

FILED

**BEFORE THE OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION OF NORTH CAROLINA**

NOV 21 2019

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

Occupational Safety
and Health Commission

COMPLAINANT,

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

v.

LOST FOREST DEVELOPMENT, LLC,
and its successors

ORDER OF THE COMMISSIONERS

RESPONDENT.

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 26th day of September 2019, Lee House, 422 North Blount Street, Raleigh, North Carolina, by Arlene K. Edwards, Chairman, Dr. Richard G. Pearson, and Paul E. Smith, Members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Complainant: Stacey A. Phipps, Assistant Attorney General; North Carolina Department of Justice, Raleigh, North Carolina.

Respondent: Michael C. Lord; Williams Mullen, Raleigh, North Carolina

The undersigned have reviewed the prior Interlocutory Order based upon the record of the proceedings before the Hearing Examiner and the briefs and arguments of the parties. The Commission OVERTURNS the Order of Hearing Examiner Reagan Weaver. The Notice of Contest is DISMISSED as untimely filed.

BACKGROUND

A hearing was held on June 25, 2019 before Hearing Examiner Reagan Weaver solely on the question of whether Complainant's Motion to Dismiss Respondent's Notice of Contest should be granted. The resulting Interlocutory Order on that Motion to Dismiss denied the motion. The Complainant Commissioner of Labor filed the Petition for Review.

ISSUE PRESENTED

I. WHETHER THE EMPLOYER FILED A TIMELY NOTICE OF CONTEST OF THE CITATION?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

NCGS §95-137(b)(1)

(b) Procedure for Enforcement. – (1) If, after an inspection or investigation, the Director issues a citation under any provisions of this Article, the Director shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail with return receipt, by signature confirmation as provided by the U.S. Postal [Service], by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, or via hand delivery of any penalty, if any, the Director has recommended to the Commissioner to be proposed under the provisions of this Article and that the employer has 15 working days within which to notify the Director that the employer wishes to: a. Contest the citation or proposed assessment of penalty; or b. Request an informal conference. Following an informal conference, unless the employer and Department have entered into a settlement agreement, the Director shall send the employer an amended citation or notice of no change. The employer has 15 working days from the receipt of the amended citation or notice of no change to notify the Director that the employer wishes to contest the citation or proposed assessment of penalty, whether or not amended. If, within 15 working days from the receipt of the notice issued by the Director, the employer fails to notify the Director that the employer requires an informal conference to be held or intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under the provisions of this Article within such time, the citation and the assessment as proposed to the Commissioner shall be deemed final and not subject to review by any court.

FINDINGS OF FACT

1. This action was initiated by Complainant's filing of a Motion to Dismiss for untimely filing by Respondent of its notice of contest. A hearing was held on that motion only, on June 25, 2019.
2. Complainant is charged with enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
3. Respondent is a Limited Liability Company operating in North Carolina at all times relevant to this dispute. The Respondent is an employer within the meaning of N.C. Gen. Stat. § 95-127 and is subject to the Act N.C. Gen. Stat. § 95-128.
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.
5. 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.
6. At the time of the inspection, Respondent signed and received a copy of the Employer and Employee Rights and Responsibilities Form (OSHA 59).
7. The citation was issued on June 15, 2017 and received by Respondent on June 19, 2017. In bold type the citation sets forth, in part, "15 working days after you receive this Citation and Notification of Penalty or 15 working days after you receive the results of the informal conference, the citation(s) and/or proposed penalty(ies) will become a final order of the North Carolina Occupational Safety and Health Review Commission and may not be reviewed by any court or agency, unless you file a notice of contestment."
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. In a letter dated June 28, 2017, HCO Tuttle (on behalf of Bruce Miles, District Supervisor) 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 stated that it "shall serve as your notice of no change" and gave the contact information to contact Complainant if there were questions. Except as noted herein, Respondent took no further action after the informal conference to contest the Citation after receiving this letter from HCO Tuttle on July 8, 2017.

10. The employer Greg Sveinsson spoke with Complainant's CSHO Supervisor Bruce Miles on October 22, 2018 and stated that he wished to contest the citation. Bruce Miles sent Greg Sveinsson an email about that conversation and told him that in order to contest the citation he could write that intention in a return email. Employer Greg Sveinsson did send a return email on October 22 in which he stated that he wished to contest the citation.
11. The undersigned have jurisdiction over this case pursuant to N.C. Gen Stat. § 95-125.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of law to the extent necessary to give effect to the provisions of this Order.
2. The Commission has jurisdiction of this cause, and the parties are properly before this Commission.
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act. N.C. Gen. Stat § 95-128.
4. The Respondent did not file a timely notice of contest.
5. The Commission **OVERTURNS** the Order of Hearing Reagan Weaver. The Notice of Contest is **DISMISSED** as untimely filed.

DISCUSSION

The employer did not file a timely notice of contest. The employer had ample notice that he was required to give written notice of contest. On the day of inspection, April 20, 2017, Greg Sveinsson, signed the Employer and Employee Rights and Responsibility Form (OSHA 59) that states that the employer may contest the citation by notifying the Occupational Safety and Health Division in writing within 15 working days. The citation itself, which was issued on June 15, 2017, includes language in bold type "...15 working days after you receive the results of the informal conference, the citation(s) and/or penalty(ies) will become a final order of the North Carolina Occupational Safety and Health Review Commission and may not be reviewed by any court or agency, unless you file a notice of contestment." In addition, further notice was given in the June 28, 2017 letter sent by HCO Tuttle (on behalf of Bruce Miles) to the employer after the settlement conference which stated, "...this letter shall serve as your notice of no change and you shall have fifteen (15) working days, from the receipt of this letter, to submit your letter on contest." The employer actually signed a statement on the date of inspection which gave the timeline for filing a contestment in writing. The citation states that notice of contest must be filed. The no change letter on June 28 speaks to a "letter of contest." All 3 of those instances serve as notice that the employer must file a written notice of contest and gave a timeline for doing so. The employer knew or should have known of the requirements. We cannot allow willful ignorance to be a justifiable excuse. The employer admitted in testimony that he did not fully read the letter sent to him after the informal conference. The employer failed to act as a reasonably prudent business person.

To allow an employer to file their contestment more than a year after the time to do so has run by statute thwarts the objectives of the OSH Act and renders the rules meaningless. The employer had ample notice, and by choice or willful ignorance, did not act to protect the rights of his company to contest. The Hearing Examiner's decision to allow this case to proceed must be reversed. The Court also notes that there is not a Rule 60b motion or appeal before us since one was never filed. However, we note that the Employer has not established excusable neglect or any other reason justifying relief under such a motion. *See JMM Plumbing and Utilities, Inc. v. Basnight Const. Co.*, 169 N.C. App. 199, 203, 609 S.E.2d 487, 490 (2005), and cases cited therein.

ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's July 11, 2019, Order in this case be, and hereby is, **REVERSED**. The Notice of Contest is **DISMISSED** as untimely filed.

This the 21th day of November, 2019.

Arlene K. Edwards
ARLENE K. EDWARDS, CHAIRMAN

R. G. Pearson
RICHARD G. PEARSON, Ph.D., MEMBER

Paul E. Smith
PAUL E. SMITH, MEMBER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

MICHAEL C. LORD
WILLIAM MULLENS
301 FAYETTEVILLE ST.
SUITE 1700
RALEIGH, NC 27602

by depositing same the United States Mail, First Class, at Raleigh, North Carolina, and upon:

STACEY PHIPPS
NORTH CAROLINA DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

by depositing a copy of the same in the NCDOL Interoffice Mail.

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

THIS THE 26 DAY OF November 2019.

ARLENE K. EDWARDS
CHAIRMAN

usa Bluss
Sluss
Office Administrator
ational Safety & Health Review Commission
ervice Center
27699-1101
733-3589
733-3020

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com
OFFICIAL USE

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

Postmark Here
11-26-19
Order of Commission
6058

Sent To
Michael C. Lord & William Mullens
Street, Apt. No.,
or PO Box No. 301 Fayetteville St. Suite 1700
City, State, ZIP+4
Raleigh, NC 27602
PS Form 3800, August 2005 See Reverse for Instructions

7009 3410 0000 2241 7484