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GOVERNOR

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CARL J. RUH
MEMBER

CHARLES E. BRADEN
MEMBER

May 14, 1984

KOSHRC #944

SECRETARY OF LABOR COMMONWEALTH OF KENTUCKY	COMPLAINANT
VS.	
ALLIED CHEMICAL, SEMET-SOLVAY DIVISION	RESPONDENT
AND	
ARMCO, INC.	INTERVENOR
UNITED STEELWORKERS OF AMERICA	AUTHORIZED EMPLOYEE REPRESENTATIVE

DECISION AND ORDER
OF REVIEW COMMISSION

Before COBB, Chairman; RUH and BRADEN, Commissioners.

PER CURIAM:

A recommended order of Hearing Officer Shirley A. Cunningham, Jr., issued on January 19, 1984, is presently before this Commission for review pursuant to a petition for discretionary review filed by the Intervenor, Armco, Inc.

As a result of an inspection conducted by a Department of Labor (Labor Cabinet) Occupational Safety and Health Compliance Officer on August 13 and 20, and October 14, 1981, Semet Solvay, Inc., a division of Allied Chemical Corporation was cited for violations of certain sections of the coke oven emissions standards promulgated pursuant to the Occupational Safety and Health Act, KRS Chapter 338. The citation was issued on December 8, 1981, and Semet-Solvay filed a timely Notice of Contest on December 23, 1981. On December 31, 1981, Semet-Solvay was acquired by Armco, Inc., which petitioned and was granted status as intervenor and by virtue of its acquisition is the real party in interest in this matter.

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The employees' bargaining unit at Armco, the United Steelworkers of America (USWA) Local 1865, requested and on February 12, 1982, received party status as Authorized Employee Representative.

On or about February 9, 1982, a settlement agreement, purportedly disposing of the issues in contest, was signed by representatives of Semet-Solvay, Armco and the Labor Cabinet. On February 19, 1982, a copy of the proposed settlement agreement was served by mail on the employee representative.

On April 2, 1982, Mr. Robert Easton, then director of the Division of Compliance of the Kentucky Occupational Safety and Health program, toured Armco's coke oven operation and testified at the hearing later held in this matter.

On June 29, 1982, the Labor Cabinet moved the Review Commission for leave to file an untimely Complaint. This motion was granted, and a Complaint was filed on September 2, 1982.

On July 15, 1982, Armco filed the proposed settlement agreement and a proposed order adopting the agreement with the Review Commission. On July 20, 1982, the USWA stated, in writing, its objections to the proposed agreement and requested a hearing before the Commission on these objections.

By order of this Review Commission issued on August 6, 1982, the request of the employee representative for a hearing on its objections to the settlement agreement was granted. The Commission ordered the matter assigned to a hearing officer to afford the employee representative an opportunity to place its objections on the record, but limited evidence to that relevant to claims that the agreement was not consistent with the "purpose and policy of the statute."

The hearing was held on October 29 and November 16, 1982. The hearing officer issued his Findings of Fact, Conclusions of Law and Recommended Order on January 19, 1984. He found each of the items in the proposed agreement to which the employee representative objected consistent with the purpose and policy set forth in the Act. However, he recommended adoption of the agreement only if current levels of coke oven emissions are within the limits prescribed in the standard, and ordered the Labor Cabinet to conduct another inspection of the facility.

Armco filed a timely Petition for Discretionary Review with this Commission pursuant to Section 48 of the Commission's Rules of Procedure (803 KAR 50:010). We granted the petition on February 15, 1984. Armco requested and was granted review of the following:

1. The hearing officer concluded that each of the challenged provisions of the Settlement Agreement was consistent with the purposes and policies of the Act, yet improperly failed to approve the Agreement.

2. The hearing officer improperly ordered reinspection of the coke oven facility, notwithstanding his conclusion that each challenged provision of the Settlement Agreement satisfies the test established by the Commission's order dated August 6, 1982.

3. The hearing officer's recommended decision improperly permits the Authorized Employee Representative to independently prosecute or demand terms of settlement.

4. The hearing officer's recommended decision improperly permits the Authorized Employee Representative to object to terms of the Settlement Agreement other than the length of the abatement period. (Respondent's Petition for Discretionary Review, pp. 1-2.)

I.

The first issue we decide in this review is whether the hearing officer acted within the scope of his authority in ordering reinspection of the coke oven facility.

A hearing officer serves the Review Commission by conducting its hearings and issuing Findings of Fact, Conclusions of Law and Recommended Orders to the Commission, subject to review by the Commission through petitions for discretionary review submitted by the parties (803 KAR 50:010, Section 48) and/or calls for review by the Commission (803 KAR 50:010, Section 47.) Obviously, a hearing officer has no greater authority than that vested in the Review Commission by the Occupational Safety and Health Act (KRS Chapter 338). We believe that ordering inspection of an employer's premises after a hearing or for purposes other than discovery authorized by appropriate rules of procedure is beyond the scope of our authority and consequently not within the scope of authority of a hearing officer.

II.

The extent to which an employee representative who has elected party status may participate in proceedings before the Review Commission is the subject of two of Armco's objections, but will be considered as one objection and treated as such here.

In the Commission's Order of August 6, 1982, the USWA was granted a hearing on its objections to the proposed settlement agreement. The Commission stated at that time that authorized employee representatives " . . . having filed timely written objections . . . are entitled to appear before a hearing officer . . . and place on record their objections." It is the extent to which the employee representative participated in these proceedings that Armco objected at the hearing (TR. Vol. I, pp. 37-42) and which it raised again in its petition for review.

The Kentucky Occupational Safety and Health Review Commission's Rules of Procedure permit a representative of affected employees to elect party status in order to participate in some Commission proceedings. KOSHRC Rules of Procedure, Section 13(1) (803 KAR 40:010). Employee representatives have in the past and will continue to participate fully in all aspects of hearings, including examining and cross-examining witnesses, introducing documentary evidence, filing motions, briefs, etc. in contested cases. By our order of August 1982, the Commission, while recognizing that the Secretary of Labor " . . . must be attentive to the desires, interests, and positions of employees . . . ," he has the " . . . prosecutorial discretion to dismiss and settle . . . actions which he has initiated."

Section 10(c) of the Federal OSH Act, the model for the state Act, states in relevant part:

> If an employer notifies the Secretary that he intends to contest a citation . . ., or if, within fifteen working days of issuance of a citation . . . , any employee or representative of employees files a notice with the secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing . . . . The rules of procedure prescribed by the Commission shall provide affected employees an opportunity to participate as parties to hearing under this section. 29 U.S.C. §659(c). (Emphasis added.)

The state Act does not contain identical language on the subject of employee participation. KRS 338.141(3), without elaborating, requires the Review Commission to afford an opportunity for a hearing to an employee or representative of employees to "challenge a citation" issued under the Act. And, in language comparable to the federal Act, a regulation promulgated by the Kentucky Occupational Safety and Health Standards Board states:

> Any employee or representative of employees of an employer to whom a citation has been issued may (i) file a written notice with the Commissioner (Secretary) alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable . . . . 803 KAR 2:140(2). (Parenthesis and emphasis added.)

The state statutory and regulatory language and the language of Section 10(c) of the federal Act are somewhat similar, but each only addresses issues dealing with citations, not proposed settlement agreements. There are no reported state appellate court decisions construing the language of the state Act or regulation. Read together, the state regulatory and statutory language appears to limit employee representative participation to a challenge of the time fixed in the citation for abatement of the alleged violation. This would be consistent with the language in Section 10(c) of the federal Act.

Since the Commission's August 1982 order, there have been additional federal courts of appeals decisions construing and interpreting Section 10(c) of the Act as it applies to employee representative objections to proposed settlement agreements. These decisions have limited the objections to abatement times proposed in the settlement agreement.

One of the most recent, and a leading case on this issue, is Mobil Oil Corporation v. Occupational Safety and Health Review Commission and Petroleum Trade Employees Union, 1983 OSHD Paragraph 26,627 (CA-2 1983). In this case, the Court of Appeals for the Second Circuit reversed a decision of the federal Review Commission that held that a union, as affected employee representative, had a right under the Act to present its objections to the effectiveness of a proposed abatement plan in a settlement agreement. .The federal Review Commission had further held that it had the independent authority to review abatement plans to determine if they are consistent with the purpose and provisions of the Act. The appeals court disagreed with the federal Review Commission and stated that the legislative history of the federal Act indicated no intention on the part of Congress to grant employees standing to challenge the substantive aspects of abatement plans or methods included in a settlement agreement. Id. at p. 34,043.

Permitting continued employee objections, the court reasoned, would only thwart the Act's remedial purpose by actually lengthening the time for abatement of a hazard, because:

> Continuation of the Commission's proceedings after an employer has agreed to withdraw its notice of contest so that an employee's representative or an employee may present objections to a settlement agreement not only puts off the day when abatement should finally occur, but also prevents the Secretary from taking any steps to compel abatement. (Citations omitted.)
>
> Moreover, employers would only be discouraged from entering settlement negotiations with the Secretary if they knew further proceedings before the Commission could be required.
>
> . . . Indeed, allowing employees to challenge the efficacy of an abatement plan in a settlement agreement would constitute a continued prosecution of the citation by employees and, hence, is proscribed under the Act. Id. at p. 34,044.

Concluding, the court stated:

> . . . , we hold that employees or employees' representatives may not use their party status under §10(c) as a jurisdictional touchstone to obtain a hearing before the Commission on their objections to the effectiveness of an abatement plan included in a settlement agreement between the Secretary and an employer. Employees do not have a right to this type of hearing under the Act, and the Commission erred in remanding the case to the ALJ for a consideration of the union's objections. Id. at p. 34,046.

Substantial federal authority is in agreement with this decision. Since 1982, other courts of appeals that have considered the issue have held similarly, the most recent being decisions from the fourth and fifth circuits. Donovan v. United Steelworkers of America, 1983 OSHD Paragraph 26,759 (CA-4 1983); Donovan and Brown & Root, Inc. v. International Association of Bridge, Structural, Ornamental Iron Workers and OSHRC, 1984 OSHD (CA-5 1984).

We have recognized that federal case law reasoning is often persuasive in resolving critical issues, especially in light of the similarities in the federal and state occupational safety and health statutes and regulations. In this case, on the issue of an employee representative's standing to object to terms in settlement agreements negotiated between the Secretary and the cited employer, we find the reasoning in the above federal appeals court decisions controlling, and participation by the authorized employee representative should have been so limited.

III.

Before the hearing in this matter was ordered, the Review Commission, on July 15, 1982, received from Armco a proposed order adopting the executed agreement. Of course, the USWA objected to the adoption of the agreement by the Commission, and the hearing on its objections was later ordered. Since the practical effect of our foregoing decision on employee representative participation is that a hearing should not have been held on these objections, in our opinion Armco's proposed order requesting adoption of the agreement is now before us.

The Review Commission's Rules of Procedure provide that settlement of cases is encouraged at any stage of the proceedings, and ordinarily we will order adoption of a properly executed Settlement Agreement. However, even though an agreement is signed by the appropriate parties, it is not a final disposition of a citation or complaint until adopted by the Review Commission. At any time prior to its adoption, the Secretary of Labor may withdraw from the agreement. In so stating, we are persuaded by Sun Petroleum Products vs. Donovan, 1980 OSHD Paragraph 24,509 (CA-1982), wherein the court held that unilateral withdrawal prior to adoption by the Commission is within the prosecutorial discretion of the Secretary, and " . . . a re-evaluation of a settlement agreement may indicate to the Secretary that the agreement . . . is not consistent with the purpose of the Act." Id. at p. 29,962. In this regard, we need only consider the testimony of Mr. Robert Easton, then Director of OSH Compliance, in order to conclude that the department withdrew from the agreement it had earlier executed. Mr. Easton testified at the hearing that after he toured the facility on April 2, 1982, he concluded that the agreement should not have been executed by the department (TR. at Vol. I, pp. 18-60). We realize that this result, at this stage in these proceedings, may be harsh--particularly to the employer--given the resources already expended in this matter. However, the court in Sun Petroleum recognized the hardship to an employer which may result from just such a unilateral withdrawal by the Secretary, especially since between the time of execution and the later withdrawal by the secretary considerable abatement costs may have been expended. Recognizing this, the court in Sun Petroleum stated:

> Although we conclude that the Secretary does have the power to withdraw from a settlement prior to final Commission action, dictates of fairness and justice require that all parties be placed in the position of status quo ante the issuance of the citation. A new inspection must be conducted pursuant to 29 U.S.C. §657(a), and if circumstances warrant, the Secretary must issue a new citation pursuant to 29 U.S.C. §658. Thus, neither the employer nor any affected employees will be prejudiced by the unilateral action of the Secretary.
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> Any expenditures or implementation by the employer of the aborted agreement will be reflected in its worksite and therefore capable of being considered ab initio by the compliance inspector. Moreover, by returning the parties to their original position, the employer will not be required to defend stale citations under conditions in which circumstances may have changed between the time of the issuance of the citation and the withdrawal from the settlement. Id. at p. 29,962.

Similarly, if the Secretary elects to reinspect Armco's coke oven facility, due consideration can be given to Armco's abatement efforts, if any, made in reliance on the agreement.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the recommended order of the hearing officer is reversed in all respects; that the objections of the authorized employee representative to the substantive provisions of the settlement agreement are stricken from the record; that Armco's motion to adopt the agreement is denied; and that the citation and complaint in this matter are dismissed without prejudice.

Robert T. Cobb, Chairman

DATED: May 14, 1984
Frankfort, KY

Carl J. Ruh, Commissioner

DECISION NO. 1296

Charles E. Braden, Commissioner

Copy of this Decision and Order has been served on the following parties in the manner indicated:

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This 14th day of May, 1984.

Kenneth Lee Collova
Executive Director
KOSH Review Commission