

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
KOSHRC DOCKET NO. 2135-92

SECRETARY OF LABOR

COMPLAINANT

VS.

**DECISION AND ORDER
OF THE
REVIEW COMMISSION**

MASTER MECHANICAL INSULATION

RESPONDENT

Before Wagoner, Yates and Butler., Commissioners:

This case comes to us for review of the recommended order of our hearing officer sustaining six of the nine citations issued by the Secretary of Labor against respondent Master Mechanical Insulation. MMI takes the position the six citations should be dismissed while the secretary asks that the hearing officer's decision be affirmed.

Master Mechanical Insulation, a contractor, employed workers who installed sheet metal at a Louisa, Kentucky power plant. TE 61. The Secretary of Labor, after completing a complaint-generated inspection, issued citations alleging in part that MMI employees were exposed to asbestos fibers, a violation of the occupational safety and health law.

Respondent argues it was denied due process of law since hearing officer Patricia Rabits presided over the trial while hearing officer Mason Trenaman (after reviewing the record) wrote the recommended order now the subject of this appeal. Mr. Trenaman was appointed by this commission to write the recommended order as Ms. Rabits contract expired before she could issue a

recommended order. Although respondent has offered us no authority to support its position, we shall treat the issue seriously nevertheless.

Broadly stated, the issue is whether a hearing officer who hears the case initially must decide it.

KRS 338.⁰771 (4) says this review commission shall hear appeals from citations issued by the Secretary of Labor in occupational safety and health cases. KRS 338.081 (1) then says the commission may hire hearing officers. Recommended orders submitted to us by our hearing officers become final orders of this commission only if we elect not to accept the case for review. KRS 338.091 (1) and ROP section 3 (2). Any decision by a hearing officer may be sustained or reversed by the review commission exercising its authority under KRS 338.^O771 (4).
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Section 3 of our rules of procedure (ROP) uses the word "may" to highlight the commission's discretion to appoint (or not appoint) a hearing officer as we see fit. ¹

Kentucky caselaw holds that an administrative officer acting in his judicial capacity need not hear the evidence to decide the case. What the administrative officer must however, is consider the evidence before deciding the case.

¹Section 3 (1) of the commission's rules of procedure says in part:

"...cases coming before the commission may be assigned to a hearing officer within the discretion of the commission for hearing and a findings of fact, conclusion(s) of law, and a recommended order." Paragraph (1) goes on to state: "Further, the commission may, upon its own motion...hold hearings..."

Howard v. Kentucky Alcohol Beverage Control Board, 172 S.W.2d 46 (1943).

A hearing officer appointed by this review commission under KRS 338.081 (1) must consider the evidence before making his ruling (a recommended order). The term "recommended order" is used deliberately in ROP, section 3 (1) ² to make it clear it is this review commission which *has* the final say in all appeals from citations issued by the Kentucky OSHA program. Hearing officers are an arm of this commission. This commission may hear the case itself. Or we may hire a hearing officer to hear the case and issue a recommended order. Or we may hire one hearing officer to hear the case and another to issue the recommended order. Kentucky law (statutory and caselaw) simply says the hearing officer or the review commission deciding the case must first consider the evidence.

Kentucky's OSHA program is similar to federal OSHA both in safety and health regulations and statutory design. The federal review commission (which employs administrative law judges equivalent to our hearing officers) hears appeals from citations. In U.S.C. Section 659 (c).

In a case where a federal ALO issued a recommended order on a procedural matter while failing to reach the substance of safety issues, the fifth circuit in *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 32^A, 9⁷⁴ (5th Cir. 1975), said the review commission

² The Kentucky Occupational Safety and Health Review Commission's Rules of Procedure are found at KAR 50:010.

under law "is the fact-finder," not the ALJ. In Accu-Namics the review commission decided the safety and health issues on the merits without remanding the case to the hearing officer for further proceedings. While Kentucky is not subject to federal precedent in occupational safety and health matters as we have our own state program (KRS Chapter 338), the logic of Accu-Namics is persuasive.

So, clearly, MNI was not denied due process in this case. While hearing officer Trenaman considered the evidence before issuing a recommended order, this review commission might simply have taken the trial record up to render our own decision. We turn now to the substance of this case.

Citations 5, 5 and 7 were dismissed by the hearing officer. Neither party has appealed those dismissals to this commission. We sustain the decision of the hearing officer as to citations -5, and 7.

There are two classes of appealed citations in this case. One class of citations, in order to be sustained, requires a showing that employees were exposed to a certain level of asbestos fibers in the air or reasonable expectation the permissible exposure level (1925.58 (c)) was exceeded. The other class of citations requires no such showing. We shall first discuss those citations requiring proof of exposure to asbestos fibers exceeding the permissible exposure level (PEL).

Citation 2 charges MMI with not establishing "a regulated area in work areas where airborne concentrations of asbestos

exceeded or could reasonably be expected to exceed the permissible exposure limit," an alleged violation of 29 CFR 1926.58 (e) (1) as adopted by 803 KAR 2:403. The permissible exposure level is defined by 1926.58 (c) as either 0.2 fibers of asbestos per cubic centimeter of air over an eight hour time weighted average or 1.0 fibers of asbestos per cubic centimeter of air as averaged over a period of thirty minutes. A regulated work area (1926.58 (b)) means an area which is enclosed in a negative air pressure enclosure or cordoned off to employees not working there.

As a practical matter, the only way to test for airborne asbestos is to hang a vacuum pump on an employee with the air intake near the worker's breathing zone. Then the pump pulls air across a filter which would afterward be tested for the presence of asbestos fibers. Although the hearing officer made no findings whether the compliance officer (the inspector for Kentucky OSHA) took airborne samples, we do so now. The compliance officer made his inspection after MMI employees left the subject worksite; there were no MMI employees to test for airborne levels of asbestos and no such tests were made.

Therefore, the only other method for determining exposure is by reference to the facts. Our hearing officer found that "airborne concentrations of asbestos...could reasonably have been expected to exceed" the PEL. We disagree. In our case **Armco Steel Company, KOSIIRC 1936-90**, we found a reasonable expectation of exposure to asbestos beyond the PEL because, in

that case, employees spent the day removing asbestos "with a jackhammer, producing a considerable amount of dust." Similarly, in **Expert Environmental Control, Inc.**, BNA 14 OSHC 1666, 1668 (1990) (a federal case), an A.U.T found evidence of a reasonable expectation of overexposure to asbestos because employees spent their working days removing asbestos in a confined space. In **Expert Environmental** the asbestos was over employees' heads and continuously in their breathing zones.

Although compliance officer Edwards, in our case, testified there was a reasonable expectation of overexposure to asbestos (TE 135), he gave his opinion without elaboration. TE 135. Employees Napier and Sias testified they knocked off screw heads and removed some of the suspect insulation for about two hours spaced over several days. TE 45, 46, 80 and 87. This intermittent removal of both screw heads and insulation fails far short of the standard for proving the reasonable expectation of over exposure to asbestos fibers as laid down by **Armco** and **Expert Environmental Control, supra**. Further, while two of three samples taken from level 70 of the Louisa plant contained asbestos, there is no proof in the record to show the material removed by MNI employees contained asbestos. Although some hNI workers wore dust masks, the problem was fly ash (potash) in the air throughout the coal-fired Louisa plant. TE 16. We, therefore, overrule our hearing officer; we find there is no reasonable expectation of over exposure to asbestos in this case.

Since no testing for exposure to airborne asbestos was

performed and since there is no proof of a reasonable expectation of exposure over the PEL, we must dismiss citation 2.

-Citation 3 accuses MMI of failing to establish a negative pressure enclosure, a violation of 1926.58 (e) (6) (i). Section (e) concerns regulated areas which, according to the definition contained in 1926.58 (b), are to be used where the **PEL** is exceeded or expected to be exceeded according to the facts of the case. Because there was no testing of airborne concentrations and because there was no reasonable expectation of exceeding the PEL, we dismiss citation 3.

Citation 9 charges MMI with not having a medical surveillance program for all employees who are exposed to asbestos above the "action level" for 30 days or more per year or who are required to wear negative pressure respirators, a violation of 1926.58 (m) (1) (i). According to the definitions, 1925.58 (b), the action level means a concentration of asbestos fibers of 0.1 fiber per cubic centimeter over an 8 hour time weighted average.

Since there was no testing, the question here is whether employees were required to wear negative pressure respirators? Although our hearing officer opined that MMI employees should be required to wear negative pressure respirators, he gave no specific reasons and in any event we reverse. Respirators must be worn, according to 1926.58 (h) (1), when installing engineering controls, when engineering controls are not feasible or where engineering controls are not sufficient in themselves to bring exposure within the PEL. 1926.58 (h) (i-iv).

In the instant case, at level 70 where MMI employees worked, the only possible engineering controls would be a negative pressure enclosure which we have already ruled was not legally required since there was no testing by the compliance officer and because there was no reasonable expectation the PEL would be exceeded. We therefore reverse the hearing officer and dismiss citation 9.

Now to the class of citations in this case which do not require a showing of over exposure to the PEL or a reasonable expectation of over exposure.

Citation 1 was affirmed by our hearing officer and we agree. Although neither side saw fit to call supervisor Bailey as a witness, it is clear he either did not recognize asbestos or, if he did, he did not know what to do once the substance was identified on the job. Or if Bailey recognized the substance as possibly containing asbestos and did nothing, this indicates MMI's vaunted safety program contained no teeth or oversight. Had employees Napier and Sias themselves been trained in the recognition of potential asbestos-containing materials, they (upon recognizing the possibility) would have gone over Bailey's head to supervisors who clearly were ready to call in the insulator employees. MMI testified they also employed insulation workers at Louisa whose job it was to remove asbestos using masks and engineering controls. We adopt the findings and conclusions of Mr. Trenaman and sustain citation 1.

At the hearing, the attorney for MMI objected to the intro-

duction of laboratory reports introduced through compliance officer Edwards that confirmed the presence of asbestos at level 70. Hearing officer Rabits let the lab reports be admitted. TE 124-127. While MMI's attorney in his brief to us offers no authority for overruling the hearing officer's order, we will take up his objection to the evidence.

As the laboratory reports show (complainant's exhibits 1 and Z), they were collected by compliance officer Edwards and sent to a laboratory for testing. At the lab they were handled according to regular procedures as Edwards testified. TE 126. KRE 901 (a) says "admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." KRE 901, according to Kentucky Evidence Law, 3d ed., is similar to the federal provision and federal cases have ruled that any gaps in the chain of custody (or integrity as Lawson calls it) go to the weight rather than admissibility. U.S. v. Lott, 854 F.2d 244, 250 (7th Cir. 1988).

In any event, inspector Edwards collected the samples, bagged them, identified them and sent them to the lab. While at the laboratory, the technician (identified by an initial) handled them and several were found to contain asbestos. We find no lack of integrity in the tested samples and so hold. Complainant's exhibit 1 contained samples one and two while complainant's exhibit 2 contained sample three. Samples one and three tested positive for asbestos. We know, therefore, there was some

asbestos at level 7r) even if we do not know exactly where.

Citation 4 charges MMI with violating 1926.58 (f) (2) (1) for riot monitoring the jobsite for asbestos fibers in the air. Our hearing officer upheld this citation. We agree but will take his rationale further. **Cleveland Electric Illuminating Company**, CCH 87-90, paragraph 28,597, a federal OSHA case, held an employer was required to monitor for asbestos because it was on notice the power plant had been built at a time when asbestos was used and despite periodic re-insulating still contained asbestos. The federal review commission imposed monitoring despite the fact the employer had assurances from the power company that one of six boilers did not pose an asbestos hazard. The commission required monitoring because it said the employer could not simply extrapolate from one work area to another.

We find, in our case, that MMI knew there was asbestos at the Louisa plant. First, we can infer MMI knew of the presence of asbestos at the Louisa. plant because Louisa officials notified MMI there was no asbestos at level 70. TE 181. Despite the fact the Louisa officials were wrong on that score (given the fact two of complainant's samples tested positive for asbestos), the inference is Louisa officials would not bother to inform MMI there was no asbestos at level 70 unless there was asbestos elsewhere at the plant.

That would be sufficient for our purposes. But MMI was in the business of sheet metal installation **and** asbestos removal

at the Louisa plant. TE 229, 231, 232 and TE 13 of the second day of the trial Hay 6, 1993. We find, therefore, MMI knew the Louisa plant had originally been insulated with asbestos.

MMI came to work at Louisa to remove asbestos insulation. They knew it was there. NMI supervisors could not simply rely on assurances of the power company. Given the circumstances, section 1926.58 (f) (2) (i) mandated monitoring. This was not done at level 70. HMI violated the cited standard (citation 4) and we so hold.

Finally, the secretary of labor charged MMI with failing to dispose of waste asbestos insulation under the requirements of 1926.58 (1) (2) (citation 8). There is no proof in this case tying HMI to the insulation scrap found by compliance officer Edwards since it might have been dropped that day or lain on the floor for several months or years. Neither is the scrap capable of any identification as to who produced it or left it where CO Edwards found it. We will thus exclude sample number one from our deliberations on the issue whether employees Sias and Napier, and other MMI employees, were removing and improperly discarding material containing asbestos. If they were, then citation 8 should be sustained.

Mr. Sias testified he removed some whitish material on an irregular basis before placing new sheet metal on the expansion joint, discarding the material on the grating. TE 13. Sample two tested negative for asbestos while sample three tested positive TE 123 and 124. Thus there is no showing the material

removed and discarded by employees Napier and Sias either did or did not contain asbestos to trigger the requirements of 1926.53 (1) (2). In any event, that discarded material is no longer available for testing. We do-not know what was removed and discarded and are not willing to speculate that MMI employees were improperly disposing of asbestos. We only know there was asbestos in the area and in the Louisa plant in general.

Examining the problem from another angle, sample two which came from a scraping overhead in the level 70 area tested negative for asbestos. TE 123, Edwards said he found that confusing (TE 123) because employee Napier had shown him where to take the sample as representative of where the employees had been removing the material. TE 123

Then CO Edwards returned to the Louisa power plant without Napier a fourth time to remove .a larger, third sample from the same area as sample two; that sample tested positive. TE 124. We have, then, two samples CO Edwards said came from the area where MMI employees removed insulation and discarded it on the catwalk: one tested positive for asbestos and one (located for the compliance officer by an employee) did not.

We cannot discern whether it is more or less likely the material removed by Napier and Sias and discarded on the floor was asbestos or not. Bryan v. Gilpin, 282 S.W.2d 133,135 (1955). Given that, citation 3 must be dismissed and we so order.

Without pleading the matter affirmatively as required by ROP section 4 (2) and CR 8.03, respondent relies on employee

misconduct as a defense in its brief before this commission. This defense, however, does not rise to a level requiring dismissal of citations 1 and 4 which we have affirmed.

Respondent argues that two of its employees (Napier and Sias) violated instructions by knocking off screw heads before installing sheet metal at level 70 thereby exposing themselves to airborne asbestos fibers. In the -case of Clark Rural Electric Cooperative Corporation, KOSHRC 830-82, one of our hearing officers listed five requirements for establishing the employee misconduct defense:

1. The violation must have been caused by an employee's action.
2. That action must have been one not normally anticipated.
3. The action must have been of short duration.
4. The action must not be participated in, observed by or performed with the knowledge of any supervisory personnel.
5. The action must be in conflict with a well established [safety] policy enforced through disciplinary action or other appropriate procedures.

Sias and Napier worked for several days knocking off screw heads so the newly-installed sheet metal would have a smooth finish. TE 45, 46, 80, 87. By comparison, in the Clark case an employee was electrocuted when a crane touched a live overhead wire as the employee standing on the ground touched the crane.

Although we are not bound by our hearing officers' decisions, we cite the rules in Clark with approval.

Several days is not a short duration violation. MMI supervisors either had to know their employees were knocking off the screw heads or they weren't checking.

While MITI may have an excellent safety policy in the

abstract, they put on no proof the policy was enforced through discipline. If foreman Bailey saw the allegedly asbestos-containing material but took no action, that fact establishes the safety policy was not strictly enforced. The federal review commission in Bill C. Carroll Company, Inc, DNA 7 OSHC 1806, 1811, CCH 1979 OSHD paragraph 23,940 (1979), says in part "That a foreman feels free to breach a company safety policy is strong evidence that implementation of the safety policy is lax."

We have, then, a violation which was not of short duration and a safety policy with lax enforcement. We find MMI has not made out a case of employee misconduct.

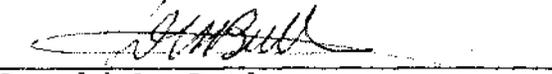
We sustain citation 1, citation 4 and the penalties (determined by the hearing officer to be \$420 and \$560 respectively) and dismiss citations 2, 3, 8 and 9.

It is so ordered.

This 16th day of February, 1994.

George _____ 4agon,,r141°) 444


Charles E. Yates


Donald A. Butler

DECISION NO. 2595-94
DATE OF ISSUANCE: 02-17-94

CERTIFICATE OF SERVICE

Copy of the foregoing Order has been served upon the following parties in the manner indicated:

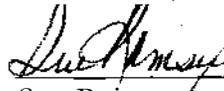
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This 17th day of February, 1994.

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