COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2403-93

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

LAWHORN TOOL & DIE, INC. — RESPONDENT

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DECISION AND ORDER
OF THE REVIEW COMMISSION

We called this case for review on our own motion under rule 47 (3). We asked for briefs on the issue whether penalties under our statute may be collected by the secretary of labor when a business has filed for chapter 11 protection under the U.S. bankruptcy code. Since we received no brief from either party on this issue, we shall proceed directly to the issue at hand.

Our hearing officer in her recommended order sustained all contested citations and set a total penalty of $44,765. We affirm her decision on the contested citations and penalty and adopt her decision on these matters as if fully set out in this decision.

In her recommended order, our hearing officer held that a chapter 11 bankruptcy:

> does not excuse it from complying with Kentucky's Occupational Safety and Health Act, or exempt it from the Secretary's enforcement of that Act.

We agree with our hearing officer recommended order to the extent that respondent's chapter 11 bankruptcy does not prevent the secretary from enforcing safety and health regulations and

necessary abatement and affirm that portion of her decision. However, to the extent that the language of our hearing officer decision which says that "...from the secretary's enforcement of that Act..." means the secretary may go ahead and collect the $44,765 in penalties from Lawhorn Tool and Die (Lawhorn) despite the protection of chapter 11 of the US bankruptcy act, we reverse.

Lawhorn filed chapter 11 protection on May 27, 1993. Then the labor cabinet inspected Lawhorn on June 4, 1993 and issued the citations in this case on June 24, 1993.

Bankruptcy as a defense to the collection of an OSHA penalty is a case of first impression here in Kentucky. A quick review of the cases, however, reveals that the U.S third circuit court of appeals has dealt with the issue.

We are not bound by federal occupational safety and health decisions (except perhaps as the U.S. Supreme Court may issue decisions based on constitutional provisions). But our Kentucky system and the federal are quite similar both procedurally and substantively.

We look to federal occupational safety and health decisions as a point of departure in our analysis in areas where this commission and the Kentucky courts have not spoken.

In the case Brock v. Morysville Body Works, Inc., 829 F.2d 838, (3d cir. 1987), the third circuit faced an issue like ours today. Morysville filed for chapter 11 bankruptcy protection on August 3, 1984 and was inspected by the secretary's OSHA compliance officer on September 17, 1985. Along with the citation, a penalty

of $21,000 was assessed. After the citation and penalty became a final order, the secretary petitioned the third circuit for collection of the penalty.

On the issue whether the secretary could collect the $21,000 penalty despite the protection of chapter 11 of the U.S. bankruptcy code, the third circuit held that abatement of safety and health hazards could not be prevented or held up by a chapter 11 bankruptcy but that collection of the penalty would be stayed pending a decision by the bankruptcy court.

We are of the opinion that the policy established by the court's decision in Morysville, supra, is one we should follow in Kentucky. Our occupational safety and health law (KRS chapter 338), like the federal law, is designed to prevent future harm to employees. That is the essential purpose of the act. It would serve no purpose for an employer to fail to abate proven safety and health violations simply because of a chapter 11 bankruptcy. The purpose of the bankruptcy code is to protect persons from money judgements, in this case $44,765, not to prevent enforcement of those laws which protect the safety, health or welfare of our citizens.[1]

We therefore sustain all contested citations, order immediate

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[1] On the issue of collection of OSHA penalties from respondents in bankruptcy, we do not believe the secretary as a creditor is entitled to take precedent over the claims of fellow creditors. For the secretary to take precedence in collection of debts against the respondent-bankrupt, would in no way serve the purpose of the occupational safety and health act to assure each and every worker a working environment free of hazards. Respondent's resources should first go towards worker safety and health and then to the committee of creditors.

abatement of all violations and fix the penalty in the amount of $44,765. However, we stay collection of the penalty fixed in this case pending a resolution of the bankruptcy issues in the bankruptcy court.

It is so ordered.

George R. Wagoner
Chairman

Donald A. Butler
Member