

BEFORE THE OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION OF NORTH CAROLINA

SEP 30 2021

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT - RESPONDENT,

v.

FSC II, LLC dba Fred Smith Company, INC,
and its successors

RESPONDENT - PETITIONER.

NC Occupational & Safety
DOCKET NO. OSHANC 2019-6213 n
OSHA INSPECTION NO. 318158078

ORDER OF THE COMMISSIONERS

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 20th day of May 2021, via remote online courtroom, by Paul E. Smith, Chairman, Cheyenne N. Chambers, and Terrence Dewberry, members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Complainant: Sage Boyd, 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 Order based upon the record of the proceedings before the Hearing Examiner and the briefs and arguments of the parties.

The Commission AFFIRMS the Order of Hearing Examiner Reagan Weaver.

ISSUE PRESENTED

**WHETHER THE HEARING EXAMINER CORRECTLY
AFFIRMED THE VIOLATION OF 29 CFR 1904.40(a) AS NON-
SERIOUS?**

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR § 1904.40(a)

Basic requirement. When an authorized government representative asks for the records you keep under part 1904, you must provide copies of the records within four (4) business hours.

FINDINGS OF FACT

1. 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.
2. Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10) and is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
3. The undersigned have jurisdiction over this case pursuant to N.C. Gen Stat. § 95-125.
4. On July 30, 2020, a remote hearing was held before the Honorable Reagan H. Weaver.
5. On August 25, 2020, Hearing Examiner Reagan H. Weaver issued an Order finding that the provisions of 29 CFR 1904.40(a) had been violated and issuing a penalty of \$0.
6. On September 22, 2020, Respondent timely petitioned the Review Board for a review of the decision of the Hearing Examiner holding that the Respondent committed a non-serious violation of 29 C.F.R. §1904.40(a).
7. An Order granting review was filed on September 22, 2020.
8. The oral arguments were heard by the full Commission on May 20, 2021.
9. The Review Commission adopts the Hearing Examiner's findings of facts.

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 Complainant met its burden of proving by substantial evidence that the Respondent committed a non-serious violation of 29 CFR 1904.40(a).
5. The Commission AFFIRMS the Order of Hearing Examiner Reagan H. Weaver.

DISCUSSION

Under 29 C.F.R. § 1904.40(a), when a Compliance Officer requests a company's OSHA 300 logs and 300A forms, employers must provide the records "within four (4) business hours." *Id.* Here, records were requested on February 26, 2019. On March 6, 2019 a company representative emailed the COSHO to inform him that the company's Vice President was reviewing the documents. No records were produced until March 8, 2019, when the employer produced its OSHA 300A forms, but not its 300 logs. The 300 logs were produced on April 14, 2019. This amounts to a plain violation of 29 C.F.R. § 1904.40(a), as the Employer concedes.

The only question on appeal is which classification should be applied to the employer's violation of 29 C.F.R. § 1904.40(a). The citation was classified as non-serious. The employer argues it should be reclassified as *de minimis*. We agree with the Hearing Examiner that the non-serious classification was correct.

As a threshold matter, the parties dispute whether we have the authority to reclassify a violation as *de minimis*. Since we have decided that the Commissioner has met their burden of proof for a non-serious violation, we do not need to reach the issue of whether the Review Commission has the power to reduce a non-serious violation to a *de minimis* violation. See *Kinston Neuse Corporation*, OSHRC No. 94-3150 (September 28, 2000). The Review Commission recognizes that 13 NCAC 07A.0301(h)(9) states that North Carolina does not have a procedure for *de minimis* violations.

“[A] nonserious violation exists where there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm.” *Dillard-Eastland Mall*, OSHANC 96-3518 (RB 1999) ; *accord Packers Sanitation Services, Inc.*, OSHRC Docket No. 17-1376 (February 11, 2019). The obligation to produce OSHA 300A forms and 300 logs has a “direct and immediate relationship” to occupational safety and health. Timely production of these records gives officers a clear picture of any safety issues, and may aid them in focusing or expanding their investigation. It ensures that officers are able to promptly identify and investigate any other concerns that might arise based on their review of the records, which could have an immediate impact on employee safety. When an employer fails to provide the requested records, it can frustrate the Compliance Officer’s ability to enforce OSHA regulations by hindering their ability to discern patterns or trends, and it could prevent them from identifying other safety concerns that may warrant further investigation. The four-hour requirement to produce documents allows the COSHO to look at documents close in time to the inspection to better evaluate what information is relevant to the current inspection, and to ensure that any additional safety concerns identified through a review of the records can be promptly

investigated and abated. Moreover, timely produced records are a more reliable indicator of the Employer's record keeping process; Employers should keep their records contemporaneously, and should not need to have time to prepare their records for production. Violations of 29 C.F.R. § 1904.40(a) therefore have a direct and immediate relationship to occupational safety and health. *See also Packers Sanitation Services, Inc.*, OSHRC Docket No. 17-1376 (February 11, 2019) (finding that recordkeeping violations are clearly safety and health related).

Moreover, the violation at issue in this case is an egregious violation of the standard. Employers are required to produce copies of records in four hours. Here, the Employer waited more than 45 days before producing copies of all the requested records, only doing so after multiple inquiries were made regarding non-production.

The Employer urges that their violation was not related to occupational safety and health because, once produced, their logs were accurate, complete, did not reflect any recordable injury or illness at the worksite, and did not result in an expansion of the inspection. But this is beside the point. Employers are required to produce their records on request, regardless of the records' contents. An employer cannot avoid all consequences for violating 29 C.F.R. § 1904.40(a) whenever their records do not reveal any recordable injuries or illnesses.

A COSHO must be able to efficiently conduct investigations in order to detect and assist in the abatement of violative conditions. The ability to conduct efficient investigations is therefore immediately related to occupational safety and health. Violations that undermine a COSHO's ability to efficiently investigate are therefore immediately related to occupational safety and health, regardless of what the investigation ultimately reveals.

ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's August 25, 2020, Order in this case be, and hereby is, **AFFIRMED** to the extent that is it not inconsistent with this opinion. Respondent has already abated the violations and no penalty is in effect.

This the 30th day of September 2021.

Paul E. Smith

Paul E. Smith (Sep 30, 2021 14:45 EDT)

PAUL E. SMITH, CHAIRMAN

Cheyenne N. Chambers

Cheyenne N. Chambers (Sep 30, 2021 17:36 EDT)

CHEYENNE N. CHAMBERS, MEMBER

Terrence Dewberry

Terrence Dewberry (Sep 30, 2021 17:25 EDT)

TERRENCE DEWBERRY, MEMBER

CERTIFICATE OF SERVICE

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

MICHAEL C LORD
WILLIAMS MULLEN
PO BOX 1000
RALEIGH NC 27602

By depositing a copy of same in the United States Mail, via certified mail, return receipt requested, postage prepaid at Raleigh, North Carolina, and upon:

VICTORIA VOIGHT
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

By depositing a copy of same in the United States Mail, First Class, postage prepaid at Raleigh, North Carolina, and upon:

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

By email to carla.rose@labor.nc.gov.

THIS THE 1 DAY OF October 2021.



Karissa B. Sluss
Docket and Office Administrator
NC OSH Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (919) 733-3589