Section 45, 803 KAR 50:010.

At the trial level, a party who wishes to intervene in one of our cases must file a petition with the hearing officer:

> The Petition shall set forth the interest of the petitioner in the proceeding and show that participation will assist in the determination of the issues in question and that the intervention will not unnecessarily delay the proceeding.
>
> Section 14 (2), 803 KAR 50:010

We have reviewed the pertinent motions, responses and orders as well as the briefs filed with this commission. We will first resolve two issues which have arisen in this matter and then undertake an analysis of the three elements found within section 14 (2), all of which a successful petitioner for intervention must prove.

Whether intervention is left to the discretion of the hearing officer?

In their brief to the commission Steve Pearman and Amos Martin, the parties, said "the decision to grant intervention is left to the hearing officer's discretion" and cited to section 14, 803 KAR 50:010. Following up on this reasoning, the parties said for the commission to overturn the hearing officer's order permitting intervention by the association, it would have to find the hearing officer abused his discretion. Brief page 2. On this issue Pearman and Martin misstated the law. Section 14 (3), 803 KAR 50:010 says:

> The commission or the hearing officer may grant a petition for intervention to such an extent and upon such terms as the commission or the hearing officer shall determine.

In the first instance the hearing officer ruled on the association's petition for intervention. Now on interlocutory review, the department of labor has brought the intervention issue to the commission. The larger question for us is who decides our cases, whether on interlocutory review or discretionary review, the hearing officer or this commission? When the general assembly created the commission, it said "The review commission shall hear and rule on appeals from citations..." KRS 338.071 (4). In the federal system "the Commission shall afford an opportunity for a hearing...The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the

Secretary's citation or proposed penalty." 29 USC 659 (c). Under these substantially similar statutes the two commissions[2] are both given the authority to decide the cases which come before them, not the hearing officers[3] who try the cases for us and then write recommended orders.

In Accu-Namics, Inc v OSHRC, 515 F2d 828, 834 (CA5 1975), CCH OSHD 19,802, page 23,611, BNA 3 OSHC 1299, 1302, the court said "the *Commission* is the fact-finder, and the judge is an arm of the commission..." The federal review commission in Little Beaver Creek Ranches, Inc, BNA 10 OSHC 1806, 1810, said "an agency's review of the decisions of its administrative law judges may extend to all issues squarely raised by the record as a whole."

Then in Ortiz-Salas v Immigration and Naturalization Service,[4] 992 F2d 105, 108 (CA7 1993), Judge Posner, citing to Universal Camera Corporation v National Labor Relations Board,[5] said "Agencies generally are free to substitute their judgment for that of their hearing officers." In Ortiz-Salas, the board of immigration appeals had affirmed its immigration judge's decision denying relief from a deportation order on an abuse of discretion standard. Mr. Ortiz argued for reversal to the court, citing cases where the board had reviewed its judges *de novo*. Judge Posner said the board had to decide on either an abuse of discretion standard or *de novo* review – one or the other.

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[2] The Kentucky commission is created by KRS 338.071 while the federal commission is established by 29 USC 661.

[3] In the federal system they are administrative law judges.

[4] See Charles H. Koch, Jr, 2 Administrative Law and Practice, page 94, footnote 3.

[5] 340 US 474, 492, 71 SCt 456, 467, 95 LEd2d 456 (1951).

In Brennan, Secretary of Labor v OSHRC and Interstate Glass[6], 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799 page 21,538, BNA 1 OSHC 1372, 1374, the eighth circuit said when the commission hears a case it does so "*de novo.*"

Our supreme court in Secretary, Labor Cabinet v Boston Gear, Inc, 25 SW3d 130, 133 (2000), said "The review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer." Since its inception in 1972 this commission has taken the position that its review, based upon its statute, is *de novo* and has acted accordingly.

We hold when this commission reviews a decision of one of its hearing officers, it does so *de novo* and as such is not limited to an abuse of discretion standard. When one of our hearing officers makes an incorrect decision, either on the facts or the law, this commission shall with reasons stated correct the mistake; that is our statutory responsibility. KRS 338.071 (4).

Whether this review commission's rule on intervention preempts the Kentucky rules of civil procedure on intervention?

This commission by statute operates under its own procedural regulations found at 803 KAR 50:010. See KRS 338.071 (4).

We have a specific rule on intervention and so does the federal commission. See section 14, 803 KAR 50:010 and 29 CFR 2200.21. 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

[6] In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2000), 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.

commission's rule reads exactly the same as ours except it refers to the federal rules. 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 intervention.

In Brown and Root, Inc,[7] Pennsylvania Truck Lines, Inc[8] and Harry Pepper and Associates, Inc,[9] 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 commission[10] said its rule on intervention preempted the federal civil rules on the same subject. We agree.

When Chairman Cleary, writing for the majority in Brown and Root, interpreted the commission's rule, 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.

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, 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

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[7] CCH OSHD 23,731, BNA 7 OSHC 1526.
[8] CCH OSHD 23,873, BNA 7 OSHC 1722
[9] CCH OSHD 23,954, page 29,058, BNA 7 OSHC 1815, 1816.
[10] In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2000), 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.

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 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." [11]

We adopt the reasoning of Chairman Cleary and Commissioner Barnako as our own. Our rule on intervention preempts those found in the Kentucky rules of civil procedure.

The court of appeals in Hughes v Kentucky Horse Racing Authority, Ky App, 179 S.W.3d 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 S.W.2d 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 (1991), CCH OSHD 29,257, page 39,222, BNA 14 OSHC 2097, 2098-2099, 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

[11] CCH page 28,774, and BNA 7 OSHC 1533.

agency's delegated lawmaking powers.
At CCH p 39,222 and
14 OSHC 2098-2099.

Our Kentucky supreme court in Kentucky Labor Cabinet v Graham, supra, has instructed us to look to persuasive federal precedent because our OSHA law so closely parallels the federal and because, we infer, there is little published authority on occupational safety and health law in Kentucky. In 1979 the federal commission held when it has its own procedural rule on intervention, that rule preempts the federal rules of civil procedure's provisions for intervention; Brown and Root, Pennsylvania Truck Lines, Inc and Harry Pepper and Associates, Inc, supra, are still good law. 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 1972. See Graham, supra.

We turn to the central issue in this matter: whether the association should have been admitted as an intervenor?

Whether the association
has demonstrated an "interest"
in these proceedings?

In his order permitting intervention by the association our hearing officer said he had to resort to a dictionary to obtain a definition of interest which he then applied to the facts as he saw them. Section 14 (2). Resort to a dictionary is not needed, however, when case law has already interpreted a regulation. The federal review commission has, in a number of decisions, decided cases involving petitions for intervention; these cases define interest in such a way as to leave no doubt as to its application.

In Brown and Root, Inc, supra, the federal review commission granted permission to intervene to a union which represented subcontractor employees who were exposed to

the hazard created by another employer. The union's interest was the safety of its members on that particular job site.

In Pennsylvania Truck Lines, Inc, supra, the federal commission permitted Consolidated Rail Corporation, Conrail, to intervene in a case because it owned the property where the alleged violation occurred and abatement of the cited condition could potentially affect its railroad operations and the safety of its employees. Here Conrail's interests were the railroad's property and the safety of its own employees at the work site where the case arose.

Florida Power and Light (FPL) moved to intervene in Harry Pepper and Associates, Inc, supra. Although the ALJ denied intervention, the federal commission granted it because the abatement prescribed for the alleged violation, deenergization or relocation of the FPL power lines, contemplated direct action on FPL's property: the power lines. Here again the interest is FPL's property where the power lines were located.

Finally, in Penn Central Transportation Co, CCH OSHD 21,540, BNA 4 OSHC 2033, the federal commission admitted the bankruptcy trustees as an indispensable party because the trustees had the responsibility for correcting any violative conditions. While the trustees were admitted under the federal rules of civil procedure (FRCP 21) rather than the commission's rule on intervenors,[12] the case stands for the proposition an entity, here the trustees, with abatement authority belongs in the case.

In each of these federal decisions the intervenors possessed an interest in the litigation which would be affected by the outcome of the case: employee safety, property

[12] In Penn Central no party raised the preemption issue and so it was not litigated.

rights, abatement responsibility. This for our purposes defines interest as some tangible connection to the case which would be directly affected by its resolution.

Applying this logic to the intervention of the home builders association, it is clear the association has no interest in the proceeding as defined by the case law. The association has no exposed employees. It has no property involved in the case. It has no abatement authority or liability. Since it is not, within the confines of this case, an employer, it has no concerns about compliance with the act; it is not subject to a penalty.

None of the association's members, excluding Steve Pearman and Amos Martin who are already parties to the instant litigation because of the citations issued to them by the department of labor, have any connection to this case; they have no exposed employees, no abatement concerns, no compliance duties and no penalty exposure arising from the case before us.

If, for example, a steel manufacturer is cited for an OSHA violation, that does not mean other steel companies may intervene because they might someday be cited for the same violation. For an entity to be admitted as an intervenor, it must show it has an interest, whether employee safety, abatement, compliance or penalty, which will be directly affected by the outcome of the case at hand. We recognize petitioners in future cases may present us with facts, dissimilar to those found in the instant action, which would qualify them for admittance as an intervenor. Our decision today is limited to the facts before us and the applicable case law.

We conclude the home builders association has not shown the type of interest in this case which would enable it to prevail in a motion for intervention. Section 14 (2), 803 KAR 50:010.

Whether the home builder's association will assist in the determination of the issues?

Our first question here, seen in the light of our rule on intervention, is what issues might require the assistance of an intervenor. From our lengthy experience with these cases, our statute came into effect in 1972, we know our cases are tried year in and year out with the department of labor as the complainant and the employer as the sole respondent. See KRS 338.141 (1) which says the department of labor issues a citation to an employer who may then contest the citation before this review commission. Once the case is lodged with the commission, the secretary of labor must file a complaint and the employer an answer in response. Section 20 (3) and (4), 803 KAR 50:010. Because the secretary of labor's representative, the compliance officer, conducted the inspections and the employers, Steve Pearman and Amos Martin, participated in the inspections (KRS 338.111), the parties have in their possession all the facts necessary for an effective prosecution and defense.

For this case in particular, because of Amos Martin's announced intention to rely on Summit Contractors as a defense, the question is whether the home builder's association as an intervenor will assist in the determination of the multi employer work site issue. The issue in Summit Contractors can be stated very simply:

> Whether, at a construction site, the general contractor who is a controlling employer may be cited for a violation even though he has no exposed employees?

That was the issue in the Summit case and it was tried before the administrative law judge by the two parties: the US department of labor and Summit Contractors. Then on review to the occupational safety and health review commission and on appeal to the

eighth circuit, the National Association of Home Builders, the Contractor's Association of Greater New York, the Texas Association of Builders, the Greater Houston Builders Association[13] and the Building and Construction Trades Department, AFL-CIO filed amicus briefs.

As labor points out, the home owners association was not present on site during the inspection and so can shed no light on the facts of the alleged violation. The parties to our case, complainant and the two respondents,[14] can easily offer the necessary proof about the work site, the contractual and working relationships of the respondents on site, the alleged violations and the exposed employees. We conclude the intervention by the home builders association in this case will not assist in the determination of the issues, at least as a party at the trial level before the hearing officer. The issue will be competently tried by the department of labor, Steve Pearman and Amos Martin.

Our ruling today is not to be construed as imposing a limitation on respondents' ability to call witnesses of their own choosing. It is up to the parties to decide who to call as witnesses, their testimony of course subject to the Kentucky rules of evidence. Section 42, 803 KAR 50:010.

Whether intervention will "unnecessarily delay" the proceedings?

In his order the hearing officer said the association's intervention will not result in unnecessary delay because the hearing had already been scheduled; this is not the issue. In US v Smithers, 212 F3d 306, 316 (CA6 2000), a federal criminal case, the court said delay "encompasses the prolonging of the length of the trial..." The Smithers court, citing

[13] The contractor associations jointly submitted one brief.
[14] Our hearing officer consolidated the Steve Pearman and Amos Martin cases because of a shared inspection. Section 10, 803 KAR 50: 010.

to Wright's Federal Practice and Procedure, said "'Delay' is a consideration of efficiency and is not readily distinguishable from 'waste of time.'" 22 Federal Practice and Procedure, section 5218, page 296 (1978).

Professor Wright on the same subject said "'Undue delay' is so difficult to distinguish from 'waste of time'...that it is...difficult to see why the Advisory Committee[15] thought that both were required [by the rule]." 22 Federal Practice and Procedure, section 5218 at page 297 (1978). While the author wrote those observations in the context of an analysis of FRE 403, he is basically saying there is no meaningful difference between the two phrases: waste of time and undue delay.

The Oxford English Dictionary,[16] second edition, 1989, defines "unnecessarily" as without necessity, needlessly. Then the OED defines "unduly" as without due cause or justification. When we put the OED definitions together with Professor Wright's understanding of undue delay, the question for us is whether the intervenor's presence would delay the trial and if so is the delay necessary or justified? This suggests a balancing test: delay of the trial process balanced against the necessity, and justification, for the intervenor's presence in the case. If the intervenor's presence is necessary or justified for a thorough discussion of the facts and issues, then delay is permissible. If, on the other hand, the intervention is not necessary or justified, then delay is not acceptable.

Another party, the intervenor, with its own witnesses, arguments and cross examination will prolong any trial including this one; the association, admitted to the case, would file briefs and have the right to appeal to the commission even if the two

[15] The drafters of FRE 403.
[16] Go to oed.com.

cited respondents felt otherwise. To answer, then, the necessary or justified part of the question, we need look no further than the two first elements of the intervention rule: the interest of the intervenor and its contribution to the determination of the issues. Neither the association nor its members by proxy have any interest in the case which would be affected by its outcome. Because the elements of the multi employer work site issue which must be proven to raise Summit Contractors as a defense are so easily stated and established, whether a general contractor who controls the work site may be cited even though he has no exposed employees, we have no doubt the complainant and respondents Steve Pearman and Amos Martin can at the trial conduct a thorough examination of the facts and issues. Given the relative simplicity of the Summit Contractors factual issues, the association's participation in their determination is neither needed nor justified. We find because the association's intervention is not necessary or justified, prolongation of the trial is not acceptable.

This order today in no way affects our liberal rule for the election of party status by employees or authorized employee representatives. Section 13, 803 KAR 50:010. Neither does it affect the statutory rights of employees and representatives of employees, as well as employers, to file a notice of contest challenging the citation. KRS 338.141 (3)

For the reasons stated, we conclude the hearing officer erred when he admitted the association as a party. We dismiss the Home Builders Association as a party. We lift the stay of proceedings and remand the case to the hearing officer for a trial on the merits.

Were we to grant review of this case, after a trial on the merits by the hearing officer, we would look with favor on motions by entities to file amicus briefs with the commission.

It is so ordered.

July 1, 2008.

Kevin G. Sell
Chairman

Sandy Jones
Commissioner

William T. Adams, Jr.
Commissioner

Certificate of Service

This is to certify a true copy of the above order for the Steve Pearman/Amos Martin case, KOSHRC 4463-07, 4499-07 and 4490-07, has on July 1, 2008 been served on the following in the manner indicated:

By messenger mail:

James R. Grider, Jr.
Susan Draper
Office of Legal Services
Department of Labor
1047 US Highway 127 South - Suite 2
Frankfort, Kentucky 40601

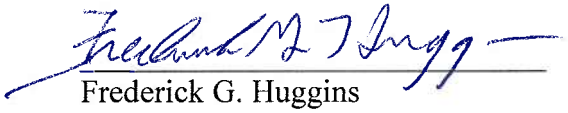
Michael Head
Hearing Officer
Office of the Attorney General
1024 Capital Center Drive - Suite 200
Frankfort, Kentucky 40601-8204

By US mail:

William Clifton Travis

Travis and Herbert
The Jefferson Marders Building
11507 Main Street
Louisville, Kentucky 40243

Lori Barker Sullivan
Greenebaum Doll
229 West Main Street - Suite 101
Frankfort, Kentucky 40601



Frederick G. Huggins
General Counsel
Kentucky Occupational Safety and
Health Review Commission
4 Millcreek Park
Frankfort, Kentucky 40601
(502) 573-6892