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KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
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EXECUTIVE DIRECTOR

MERLE H. STANTON
CHAIRMAN

CHARLES B. UPTON
MEMBER

JOHN C. ROBERTS
MEMBER

October 23, 1980

KOSHRC #691

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

CITY CLEANING SERVICE, INC. — RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STANTON, Chairman; UPTON and ROBERTS, Commissioners.

UPTON, Commissioner, for the MAJORITY:

A Recommended Order of Hearing Officer John T. Fowler, Sr., issued under date of August 11, 1980, is presently before this Commission for review pursuant to an Order of this Commission Granting Complainant's Petition or Motion for Discretionary Review.

Because of the somewhat uncustomary procedures followed in this case and their bearing upon the ultimate substantive outcome herein, we recite an abbreviated procedural history.

An initial Recommended Order dated April 4, 1980, issued in this matter subsequent to hearing held on January 22, 1980.

The Respondent filed a letter with the Commission on 8 April 1980, which the Commission construed to be a petition for discretionary review and which was granted by order of the Review Commission dated 10 April 1980. The Respondent's letter alleged that he did not receive a fair hearing and impartial judgment in his contest.

After careful review of the record as presented at the January 22 hearing, this Commission by Order of Remand dated 8 May 1980 concluded that "In the interests of fundamental fairness and justice to all parties, and pursuant to Rule 59 of the Kentucky Rules of Civil Procedure, KRS Chapter 338.081(2) and Section 36 of the KOSHRC Rules of Procedure" a partial rehearing be granted. The Order of Remand authorized a rehearing "to the extent that . . . the Respondent . . . may present any evidence (before the Hearing Officer) relevant to his defense," and granted the Complainant the right of cross-examination on any issues raised by the Respondent's direct testimony.

Specifically, the Order of Remand instructed the Hearing Officer to conduct the rehearing

> in accordance with the powers delegated to him by KRS Chapter 338.081(2) to . . . "examine witnesses, require the production of evidence, administer oaths and take testimony . . . "
>
> . . . We further note that pursuant to Section 36 of the KOSHRC Rules of Procedure it is the duty of the Hearing Officer "to assure that the facts are fully elicited" in a fair and impartial manner.

The Recommended Order now on review issued from the rehearing in this matter, held on 25 June 1980.

Prior to a consideration of the Hearing Officer's findings and conclusions on the merits of this case, we address a question contemplated by Hearing Officer Fowler in the Recommended Order and subsequently raised on review by the Complainant concerning the nature and degree of the Hearing Officer's participation in the June 25 rehearing.

Counsel for the Complainant contends that on remand the Hearing Officer acted as Counsel for the Respondent.

Citing Formco of Tennessee, KOSHRC #536, and Tarlton's One-Hour Martinizing, KOSHRC #496, the Hearing Officer stated that it was his opinion that the procedures to be followed on rehearing as set forth in the Order of Remand were contrary to the prior policy of the Commission concerning the role and conduct of the Hearing Officer during a hearing.

We note first of all that both decisions cited by the Hearing Officer in support of his reasoning in the August 11 Recommended Order are Recommended Orders which did not receive a discretionary review by the full Commission. This Commission finds that while such unreviewed decisions are binding upon the parties, they do not constitute binding Commission precedent as do the Decision and Orders issued by this Commission. This position is consistent with that adopted by the Federal Occupational Safety and Health Review Commission and has been affirmed by the Sixth Circuit Court of Appeals.[1] We therefore find the following statement of the Federal Review Commission in State, Inc., supra, at 25,503 to be particularly apropos: " . . . We . . . decline to pass on the issue raised or on any other aspect of the Judge's decision. Although the decision is affirmed, it is not binding as precedent. . . . However, it is a guide in the growing body of occupational safety and health law." (Emphasis added).

The Complainant in his Motion for Discretionary Review charges that the Hearing Officer acted as counsel for the Respondent by "presenting defenses for the Respondent" and by "eliciting facts which may be helpful to the Respondent."

We find that the Hearing Officer conducted the rehearing in accordance with the Order of Remand and with KRS 338.081(2) and 803 KAR 50:010 Section 36. One aspect of the Hearing Officer's role is the responsibility of determining to what degree his own active participation becomes adversary--that is, distorting of the Hearing Officer's role as an impartial trier of fact. Implicit in the Order of Remand is a finding by this Commission that the particular circumstances of the January 22 hearing operated somewhat prejudicially against this particular Respondent. That decision was made by an objective assessment by this Commission of the totality of facts and circumstances surrounding the January 22 hearing as indicated by the record. We find the Hearing Officer's more active participation in the hearing on remand to be entirely within the scope of Section 36 of our rules, and within the powers and duties of the Hearing Officer as set forth in KRS 338.081(2). While we do not encourage excessive and unnecessary partici-

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[1]See, for example, State, Inc., 1976-1977 CCH OSHD Paragraph 21,209 (1976); Water Works Installation Corporation, 1976-1977 CCH OSHD Paragraph 20,780; Leone Construction Company, 1975-1976 CCH OSHD Paragraph 20,387 (1976). See also RMI Company v. Secretary of Labor, 594 F.2d 566,571 n. 13 (6th Cir. 1979). We note that while neither the Federal Occupational Safety and Health Review Commission decisions nor those of the Sixth Circuit Court of Appeals are binding upon this Commission, they are persuasive in the absence of a pertinent state decision. Chesapeake and Ohio Railway Company (Chessie System), KOSHRC #612 (1980), DEOC, Vol. 5; The Trane Company, KOSHRC #499 (1979), DEOC, Vol. 5).

pation in the hearing by any of our Hearing Officers, we find that Hearing Officer Fowler's participation herein was fair, impartial and entirely justified by the circumstances indicated by prior record in this case.

We now turn to a review of the Hearing Officer's findings and conclusions with respect to the substantive questions at issue herein.

We find that the weight of the evidence adduced at both hearings supports the Hearing Officer's findings of fact and conclusions of law.

Accordingly, it is the ORDER of the Review Commission that the Recommended Order of Hearing Officer Fowler dismissing Citation No. 1 Item 1 and its concomitant proposed penalty be and it is hereby AFFIRMED, except to the extent that it is inconsistent with the principles set forth in this Decision and Order. All findings and conclusions of the Hearing Officer not inconsistent with this opinion are hereby AFFIRMED.

Charles B. Upton

Charles B. Upton, Commissioner

s/John C. Roberts

John C. Roberts, Commissioner

STANTON, CONCURRING IN PART, DISSENTING IN PART:

I concur with the majority's opinion insofar as it holds that unreviewed Recommended Orders are binding upon parties to them, but that they do not constitute binding Commission precedent.

I further agree with the majority that Hearing Officer Fowler conducted the Hearing in a fair and impartial manner within the permissible scope of 803 KAR 50:010 Section 36 and KRS 338.081(2).

On the merits, however, I would find for the Complainant. The Hearing Officer's dismissal of the citation in this matter is based upon his finding that the Respondent proved that there was isolated occurrence of employee misconduct involved.

As I stated in my dissent in Jay-Gee, Inc., KOSHRC #461, DEOC Vol. 5, it is my opinion that the defense of an isolated occurrence of employee misconduct is quite narrow, and is established only when an employer shows by specific factual detail that there has been a deviation from a company work rule or instruction which is enforced. The deviation must have been unknown to the employer.

It is my opinion that the Complainant met its initial burden of proof--that is, the Labor Department initially established the existence of a violation of the cited statute and standard. I would hold that the Respondent, however, did not present evidence sufficient to establish that the employee who was working from the window ledge did so in disregard of an enforced company work rule.

The Respondent Company's President testified that he was not present at the worksite when the employee fell from the ledge. There was no corroboration of the Respondent's statements by a foreman or by any other employee concerning the presence of additional sections of ladder on the truck. The Hearing Officer in the Recommended Order admitted that the training method employed by the Respondent was "actually an on-the-job training session of doubtful nature." Recommended Order, August 11, 1980, p. 4. This conclusion is supported by the Record.

Because of their relevance to the facts herein, I quote from my dissent in Jay-Gee, Inc., supra, at 2:

> The Company did not establish that the employee's action was a deviation from an "enforced" company work rule or instruction regarding use of this particular device.
>
> Another factor to be considered in cases involving a defense of isolated occurrence is the degree of supervision exercised by the employer. It is evident in this case that company supervision or instruction to the particular employee involved was minimal. The degree of supervision exercised directly affects the employer knowledge element of the defense.

I would therefore find the Respondent in violation of 29 CFR 1910.28(a)(1) (as adopted by 803 KAR 2:020) or in the alternative, KRS 338.031(1)(a).

Merle H. Stanton, Chairman

DATED: October 23, 1980
Frankfort, Kentucky

DECISION NO. 921

Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
U. S. 127 South
Frankfort, Kentucky
Attention: Hon. Michael D. Ragland
Executive Director for
Occupational Safety & Health

Hon. Frederick G. Huggins (First Class Mail)
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Mr. William C. Masters, Sr., Pres. (Cert. Mail #P14 8475636)
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625 South Hancock Street
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This 23rd day of October, 1980.

Iris R. Barrett
Executive Director