

BEFORE THE NORTH CAROLINA
 OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 RALEIGH, NORTH CAROLINA

FILED
 JUL 11 2019

COMMISSIONER OF LABOR OF THE
 STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

LOST FOREST DEVELOPMENT, LLC,
and its successors,

RESPONDENT.

DOCKET NO.: OSHANC 2018-6058
 INSPECTION NO.: 318104346
 CSHO ID: X-2161

ORDER AFTER HEARING OF
 MOTION TO DISMISS

THIS CAUSE came on for hearing on the Motion of Complainant for a dismissal of Respondent's Notice of Contest pursuant to Rules .0303, .0308-09 of the Rules of Procedure of the North Carolina Occupational Safety and Health Review Commission and was heard before the undersigned Reagan H. Weaver, Administrative Law Judge for the Occupational Safety and Health Review Commission on June 25, 2019 at the Lee House offices of the Commission at 422 N. Blount Street, Raleigh, NC. 27601.

Present for the hearing were counsel for Complainant, Stacey A. Phipps, Assistant Attorney General, and counsel for Respondent, Michael C. Lord, Williams Mullen and Greg Sveinsson, owner and representative of Respondent, Lost Forest Development, LLC.

At the initiation of the hearing, Respondent's counsel offered to stipulate as to the facts in the Motion to Dismiss of the Complainant. Complainant's counsel accepted the stipulation and reviewed orally her pleading. At the conclusion of Complainant's review, Respondent's counsel was asked if he intended to present evidence in Respondent's defense. Answering that he wished to present evidence in defense of the Motion, Respondent's counsel offered Respondent's owner and representative, Greg Sveinsson. Counsel for Complainant objected on the basis that time had expired for Respondent to present a defense to the motion. The objection was overruled, and Sveinsson took the stand and testified after being sworn.

FINDINGS OF FACT

1. This hearing was initiated by Complainant's filing of a Motion to Dismiss based on what Complainant alleged was an untimely filing of a Notice of Contest. This Order relies almost entirely, if not entirely, on Complainant's Motion and its exhibits.¹

¹ References to paragraph numbers and exhibits herein are in every instance references back to the original Motion's paragraphs and exhibits using the same numbering and lettering.

2. Complainant is charged with enforcement of the provisions of the Occupational Safety and Health Act of North Carolina, N.C.Gen.Stat. 95-126, *et seq.*
3. Respondent is a Limited Liability Corporation operating in North Carolina at all times relevant to this dispute.
4. On April 20, 2017, Compliance Safety and Health Officer Jeff McClaren conducted an inspection of Respondent's worksite at 100 Warrenton Road in Henderson, North Carolina and documented a Serious citation with five sub parts on June 15, 2017. The Citation was received on June 19, 2017.
5. According to the Citation, all violations noted by CSHO McClaren were said to have been corrected during inspection so no violations were pending abatement when the inspection was concluded. *See* Exhibit B.
6. Judicial notice is taken of a record from the national Occupational Safety and Health Administration that indicates no record of previous OSHA violations for Respondent.
7. At the time of the inspection, Respondent signed and received a copy of the Employer and Employee Rights and Responsibilities Form (OSHA 59). *See* Exhibit A. The form does not warn Respondent that the failure to notify the OSH Division of contestment will convert the Citation into a Final Order, not subject to review. Nor does it explain that a Final Order can then become the basis for collection of Citation penalties by the Department of Labor.
8. Respondent's owner, Greg Sveinsson, timely requested an informal conference with the Department of Labor and said conference was held by telephone between Brian Tuttle, Health Compliance Officer II and Sveinsson on June 27, 2017.
9. Complainant acknowledged that Respondent's owner claimed to have disputed the findings of the citation, including the penalty amounts, at the informal conference. Except as noted herein, Respondent took no further action after the informal conference to contest the Citation after receiving a letter from HCO Tuttle (on behalf of Bruce Miles, District Supervisor) on July 8, 2017. *See* Exhibit H and Paragraphs 16 and 17.
10. The letter from HCO Tuttle dated June 28, 2017 informed Sveinsson that he needed to submit a letter of contest within fifteen (15) days if he did not sign and return the enclosed settlement agreement. The letter did not warn Respondent that the failure to submit a letter of contest would convert the citation into a Final Order, not subject to review. Nor did it explain that a Final Order can then become the basis for collection of Citation penalties by the Department of Labor. *See* Exhibit E.
11. Complainant made no effort to collect the penalties imposed by its Citation of Respondent in spite of statutory provision that deems a non-contested Citation a Final Order. N.C. Gen.Stat. 95-137(b)(1).
12. Employer's owner, Sveinsson, spoke to Complainant's CSHO Supervisor, Bruce Miles, on October 22, 2018. This date was almost fifteen (15) months after the date by which the citation could have been treated as having been converted to a final order. When Sveinsson and Miles conversed on October 22, 2018, Sveinsson said he had told the inspector that he wished to contest the citation. Miles told him to send a return email to him stating that he wished to contest the citation and the penalty from Inspection #318104346 (*See* Paragraph 20 and Exhibit H).

13. Sveinsson sent Miles a return email on October 22 that stated that he wished to contest the citation (*See* Paragraph 24 and Exhibit H).
14. Complainant impliedly extended the time limit for Respondent to file its notice of contest in the email sent by CSHO Bruce Miles to Respondent's owner, Sveinsson, on October 22 as reflected in Exhibit H.

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are incorporated by reference hereunder as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. N.C. Gen. Stat. Section 95-137(b)(1) provides that if an employer fails to notify the Director of the Occupational Safety and Health Division of the Department of Labor that it contests the citation and no employee or representative of the employees files a notice under the provisions of the Article, then the citation and its assessment of penalty "shall be deemed final and not subject to review by any court."
3. No provision of N.C. Gen. Stat. 95-137(b)(1) requires Respondent to give written notice.
4. Judicial notice is taken of Chapter XIII of the Field Operations Manual for the Occupational Safety and Health Division of the North Carolina Department of Labor which states, "Once the notification is mailed to the employer, the district supervisor should not make any further contact with the employer that could be construed as extending the time limit the employer has to respond to the ISA."
5. Complainant's failure to attempt to collect on what it now claims to have been a final order as of July 28, 2017, in conjunction with its soliciting of a written notice of contestment from Respondent almost fifteen (15) months after the alleged conversion of the citation to a final order operate as either a waiver of Complainant's right to claim Respondent did not properly contest the citation or as a judicial estoppel to deny the motion to dismiss.

DISCUSSION

This hearing officer is concerned with the difficulty and awkwardness of the OSH Division apprising employers who have become the subject of Citations what they can or must do in response to Citations. The employer may not plead ignorance of the law and expect to prevail, and the Division cannot be responsible for informing employers of their legal rights; however, Complainant's Exhibit A actually is entitled "Employer and Employee *Rights* and Responsibilities" (emphasis added). Especially with first time offenders, Complainant could be more explicit in its instructions to employers to explain the impact of a failure to give notice of contest. Just telling the employer to file a Notice of Contest within fifteen (15) days falls short of explaining to an employer that failing to file anything can result in a Final Order and a collection action by the Department of Labor. Complainant should not attempt to apprise employers of their rights and not tell them the possible consequences of their failure to comply with Complainant's instructions.

While the Commission has gone on record to favor the decision of cases on their merits as opposed to procedural technicalities (*See Brooks v. O.S. Erectors*, 2 NCOSHD225, 227, 230 (1981)), the overriding decision point in this case is the choice Complainant's official made to ask and permit the Respondent to submit a notice of contest almost fifteen (15) months after the date when Complainant could have begun collection efforts on the debt that it claims in this hearing became extant on July 28, 2017. Complainant's own Field Operations Manual states in its Chapter XIII, "Once the notification is mailed to the employer, the district supervisor should not make any further contact with the employer that could be construed as extending the time limit the employer has to respond to the ISA." Complainant should not be permitted to resurrect a previously forfeited procedural advantage.

Whether other arguments of waiver or judicial estoppel might apply to justify the decision of this case need not be explored as Complainant's own Field Operations Manual provides a more than sufficient basis to deny Complainant's motion.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and Discussion, it is hereby ORDERED that the Motion to Dismiss is DENIED and the Commission shall place the hearing of this matter on its calendar for a hearing on the merits.

This the 26 day of June, 2019.



Reagen H. Weaver
Administrative Law Judge