

**COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
ADMINISTRATIVE ACTION NO. 19-KOSH-0180**

KOSHRC #5592-19

COMMISSIONER, DEPARTMENT OF
WORKPLACE STANDARDS,
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v.

HARLAND CLARKE CORPORATION

RESPONDENT

**DECISION AND ORDER
OF THE REVIEW COMMISSION**

On December 1, 2021, this Commission granted Respondent's petition seeking discretionary review and directed the parties to file brief, response, and reply according to the schedule we included therein. We have completed our review of the arguments, evidence, and record.

Harland Clark argues evidence collected during the onsite inspection of its facility should be deemed inadmissible. It asserts the inspection was conducted without valid consent and asks us to find the evidence collected at the facility must be excluded. The Cabinet asserts its inspection was conducted with valid consent and the evidence collected

during the two-day inspection is properly admissible. The parties agree the question of consent turns on the facts surrounding the inspection.

I. Harland Clark gave valid consent

Courts have found administrative searches distinct from criminal searches. The justification for this distinction is that the regulated entity knows an inspection is likely to occur at some point. In the criminal context, a party has no such expectation. The Commissioner distilled guiding precedent for valid consent in administrative searches to the following factors: evidence of the inherent coercion of the badge, presence of armed police, fear of criminal penalties, fear of criminal sanction, or fear of arrest.¹ Harland Clark presented no evidence that the Labor Cabinet brought these coercive elements to bear and thus compelled Harland Clark officials to grant permission to inspect. The main thrust of Harland Clark's argument is that the Jeffersontown Fire Department (hereafter, "JFD") decision to place a padlock on the print could have placed Harland Clark in breach of a demand printing contract.²³ However, the specter of possible economic loss is not listed among the factors affecting consent within the context of an administrative search.

Harland Clark also argues the JFD's act of padlocking the printer before the Commissioner's inspection somehow invalidated the consent Harland Clark gave. Harland Clark does not provide legal precedent or explanation of how the alleged wrongdoing by JFD should be imputed to the Commissioner to thereby exclude the evidence collected the during Commissioner's administrative investigation. Witnesses for Harland Clark coyly suggest the

¹ Citing *United States v. Thriftmart, Inc.*, 429 F.2d 1006, 1009 (9th Cir 1970).

² Birkenfeld at T.E. page 172, lines 20-21; page 173, lines 3-6

³ Birkenfeld at T.E. page 173 "I can't think about safety. I have other obligations...."

Cabinet may have exerted influence or control over JFD, but the record does not contain evidence to advance the control theory beyond innuendo.

We agree with Harland Clark that the Commissioner must prove she received valid consent to conduct the warrantless inspection. We find the Commissioner has met her burden. The record contains support for the Commissioner's position that her compliance officers received valid consent to conduct the investigation. Both parties acknowledge that Harland Clark gave verbal consent for the inspection.⁴ Cheston Hammonds and Donna Hardy, as witnesses for Harland Clark, testified that Harland Clark called the Labor Cabinet (hereafter "KOSH") and asked the agency to come to its facility.⁵ Once KOSH arrived at the facility, Harland Clark employees did not refused them entry nor did they ask the compliance officers to leave.⁶ Harland Clark employees never asked the compliance officers for a warrant.⁷ Employees Kyle Birkenfeld, Donna Hardy, and Cheston Hammonds participated in the opening conference.⁸ At Mr. Birkenfeld's request, the compliance officers deviated from normal procedure by pausing the opening conference to inspect the printer so the fire department would remove its lock sooner.⁹ Mr. Hammonds testified that he spoke the compliance officers as he took them to the production floor to examine the printer at issue.¹⁰

⁴ T.E. page 17, lines 10-15; T.E. page, 122, lines 21-23; T.E. page 124, line 8-12

⁵ Cheston Hammonds, "So I directed our support manager, Donna Hardy, who is also our safety manager per se, to contact OSHA and get the wheels turning" T.E. page 117; Donna Hardy, "And so Cheston instructed me to call OSHA to see how fact we can get somebody out here so we can get the lock off the machine for production purposes." T.E. page 154, lines 6-9

⁶ When asked if he asked the compliance officers to leave, Cheston responded, "I did not." T.E. 132, line 17. When asked if she refused KOSH compliance officers entry, Donna Hardy testified, "No, because I called them to come remove lock." T.E. 162, line 24-25.

⁷ Hammonds at T.E. 132, lines 18-19; Hardy at T.E. 162, line 20. Mr. Hammonds testified that he personally "badged in" the KOSH into a secured area which cannot be entered with an authorized employee. T.E. page 113, lines 12-16.

⁸ T.E. 119, line 15 through T.E. 122; T.E. 175, lines 2 - 4.

⁹ T.E. 122, line 1-5.

¹⁰ T.E. 124, line 2.

When the compliance officers indicated they would need to return a second day to continue the inspection, Harland Clark worked with KOSH compliance officers to schedule the return visit to the facility.¹¹

We find the totality of circumstances support our Hearing Officer's finding that the inspection was conducted with Harland Clark's valid consent and uphold his decision to admit the evidence collected at the facility during the investigation.

II. Citation to Affidavits

Harland Clark also contests the recommended order because our hearing officer referenced compliance officer affidavits in the Recommended Order. It insists this is error as the affidavits were not admitted as evidence on the record at the hearing. Further it argues the affiants were not subject to examination when the affidavits were executed.

We understand the argument. In general, "[a]n affidavit is the weakest kind of proof and is not admissible as primary evidence of facts it narrates except under an express or special statutory provision...." *Commonwealth, Funk v. Clark*, 311 Ky. 710, 713, 225 S.W.2d 118, 119 (1949) Fortunately, we do not have to make a determination of this issues; even if we were to rule the affidavits were not proper support for findings of fact, our hearing officer's findings are still supported by evidence that is indisputably in the record. Compliance Officer Coleman provided sworn testimony at the hearing that covered the same inspection. Henry Clark cross-examined Coleman about her testimony and at that time,

¹¹ T.E. 32 line 16.

could have cross-examined her about the affidavits.¹² She testimony about sequence of steps taken, parties present, and evidence collected covers the same facts contained in her affidavit. See T.E. 26-90. We find any alleged error created by reference to the affidavits is remedied by testimony taken on the record at hearing. To alleviate Harland Clark's concerns, we amend paragraphs 7 and 11 of the Recommended Order to read:

7. Pursuant to their usual procedures, they conducted an opening conference with plant personnel in the conference room and with Mr. Birkenfeld, the safety director, who participated by telephone; went on a walkabout of the facility; gather safety documents, and took photographs. Ex Nos 2 -7. It should be noted that the by the time the compliance officers started their inspection of the printer, JFD had removed the padlock, thereby allowing operations to resume upon completion of the inspection. See TE 32.

11. In contrast, the commissioner offered the testimony of Compliance Officer Coleman. She stated that as they started the inspection, JFD personnel removed the padlock and left the plant. T.E. 32 Further, when Mr. Carruth asked if she knew whether Kentucky OSHA had ever asked a fire department to stop doing padlocking printers, she explained Kentucky OSHA does not get involved with procedures of other departments. T.E. 78.

III. The Cabinet's Proof of its Case

Harland Clark did not present a defense to the substantive facts alleged in the Cabinet's complaint. It focused efforts on the issue consent and citation to affidavits. Based on the record, we agree with our hearing officer's findings that the Cabinet provided testimony and other evidence adequate to prove the standard cited applies to the conditions at Harland Clark, that Harland Clark failed to comply with the standard, that one Harland Clark employee had access to the violative conditions undergirding the citation,

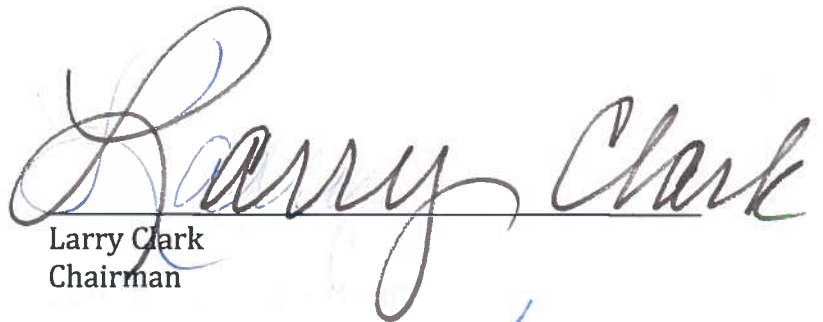
¹² Counsel for Harland Clark was aware of its right to cross-examine the compliance officers concerning the content of affidavits, "there's no cross-examination, which is what the hearing will be for." T.E. page 19, lines 21-22.

and that Harland Clark was aware of the violative condition as it installed a "cheater" on the printer which circumvented protective features.

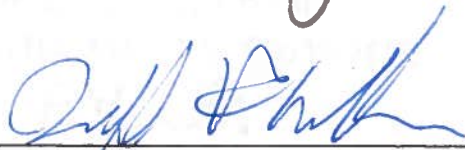
For the foregoing reasons, we **AFFIRM** our hearing officer's evidentiary rulings, findings of fact, and conclusions of law. We incorporate our previously discussed modifications of paragraphs no. 7 and no. 11 into our hearing officer's recommended order and **ADOPT** the order so modified it as the final order of this Commission.

It is so ORDERED.

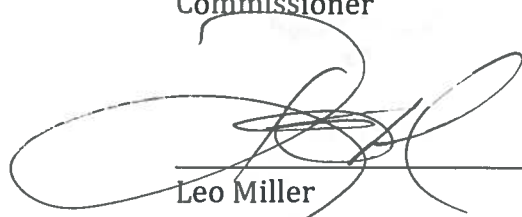
March 2, 2022.



Larry Clark
Chairman



Frank Jeff McMillian
Commissioner



Leo Miller
Commissioner

Certificate of Service

I certify that a copy of the foregoing order and decision has been served this 2nd day of March, 2022, on the following as indicated:

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