COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC DOCKET NUMBER 3165-98

SECRETARY OF LABOR,
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

LION APPAREL — RESPONDENT

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DECISION AND ORDER OF
THIS REVIEW COMMISSION

This case comes to us on respondent Lion Apparel's petition for discretionary review (PDR).[1] Rather than grant the petition, we called this case for review on our own motion and asked for briefs. Section 47 (3).

KRS chapter 338, the Kentucky occupational safety and health act, charges the Secretary of Labor with its enforcement. When his compliance officers conduct an inspection and discover violations, the secretary issues citations to the employer, here Lion Apparel. KRS 338.141. In this case, the secretary issued one serious citation to Lion with a proposed penalty of $975 following an inspection initiated by a complaint. Transcript of the evidence (TE) 20.

The Kentucky General Assembly created the review commission and authorized it to "...hear and rule on appeals from citations..." KRS 338.071 (4). (emphasis added) The commission,

[1] Section 48 (1) of our regulations, enacted as 803 KAR 50:010.

under the statute, reviews the citations and not merely the recommended orders issued by its hearing officers it appoints under KRS 338.081. Thus the review commission by statute is the ultimate fact finder in contested cases and may take the case from the hearing officer and make the final decision. The United States Court of Appeals for the Sixth Circuit, analyzing a similar statute, held that when the federal review commission reviews a case, it does so "de novo." Brennan, Secretary of Labor v. OSHRC and Interstate Glass, 487 F.2d 438, 441, (8th Cir. 1973), CCH OSHD 16,799, BNA 1 OSHC 1372. See also Accu-Namics, Inc. v. OSHRC, 515 F.2d 828, 833 (5th Cir. 1975), CCH OSHD 19,802, BNA 3 OSHC 1299.

A party who feels aggrieved by a decision of a hearing officer may petition this commission for discretionary review (section 48 (1), 803 KAR 50:010) or the commission may elect to call a case for review on its own motion. Section 47 (3), 803 KAR 50:010.

Lion Apparel makes clothing for fire fighters. Fabric, purchased by Lion for the clothing it makes, contains minute amounts of formaldehyde. TE 25. Because the fabric is treated with formaldehyde, the cloth comes to the factory with a material safety data sheet which states the concentration of any chemicals it may contain. These material data sheets list possible consequences from exposure to formaldehyde; they include "skin, respiratory, nasal or sinus sensitivity." TE 26. During her inspection the compliance officer, industrial hygienist Nicole Michelle Perry, talked with employees who complained about skin

rashes. TE 31.

Counsel for Lion, Mr. Fischer, immediately objected to the hearsay testimony citing to KRE 803 (a) (4). In support of his objection Mr. Fischer stated the hearsay exception was "the statement by the parties, agent, or servant concerning a matter within the scope of the agency or employment made during the existence of that relationship." TE 32. Actually, while Mr. Fischer at the hearing did correctly state the rule, the cite is KRE 801A (b) (4). Because this issue assumed a central place in the hearing of this case, and because the issue of employee hearsay often plays a role in cases which come before us, we shall delve into the matter at some length. KRE 801A (b) says:

> A statement is not excluded by the hearsay rule... if the statement is offered against a party and is:
>
> (4) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship...

Counsel for Lion argued the hearsay must be about the employee's work. He cited to Darnell v Northern Can Systems, Inc., 937 F.Supp. 668, 673 (ND Ohio 1995). In that case an employee worked on a production line packing can lids. A witness offered to testify to what the packing employee said about how he got his job. The court in Darnell excluded the testimony because it was about a personnel matter and not about packing can lids. Lion says because it hires people to sew and not to discuss their health or problems they may be having at work, the proffered

hearsay testimony was not admissible under KRE 801A (b) (4) as it was not within the scope of employment. TE 32-34. Lion's argument is a very narrow reading of Darnell.

For us today the issue is whether a hearsay statement about a medical complaint from a sewer for Lion Apparel can be admitted under the 801A (b) (4) exception to the rule against hearsay? Lion's position is their workers are paid to sew but not to discuss their work related medical problems. Hearing officer Head very commendably likened the situation to a case where an employee working with sharp objects cuts himself at work. TE 44. Mr. Head at that point allowed the hearsay testimony. We agree.

An employee who sews might work on a machine that regularly sticks her with the sewing needle. When an employee is injured on the job, the employer must file a first report of that injury. KRS 342.038. The same employer must also record the injury on its accident and illness report required by 803 KAR 2:180. Employers cannot be everywhere at once. To report an injury, the employer must regularly rely on its employees as the source of the injury reports. So it is with an illness caused by a substance encountered at work. The cited workers compensation statute and the occupational safety and health regulation broadly suggest that employees must report medical problems encountered at work. Employers must report injuries and illnesses. Since employers cannot do so unassisted, we infer KRS 342.038 and 803 KAR 2:180 make the reporting of work related injuries and illnesses, by implication, part of an employee's job.

The same is true of employee discussions of work related injuries and illnesses with compliance officers. KRS 338.121 makes it clear that employees may register work related complaints with the Secretary of Labor and that they may do so confidentially. Similarly, KRS 338.101 (1) (a) makes it plain that compliance officers may interview employees privately when performing inspections. This commission has consistently taken the position that employee complaints about job safety and health, whether to their employer or the inspecting compliance officer, are vital to the enforcement of Kentucky's occupational safety and health law.

We hold that when an employee discusses work related injuries or illnesses with his employer or the Secretary of Labor, he does so as a part of his job; given that such discussions relate to the employee's job, the exception found in KRE 801A (b) (4) applies. Of course, the hearsay must be made during the existence of the employment relationship and must be about the employee quoted at the hearing. Hearsay testimony from an employee about another employee would be clearly inadmissible. Hearing officer Head properly admitted the testimony.

Later in the hearing, on cross examination, Lion asked compliance officer Perry for the names of employees who were the source of her hearsay testimony. TE 65. Labor objected. Our hearing officer said that "in fairness those employees' names must be revealed." Hearing officer Michael Head then ruled the hearsay testimony about employee complaints would be stricken from the

record unless their names were revealed. TE 67. As the Secretary of Labor declined to reveal employee names, the hearing officer struck the testimony, characterizing it after the fact as an avowal. CR 43.10.

Here the issue is whether hearsay from an unidentified declarant may be admitted as an exception to the rule against hearsay under KRE 801A (b) (4)? In Davis v Mobile Oil Exploration and Producing Southeast, Inc., 864 F2d 1171, 1173-1174 (5th Cir 1989), the court permitted hearsay testimony from an unidentified employee after two witnesses stated he was a Mobile company man. The court said:

> ...a district court should be presented with sufficient evidence to conclude that the person who is alleged to have made the damaging statement is in fact a party or an agent of that party for purposes of making an admission within the context of Rule 801 (d) (2) (D)[2]...

In the case at bar the compliance officer talked with the employee herself. She had, thus, identified her as a Lion employee at the time she made the statement. Under Davis, the unidentified Lion employee's hearsay statement is admissible. It was error for the hearing officer to rule otherwise. We reverse him on this matter.

During her inspection the compliance officer took air samples to ascertain whether the employees were breathing formaldehyde and if so in what amounts. She took four samples measured according to an 8 hour time weighted average; the tests showed .043 parts

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[2] FRE 801 (d) (2) (D) is the same as KRE 801A (b) (4).

The applicable standard reads:

> The employer shall also make the following medical surveillance available promptly upon determining that an employee is experiencing signs and symptoms indicative of possible overexposure to formaldehyde. 29 CFR 1910.1048 (l) (3)

The permissible exposure level for formaldehyde is .75 PPM. The greatest amount of formaldehyde found in airborne samples was .043. The greatest concentration of formaldehyde in fabric used by Lion was 10 PPM or .001%. Obviously, small amounts of formaldehyde in the air will bring the standard into play. However, the standard does not absolutely ban formaldehyde from the work place. Section (l) (1) (ii) of 1910.1048 says in part:

> When determining whether an employee may be experiencing signs and symptoms of possible overexposure to formaldehyde, the employer may rely on the evidence that signs and symptoms associated with formaldehyde exposure will occur only in <u>exceptional circumstances</u> when airborne exposure is less than 0.1 ppm and when formaldehyde is present in material in concentrations less than 0.1 percent. (emphasis added)

This standard, which explains when an employer may rely on his employees not experiencing signs and symptoms of exposure to formaldehyde, is a confusing one. First it talks about parts per million for airborne formaldehyde. Second, it talks about formaldehyde in material as a percentage. Barring exceptional circumstances, the employer may assume his employees have no signs or symptoms of overexposure if airborne formaldehyde is less than .1 part per million. The compliance officer's tests showed only

.043 parts per million of formaldehyde in the atmosphere. We find the airborne levels of formaldehyde found by the compliance officer were substantially less than the .1 PPM in 1910.1048 (l) (1) (ii).

Next, the greatest concentration of formaldehyde in the material used at Lion was .001% which is smaller than .1% by a factor of 100. We find the concentration of formaldehyde in the material at Lion was substantially less the 0.1% threshold in 1910.1048 (l) (1) (ii).

Where an employer uses material which contains .001% formaldehyde and airborne exposure is .043 PPM or less, 1910.1048 (l) (1) (ii) says an he may assume his employees do not show signs or symptoms of exposure to formaldehyde unless there is a showing of exceptional circumstances. The issue then is what does exceptional circumstances mean and was there such a showing.

At the close of the trial Lion's lawyer asked the compliance officer to read a definition found in the preamble to the formaldehyde standard into the record. This is what she read:

> Because observations of signs or symptoms related to formaldehyde exposure have only occurred in situations involving exposures above 0.1 parts per million, OSHA would expect that such signs and symptoms would almost never occur at levels below 0.1 parts per million. Only in the most exceptional circumstances will the administration of a questionnaire be called for below 0.1 parts per million. Such is where an employee has a history of hypersensitive reaction. TE 119

While the standard itself does not define exceptional circumstances, the preamble does. To prove exceptional

circumstances, which the secretary must do here because the airborne level at the plant was less than .1 PPM and the material contained less than .1 percent of formaldehyde, there must be proof that at least one employee had a history of a hypersensitive reaction.

The proof in this case is the airborne levels of formaldehyde were below the action level, PEL and STEL. The concentration of formaldehyde in the cloth was far less than the .1% specified in 1910.1048 (l) (1) (ii). There is, however, no proof any employee had a 'history of hypersensitivity.' The compliance officer testified she encountered employees who reported swelling, rashes, nausea, headaches, fingers cracking and drying. TE 45. There is no evidence how long these symptoms had existed, how long the employees worked for the company, how severe the problems were or whether the employees touched cloth while at work. There is no testimony from a physician connecting the reported problems with formaldehyde exposure. In short, there is no proof in the record that any employee had a history of hypersensitivity to formaldehyde.

In his recommended order the hearing officer affirmed the citation and approved the proposed penalty. He found Lion Apparel periodically tested its atmosphere for formaldehyde. Lion never detected any formaldehyde in its atmosphere. TE 94. Our hearing officer found the plant manager was aware that formaldehyde could cause skin irritation. Recommended order (RO) p. 7. He also found the plant manager knew employees were filing workers'

compensation reports about rashes on their hands. RO 11. Based on the manager's knowledge about the workers' compensation reports and the possible effects of formaldehyde, the hearing officer concluded her knowledge was sufficient to trigger the medical surveillance questionnaire requirements under the standard. We do not agree.

The hearing officer reached his conclusions under the mistaken impression Lion had formaldehyde in excess of the threshold limits contained in 1910.1048 (l) (1) (ii). He wrote "Although the Preamble speaks of the administration of a questionnaire 'only in the most exceptional circumstances' where exposure levels are below 0.1 ppm, the proof showed most of Lion Apparel's materials contained up to 10 times this level (of formaldehyde (<1ppm) and one material contained up to 100 times this level (<10ppm)." RO 11. Apparently, our hearing officer confused parts per million of formaldehyde in the atmosphere with a percentage of formaldehyde contained in the fabric used to make the garments. We find our hearing officer erred when he concluded the amount of formaldehyde contained in the fabric exceeded the permissible levels by 10 to 100 times and reverse him on this point. Instead, we find the levels of formaldehyde in the atmosphere and in the material was below those threshold values in 1910.1048 (l) (1) (II).

Section (l) (1) (ii) of 1910.1048 says an employer may "rely on the evidence that signs and symptoms associated with formaldehyde exposure will occur only in exceptional circumstances

where airborne exposure is less than 0.1 PPM and when formaldehyde is present in material in concentrations less than 0.1 percent." The proof in this case is airborne levels of formaldehyde were only .043 PPM or less and the presence of formaldehyde in the material was at the most .001 percent and we so find. Because of the levels of formaldehyde, airborne and present in materials, were less than the threshold amounts in 1910.1048 (1) (1) (ii), we conclude Lion had no reason to suspect formaldehyde exposure barring evidence of exceptional circumstances.

We find no proof in this case of exceptional circumstances, defined by the preamble to the standard as a history of hypersensitivity to formaldehyde. No employee was diagnosed as being hypersensitive to formaldehyde. Neither do we have any proof of the length of exposure, the severity of the reaction to formaldehyde or the employee's specific job assignment. We have only an assumption that formaldehyde caused the conditions reported to the compliance officer.

We conclude under the facts of this case that Lion Apparel had no reason to determine its employees were experiencing any signs or symptoms of possible overexposure to formaldehyde at the time of the inspection. We conclude the employer did not violate the cited standard.

We reverse the hearing officer's recommended order and dismiss the citation.

Entered this June 1, 1999.

It is so ordered.

Thomas M. Bovitz
Chairman

Donald A.Butler
Commissioner

Robert M. Winstead
Commissioner

Thomas M. Bovitz
Chairman

Donald A. Butler
Commissioner

Robert M. Winstead
Commissioner

Copy of the foregoing Order has been served upon the following via Messenger Mail:

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This 2nd day of June, 1999.

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