COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4629-08

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

WEBER GROUP, INC — RESPONDENT

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ORDER OF THIS REVIEW COMMISSION DENYING MR. VAN METER'S MOTION TO SET ASIDE OUR ORDER OF SETTLEMENT

On June 2, 2009 we issued an order accepting a settlement agreement signed by the two parties, the secretary of labor and the Weber Group. Within the settlement agreement the secretary withdrew the serious citation he had issued to Weber Group. Our rules encourage the parties to settle cases. 803 KAR 50:010, section 51. Our order of settlement was a final order. See section 3 (1) of our rules which says "Cases may be withdrawn by agreement..." According to KRS 338.091 (1), an aggrieved party has 30 days to file an appeal in Franklin circuit court. Neither party appealed; and so by our reckoning the settlement in this Weber Group case became unappealable on July second.

Notwithstanding the finality of our order of settlement for this case, on July 6 we received responses from both the secretary and the Weber Group which they had directed to a motion served upon them by Mr. Dudley Van Meter, Jr, who, apparently, had been severely injured while he was assigned by A Better Industrial Temporary Agency, LLC, a labor contractor, to work for the Weber Group. We had not been served with Mr. Van Meter's motion.

We then obtained a copy of Mr. Van Meter's motion to set aside from counsel for the secretary of labor and so informed counsel for Weber Group. Mr. Van Meter's motion, filed by counsel Mikell Skinner, asked this commission to set aside our order of settlement. Because of the serious issues of public concern raised by Mr. Van Meter's motion to set aside, we have elected to treat his motion as one correctly filed with this review commission according to section 3 (3) of our rules.

Taking into consideration our record in this case, Mr. Van Meter's motion to set aside our order of settlement and the responses filed by the secretary and the Weber Group, we felt we had sufficient information to rule on the motion, with one exception: we did not know when Mr. Van Meter's counsel learned the secretary of labor had issued a citation to Weber Group, the contested citation which the secretary had withdrawn according to the settlement agreement executed by the litigating parties. With this singular and yet significant lack of information in mind, on July 15 we issued an order to counsel for the secretary, the Weber Group and Mr. Van Meter directing them to submit documents and supporting affidavits which would tend to establish whether, and if so when, Mr. Van Meter's lawyer learned the secretary of labor had issued a citation to Weber Group. Our July 15 order asked the parties and Mr. Van Meter to file supporting documents, and affidavits if necessary, to us on July 21 with responses due July 28.

On July 21 Weber Group and the secretary of labor sent us letters in response to our order for information about when Mr. Van Meter's lawyer came to know the Weber Group received a citation. With his letter of response to the commission, the secretary of labor attached a letter he had sent to Mr. Van Meter's lawyer to answer her open records request for details about the Weber Group inspection. That letter to Van Meter's lawyer, dated October 15, 2008, included a copy of the citation issued to Weber Group. Weber Group's letter to us from its counsel

included, as an attachment, an affidavit from Mr. Manion in which he said he had spoken to Van Meter's lawyer before and during a deposition taken for Mr. Van Meter's workers compensation claim on December 5, 2008. According to Mr. Manion's affidavit, Ms. Skinner knew Weber Group had contested the citation.

On July 23 we received a response from Mr. Van Weber's attorney, Ms Skinner, who said she received a copy of the citation on October 20, 2008.

Then on July 30 we received two replies from Ms. Skinner. She said she became aware of Weber Group's contest of the citation as a result of an October 15 2008 letter she received from the labor cabinet. In her reply to the letter written by Mark Bizzell, Ms. Skinner argues her client, Mr. Van Meter, was an affected employee who never received any notice of the settlement.

From these responses and replies, we have learned Mr. Van Meter's counsel in October of last year knew a citation to Weber Group had been issued and that Weber filed a notice of contest. Our hearing officer received the Weber Group case on November 26, 2008. On May 18, 2009 Mark Bizzell, counsel for the secretary, mailed the executed settlement agreement and accompanying notice and motion to withdraw contest to the hearing officer.

In their letters to the commission, the secretary and Weber Group argue the commission lacks jurisdiction to consider Mr. Van Meter's motion to set aside our order of settlement, the same arguments they made in their responses to the motion itself.

In his motion to set aside our settlement order, Mr. Van Meter says he was entitled to notice of the settlement due to his status as an affected employee. Weber Group, in its response to the motion to set aside our settlement order, says Mr. Van Meter has no standing to challenge the settlement because he never intervened. Weber Group says Mr. Van Meter was not entitled

to notice of the pending settlement because he was not a Weber employee and was thus not an affected employee. We agree Mr. Weber was not an affected employee; had he been, Mr. Van Meter would then have been entitled to receive notice of the issuance of the citation and a pending settlement agreement. See 803 KAR 2:125, Section 1 (1) which requires an employer to post a citation where employees may see it and 803 KAR 50:010, section 51 (3) which says a settlement agreement shall be posted where "affected employees" may see it.

Our procedural regulation says "'Affected employee' or 'employee' means an employee of a cited employer who is exposed to the alleged hazard described in the citation, as a result of his assigned duties." 803 KAR 50:010, section 1 (6). Mr. Van Meter has not claimed to be a Weber Group employee. According to his motion to set aside, Mr. Van Meter expected the settlement agreement to be posted at A Better Industrial Temporary Agency, the labor contractor, or the Bank of America site where the injury occurred. Our procedural regulations apply only to parties to a contested citation and, when a case is settled, to affected employees; typically the parties are the secretary of labor who issues the citation and the employer who receives the citation and then contests it. KRS 338.141 (1). Our rules provide no mechanism for requiring an entity who is not a party to post a settlement. We presume the same logic applies to the secretary's regulation which requires an employer to post a citation.

An employee exposed to a hazard allegedly created by another employer is not without resources. Our rules provide for intervention where appropriate. To succeed the petitioner must set forth his interest in the proceeding and demonstrate his participation "will assist in the determination of the issues in question and that the intervention will not unnecessarily delay the proceeding." Section 14 of our rules. In Brown and Root, Inc, a federal review commission decision, CCH OSHD 23,731, BNA 7 OSHC 1526, a union representing construction employees

who had been exposed to a hazard created by another employer moved to intervene in the case to protect the interests of their members. The commission granted intervention.

Unfortunately, Mr. Van Meter did not move to intervene even though he was allegedly exposed to a hazard created by Weber Group and was aware Weber Group had contested the citation issued to it. Had Mr. Van Meter intervened when he learned about the contest in October of last year, then as a party to the case he would have participated in the telephone prehearing conferences and would have known a settlement was in the offing.

When Mr. Van Meter moved the commission to set aside its settlement order, as a practical matter he was asking us to reopen the case since our order was final. KRS 338.091 (1). Agencies such as ours are creatures of their statutes and regulations. In Kentucky Board of Medical Licensure v Ryan, Ky, 151 SW3d 778, 780 (2004), the Kentucky supreme court said:

> '...an administrative agency does not have any inherent or implied power to reopen or reconsider a final decision and... such power does not exist where it is not specifically conferred upon the agency by the express terms of the statute creating the agency.' Phelps v Sallee, Ky, 529 SW2d 361, 365 (1975). (emphasis added)

We have no statutory authority to reopen or reconsider a final decision; and our order of settlement was final. We are, and have been, aware we cannot reopen or reconsider a case once we have issued our decision. Ryan, supra. What we have accomplished through our order issued today is simply to address the issues raised by Mr. Van Meter in his motion to set aside. Since Mr. Van Meter, who was not a party to this case, took the trouble to make his concerns and objections known to our commission, we felt, as a public agency, it was our duty to respond formally to his motion even though our order was not the answer he sought.

As we said, our rules encourage settlements; these settlement often take the form of a compromise about the characterization of the citation, the terms of the citation or the amount of

the penalty. Sometimes an employer will simply withdraw his notice of contest and agree to pay the penalty and abate any hazard. In this case, however, the secretary of labor withdrew the citation as is his prerogative. In the federal system there has been much litigation about whether the federal review commission or the secretary of labor had the authority to set aside or delete a citation once it has been contested. Because of the conflict among the federal circuits, a case went to the US Supreme Court which held the secretary as the enforcer of the act, she writes safety standards, inspects employers and issues citations, had unfettered discretion to withdraw a citation at any stage of the proceedings. Cuyahoga Valley Railway Co v United Transportation Union, 474 US 3, 106 SCt 286 (1985), CCH OSHD 27,413, BNA 12 OSHC 1521.

Once the Kentucky secretary of labor serves notice he will withdraw a citation, this review commission must respect that decision. We then accept settlement on those terms.

Within Mr. Van Meter's motion to set aside our order his attorney, Ms. Skinner, says when she saw our order of settlement she "contacted" Faye Lieberman, our chair. Then in the next sentence Ms. Skinner says she was "contacted" by Mark Bizzell, the secretary's counsel.

Mr. Bizzell in his July 20 letter to the review commission says he had no direct or indirect contact with Chair Liebermann.

In her July 30 reply, Ms. Skinner says she never spoke to Chair Liebermann.

Our rules prohibit ex parte communication "with respect to the merits of any case not concluded..." Section 54 (1), 803 KAR 50:010. Although Mr. Van Meter was not a party to the Weber Group case and so technically our rules do not apply to him, his motion to set aside, coupled as it is with the revealed ex parte contact, places the matter within our purview and raises potentially troubling concerns.

When ex parte contact comes to light, the remedy, in the first instance, is for the contact to be placed on the record. See Professional Air Traffic Controllers Organization v Federal Labor Relations Authority, 685 F2d 547, 564 (CADC 1982) and Louisville Gas and Electric Company v Public Service Commission, Ky App, 862 SW2d 897, 901 (1993). Although in the PATCO case the court referenced section 557 (d) of the Administrative Procedure Act as authority for placing the matter in the public record, the court of appeals in the LG&E case looked to disclosure of the contact as one part of its analysis of what harm if any was done.

Counsel Skinner herself, in Mr. Van Meter's motion to set aside, placed the impermissible contact on the record although she did not at that time reveal the specifics of the contact, if any. As our rules state, the ex parte prohibition is directed to the merits, here a motion to set aside a final order of this commission. LG&E at 900. Then the next issue, according to our court of appeals, is whether the contact affected the decision on the merits:

> The question of whether a decision has been tainted requires analysis of whether the improper contacts may have influenced the agency's ultimate decision...
>
> LG&E at 901.

Our unanimous decision to deny Mr. Van Meter's motion to set aside our order of settlement answers any questions which might be raised about the effect of an impermissible, but disclosed, ex parte contact. It had no effect, given that Mr. Van Meter sought a quite different result. LG&E at 901.

In Maggard v Board of Examiners of Psychology, Ky, 282 SW3d 301, 305 (2009), the supreme court was confronted with "claims of concealment of ex parte knowledge." Because questions about those claims had not been answered below, the supreme court remanded the case to circuit court so discovery could be had to determine the effect of the contact. Unlike the situation presented in Maggard, discovery in our case is neither appropriate nor necessary since

the alleged ex parte contact, and Ms. Skinner's July 30 assertion she never actually spoke to Chair Liebermann, are of record and Mr. Van Meter's motion to set aside was for naught. So far as we are concerned, our order today puts an end to the matter.

As we have said, this case was closed on June second and remains so. The time to appeal has run. We have answered Mr. Van Meter's questions because they raised significant issues of public interest.

The motion to set aside our order of settlement is denied.

It is so ordered.

August 4, 2009.

Faye Liebermann
Chair

Sandy Jones
Commissioner

Michael L. Mullins
Commissioner

Certificate of Service

I certify a copy of the foregoing order denying Mr. Van Meter's motion to set aside our order of settlement was served on the following in the manner indicated on August 4, 2009.

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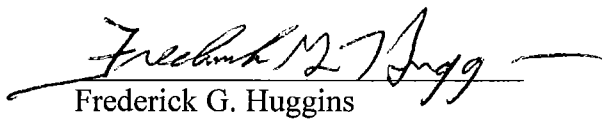

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