COMMONWEALTH OF KENTUCKY.
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
07-KOSH-0446

KOSHRC 4513-07

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

B + B ELECTRIC CO, INC — RESPONDENT

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ORDER OF THIS REVIEW COMMISSION ON INTERLOCUTORY APPEAL DENYING B + B'S MOTION TO RECONSIDER OUR OCTOBER 5 ORDER

On October 5, 2010 we issued an order directing the parties, in their briefs to us, to discuss whether in each of B +B's tendered interrogatories the company already has or can demonstrate it has some exceptional need or circumstance for the discovery which would justify a special order. Section 27 of our rules[1] and Emerson Masonry, KOSHRC 4695-09. On October 19 we received respondent's motion asking us to reconsider our October 5 order. Labor did not, as our rules permit, file a response to B + B's motion. Section 22.

We have reviewed respondent's motion to reconsider and the cases he cited in support.

B + B cited to a decision entered by a federal administrative law judge in Circle T Drilling Company, CCH OSHD 24,137. In Circle T, the ALJ recommended dismissing the citations and proposed penalties because of "Complainant's contumacious conduct." Relying on this ALJ decision for support of its position, B + B said the secretary's citation and penalty

[1] We know our procedural regulations found at 803 KAR 50:010 are not rules but refer to them as such for convenience. KRS 13A.120(5).

should be dismissed because of his "utter refusal...to support his interlocutory appeal by compliance with the Rules of Procedure and the multiple briefing Orders of this Commission." We have several problems with this argument. One, if B + B is citing to the Kentucky rules of civil procedure, it is in error because this commission in Emerson Masonry, KOSHRC 4695-09, and other interlocutory orders, has held our discovery rules preempt those found in Kentucky's civil rules. Both complainant and respondent have a history of ignoring our briefing orders for this case.

Two, the full commission in Circle T[2] reversed its ALJ; in its decision the commission said:

> Absent a showing that the Secretary's behavior was contumacious or that Respondent was prejudiced, dismissal under the circumstances of this case is too harsh.

We agree. We find neither party's' conduct contumacious. B + B has not claimed prejudice.

B + B, citing to Caterpillar, Inc, a federal review commission decision, CCH OSHD 30,972, BNA 17 OSHC 1507 (1996), reminded us that we "cannot alter the terms of a stipulated settlement agreement," apparently equating a settlement agreement with a discovery order. What is at play in the matter before us is our hearing officer's order wherein he, without any reference to our section 27 discovery rule, elected to permit respondent to file interrogatories and take a deposition. Hearing officer order dated October 2, 2008. The matter before us is not a settlement agreement.

Respondent's reliance on Dawson Brothers Mechanical Contractors, a review commission decision, BNA 1 OSHC 1024 (1972) and Nashua Corporation, also a commission decision, CCH OSHD 25,020, BNA 9 OSHC 1113 (1981), is similarly misplaced. We are not reviewing a settlement agreement. In Cuyahoga Valley Railway Company v United

[2] CCH OSHD 24,583, page 30,155, BNA 8 OSHC 1681, 1682 (1979).

Transportation Union, et al, and Brock, Secretary of Labor, 474 US 3, 7, 106 SCt 286, 288 (1985), the US Supreme Court said the federal commission's "authority plainly does not extend to overturning the Secretary's decision not to issue or to withdraw a citation." Rather than reviewing a settlement, we are instead discharging our duty to interpret our procedural regulations and then to apply them to this interlocutory appeal. While our role in approving settlements or withdrawals of citations is somewhat limited, the same cannot be said of the interpretation of our own rules promulgated according to KRS 338.071 (4).

Our rules were specifically designed to control the litigation which comes before us. KRS 338.071 (4). While our rules say we may resort to the Kentucky rules of civil procedure, we may do so only "in the absence of a specific provision" within our rules. Section 4. Our rules, sections 26 through 29, cover discovery. Section 27 says in part "Except by special order of the commission or the hearing officer, discovery...shall not be allowed." We and our hearing officers are "bound by the regulations" we promulgate. Hagan v Farris, Ky, 807 SW2d 488, 490 (1991). Then the court in Hagan v Farris said "KRS 13A.130 prohibits an administrative body from modifying an administrative regulation by internal policy or another form of action." As we said in our order calling this case for interlocutory review, we expect our hearing officers to follow our rules. When a hearing officer ignores one of our regulations, here section 27, he is attempting to modify that regulation. This is impermissible.

In his first discovery order dated April 15, 2008, our hearing officer without elaboration said "The parties agreed...to conduct discovery." Then he said the "Kentucky Rules of Civil Procedure shall otherwise govern discovery to the extent not inconsistent herewith and in the absence of a specific provision in 803 KAR 50:010." In his second discovery order of October 2, 2008, the hearing officer said "although the current counsel for the Secretary objects to

interrogatories, his predecessor's agreement will be followed." Again, he said the Kentucky civil rules would apply but failed to acknowledge our rules on requests for admission, discovery and the production of documents. Sections 26, 27 and 29.

As matters stood after the hearing officer's second discovery order, the parties, over the objection of complainant, were to tender interrogatories to one another in accordance with Kentucky's rules of civil procedure and without any reference to our requirement that discovery can be had only by special order of the commission or hearing officer.

When we granted complainant's petition for interlocutory review, we of course had reviewed all orders, motions and responses. We were aware this discovery issue has become quite contentious. Our intention was to resolve the discovery dispute and remand for a trial on the merits; it is still our intent.

In its motion to reconsider our previous order, respondent reminds us labor's first lawyer had agreed to discovery. We are prepared to order discovery by interrogatory according to the terms of our October 5 order and within the limits set out by our rule 27 and its requirement for a special order. Emerson Masonry. We cannot do otherwise. Hagan v Farris.

B + B's request for a deadline by which the secretary must respond to the October 5 discovery order requiring him to answer the propounded requests for admission is well taken. Labor has 50 days from the date of this order to so comply.

In its motion for reconsideration B + B says our rule 27 on discovery "goes to the type of discovery a litigant desires...and not a special need for the information requested by the employer in each and every written question...Once the Labor Cabinet or the employer satisfy the Hearing Officer or this Commission that additional discovery is warranted, then the specific information sought by the parties should be left to them, with any valid and legitimate objections presented to

the Hearing Officer for disposition." Motion, page 4. (emphasis added) B + B's argument completely invalidates our section 27 discovery rule which says "Except by special order of the commission...discovery depositions of parties, intervenors or witnesses and interrogatories directed to parties, intervenors or witnesses shall not be allowed." We have interpreted this rule to mean a party seeking discovery must show a special need for the discovery. We have long enforced this rule to limit discovery and so to avoid delay which, using the instant matter as an example, has prevented this case from coming to trial for some three years. Emerson Masonry, supra. B + B's suggestion leaves the determination of the breadth of administrative discovery to the hearing officer and to the parties, rendering section 27 meaningless. Our concern is not misplaced. In our hearing officer's two discovery orders he ignored the limits we have placed on discovery in section 27 of our rules.

As the agency head, we are required by law to enforce our rules. Hagan v Farris, supra. "The extent of discovery that a party engaged in an administrative hearing is entitled to is primarily determined by the particular agency..." Chief Judge J. Skelly Wright writing for the majority in McClelland v Andrus, 606 F2d 1278, 1285 (CA DC 1979).

Because of the unnecessary delay caused by respondent's motion to reconsider, we will issue a new briefing schedule for our October 5 order. The parties may file their simultaneous briefs forty days after the date of this order. Then they may file responses sixty days after this date. If labor fails to file a simultaneous brief, we will sustain B + B's motion to dismiss this interlocutory appeal and remand. Correspondingly, if B + B fails to submit a brief, we will disallow all tendered interrogatories and remand.

Having been fully advised, we deny B + B's motion to reconsider.

The stay of proceedings remains in place.

It is so ordered.[3]

November 8, 2010.

s____________________________
Faye S. Liebermann
Chair

s____________________________
Paul Cecil Green
Commissioner

Certificate of Service

I certify a copy of this order denying the motion for reconsideration was served this November 8, 2010 on the parties in the manner indicated:

By messenger mail:

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[3] Commissioner Mullins took no part in this order.

s_______________________________
Frederick G. Huggins
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