

**COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
ADMINISTRATION ACTION NO. 00-KOSH-0087
KOSHRC 3396-00**

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

**DECISION AND ORDER OF
REVIEW COMMISSION**

ROSS BROTHERS CONSTRUCTION CO.

RESPONDENT

* * * * *

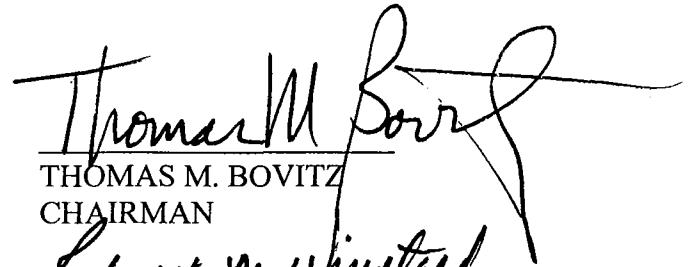
This matter came before the Review Commission on its own motion for review. On January 24, 2001, the Review Commission ordered the parties to file simultaneous briefs on three issues: 1) whether the correct regulation and standard was applied in the present case; 2) whether asserting unpreventable employee misconduct as an affirmative defense is plausible in this case and; 3) what laws or regulations would be violated if it were found that the Complainant abused its prosecutorial discretion, what harm would such an abuse represent to the Respondent in the present case and what remedy would be available to the Respondent or any Respondent were such a claim of abuse verified.

The Review Commission, having considered the briefs submitted by the parties, and the transcript and evidence submitted at the hearing makes the following findings:

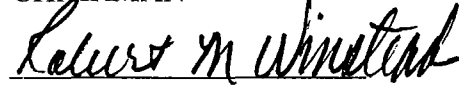
The correct regulation and standard was applied in the matter at hand. The Respondent, although asserting the affirmative defense of unpreventable employee misconduct, is unable to satisfy its evidentiary burden. There has been no evidence presented, either in the hearing record or in the briefs submitted, of prosecutorial abuse.

IT IS ORDERED that the Findings of Fact, Conclusion of Law and Recommended Order be and it hereby is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law and Final Order of the Review Commission.

This 11th day of April, 2001.

A handwritten signature in black ink, appearing to read "Thomas M. Bovitz", written over a horizontal line.

THOMAS M. BOVITZ
CHAIRMAN

A handwritten signature in black ink, appearing to read "Robert M. Winstead", written over a horizontal line.

ROBERT M. WINSTEAD
MEMBER

A handwritten signature in black ink, appearing to read "Donald A. Butler", written over a horizontal line.

DONALD A. BUTLER
MEMBER

CERTIFICATE OF SERVICE

A true copy of the foregoing Decision and Order has been served on the following in the manner indicated:

HON JAMES R GRIDER
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OFFICE OF GENERAL COUNSEL
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C ROBERT SCHAUB
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This 11th day of April, 2001

KOSH REVIEW COMMISSION
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JACQUES J. WIGGINTON
EXECUTIVE DIRECTOR