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

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA,	)	
COMPLAINANT,	)	**ORDER**
v.	)	
	)	**OSHANC NO: 2019-6213**
	)	**INSPECTION NO.: 318158078**
FSC II, LLC dba FRED SMITH COMPANY, INC. *and its successors,*	)	**CSHO ID: I 9042**
RESPONDENT.	)	

THIS MATTER came on for hearing and was heard remotely before the undersigned on July 30, 2020. The Complainant was represented by Assistant Attorney General, Sage A. Boyd, and the Respondent was represented by its General Counsel, James A. Beck, II. Complainant's witness was Merville Forrester, Compliance Safety and Health Officer with the North Carolina Department of Labor, Occupational Safety and Health Division. Respondent's witnesses were Robert Cameron, formerly a Safety Specialist with Respondent, Joseph Polansky, Jr., Director of Health, Safety and Environmental and Brent Wood, Vice President for Legal Affairs. No other employees of Respondent attended to have a say in, or participate as a party in, this hearing.

Based upon the evidence presented at the hearing, and with due consideration of the contentions of both parties and the applicable legal authorities, the undersigned makes the following Findings of Fact and Conclusions of Law, engages in the Discussion and enters an Order accordingly.

ISSUES PRESENTED

I. Did Complainant meet its burden of proving by a preponderance of the evidence that Respondent violated 29 CFR 1904.40(a) for failing to provide OSHA 300 logs and 300A forms for the years 2015-2018 and year-to-date for 2019 within four business hours of the request by the CSHO, Merville Forrester, and if so, was the classification of the violation proper and was the penalty appropriate?

II. Should the Citation for the violation of 29 CFR 1904.40(a) be dismissed or set aside because the failure to produce OSHA 300 logs and OSHA 300A forms in a timely manner is a *de minimis* violation which has no direct or immediate relationship to safety or health?

III. If there was no *de minimis* defense to the alleged violation of 29 CFR 1904.40(a), did Respondent prove that dismissal was required by any other reason at law, in equity or in the interest of justice?

a. Does the provision of N.C. Gen. Stat. 95-137(b)(3) prohibit the amendment of the Citation because Complainant should have moved to amend the Citation before six months passed following the occurrence of the violation?
b. Did Complainant plead inconsistently when the Complaint stated that the violation was corrected during inspection and within the same Complaint state that the documents were provided 53 hours after inspection and thereby demonstrate that it did not hold itself to a level of precision and consistency necessary in pleading?
c. Can there be a violation of 29 CFR 1904.40(a) when there is no associated safety violation found in the inspection?
d. Does 13 NCAC 07A.0301 (h)(9) bar the Department of Labor from issuing citations for violation of 29 CFR 1904.40(a)?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1904.40(a) provides as follows:

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.

N.C. Gen. Stat. 137(b)(3)

(3) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

13 NCAC 07A.0301(h)(9)

13 NCAC 07A .0301 INCORPORATION BY REFERENCE
(a) Subject to the exceptions provided in Paragraph (h) of this Rule, the provisions of Title 29 of the Code of Federal Regulations referenced below are incorporated by reference throughout this Chapter, including subsequent amendments and editions thereof.
. . .

(h) The provisions of Title 29 of the Code of Federal Regulations referenced in Paragraph (a) of this Rule are subject to the following exceptions:

. . .

(9) Within 29 CFR 1903.14, "Citations; notices of de minimis violations," any reference to a notice of de minimis violations is deleted as North Carolina does not have a procedure for issuance of a notice with respect to de minimis violations that have no direct or immediate relationship to safety or health;

FINDINGS OF FACT

1. Complainant, Commissioner of Labor of the State of North Carolina (hereafter Complainant or Commissioner), is charged by law with responsibility for compliance with and enforcement of the provisions of N.C. Gen. Stat. §§95-126 et seq., the Occupational Safety and Health Act of North Carolina (the Act) as well as the regulations adopted pursuant thereto.

2. Respondent, FSC II, LLC, is a limited liability company duly organized and existing under the laws of the State of North Carolina and does business as Fred Smith Company.

3. Respondent is an "employer" within the meaning of N.C. Gen. Stat. §95-127 (11) and all of Respondent's employees referred to herein are "employees" within the meaning of N.C. Gen. Stat. §95-127 (10).

4. Respondent is in the business of public infrastructure construction, including storm drainage and water and sewer installation.

5. On February 26, 2019, in response to a complaint, Merville Forrester, Compliance Safety and Health Officer (CSHO) with the Occupational Safety and Health Division of the North Carolina Department of Labor properly conducted an inspection of Respondent's work site in the vicinity of 10700 Chapel Hill Road, Morrisville, North Carolina 27560.

6. Respondent consented to the inspection, through its representatives, Robert Cameron, Safety Specialist, and Trent Clifton, Foreman.

7. CSHO Forrester conducted his inspection after an opening conference that began at or about 2:55 pm. The inspection followed the opening conference, and after the inspection, a closing conference occurred at or about 5:00 pm.

8. Forrester gave a copy of a page entitled, "Employer and Employee Rights and Responsibilities" to Robert Cameron. At the top of the page appears a blank labeled, "Employer Name," and Cameron filled in the blank with "FSC 2 dba Fred Smith Company" and signed the page at the bottom as "Employer Representative" (Complainant's Exh. 2).

9. Forrester, while at the job site, gave a second document to Cameron, the "Employer Checklist," which listed a number of documents that Forrester needed—and requested—in order to complete his inspection. Among the items listed were the OSHA 300 logs and the OSHA 300A forms. The fact that the OSHA 300A forms and the OSHA 300 logs, unlike the other documents requested, were due within four business hours was *not* noted on the document.

10. There is no regulation requiring that Forrester's request for the OSHA documents be in writing.

11. During at least one of the conferences with Respondent's representatives on the day of the inspection, if not both of the conferences, CSHO Forrester orally requested that Respondent provide its OSHA 300 logs and its OSHA 300A forms within four hours.

12. Forrester was an authorized government representative per the requirements of 29 CFR 1904.40(a).

13. On March 5, 2019, Respondent's representative, Robert Cameron, telephoned Forrester, apologized for the delay, and asked if he could bring the requested documents to the Lake Boone Trail OSHA office in Raleigh that afternoon. Forrester explained that it would be acceptable to deliver them that afternoon, but the delivery would be late.

14. The documents were not delivered to the Lake Boone Trail Office on March 5.

15. On March 6, 2019, Cameron emailed Forrester to inform him that the company's Vice President was reviewing the documents. Forrester replied by email to ask when he should expect to receive them. Cameron replied by email and apologized for the delay and said that it would be "soon" when the documents would be sent. Forrester then replied by email by saying, "Please be advised that the records requested must be provided within 4 business hours or a possible citation may be issued." (Complainant's Exh. 4)

16. Cameron said nothing to acknowledge that he heard, read or understood the specific time deadline at any time, although he apologized multiple times for the delays.

17. On March 8, 2019, Cameron emailed the OSHA 300A's at 11:24 am to Forrester and apologized again for the delay (Complainant's Exh. 4). Forrester emailed his thanks in reply that day.

18. On March 13, 2019, Respondent's Vice President (Wood) emailed the same 300A forms at 4:25 pm to Forrester with a cover letter and Forrester emailed a "Thank you" late that afternoon (Complainant's Exhibit 4, letter not included).

19. On April 3, 2019, at 2:06 pm Forrester emailed Wood, to say that he had received the 300A forms but not the 300 logs. Forrester added that both sets of documents had been requested per the "Employer Checklist" that had been given to Cameron when Forrester was on site. The next morning, at 8:17 am, Wood replied by email with the 300 logs (Complainant's Exh. 4).

20. No evidence was admitted of any contact between the parties between Forrester's "Thank you." at 5:08 pm on March 13, 2019 and his email to Wood on April 3, 2019.

21. There was no evidence admitted to prove that Respondent failed to maintain the data from which the OSHA 300A's and the OSHA 300 logs are prepared, nor was there any evidence admitted to show that Respondent had failed to file timely its 2019 report for the year 2018.

22. In Forrester's experience, which consists of three years in the CSHO role, 80% of the time he inspects a larger-than-ten-employee-company's work site, the respondents supply the 300A's and the 300 logs within the required four hours.

23. In Forrester's experience, when respondents fail to meet the time deadline for producing the 300A forms and the 300 logs, most of the time citations for not meeting the deadline are issued.

24. The citation in this case was issued on May 3, 2019 and was issued to "FSC 2 dba Fred Smith Company." After formal pleadings were requested and filed, Complainant moved to amend its name for Respondent and on February 24, 2020 ALJ Wetsch granted the motion to restate the name of the employer. ALJ Wetsch noted that Respondent admitted that it was not prejudiced by the amendment and so found.

25. Respondent was not prejudiced by having its proper name misstated in the original citation and initial Complaint.

26. Since the Respondent had supplied the documents requested by Forrester prior to the issuance of the citation, the Department of Labor considered the violation abated and corrected during the inspection even though the physical site inspection was completed on February 26, 2019.

27. Forrester observed no safety hazards during his physical inspection of the work site.

28. After the inspection was completed, Cameron reported to his supervisor, Polansky, that there were no violations found by the Inspector. Polansky's concern was diminished, and he figured it was like a routine inspection where the parties would work together to bring the matter to a close.

29. Respondent is proud of the substantial efforts it has made to work with the voluntary compliance program of the Commissioner. Respondent has been used as a model for other companies. In particular, Polansky described how Respondent has been asked by the Commissioner to demonstrate for others how excavations are supposed to be done. Over the past five years, Respondent has cooperated with as many as two dozen voluntary inspections where the inspectors allowed the company to take routinely 15 days to respond to requests for additional data. Polansky explained that the cooperative relationship that it had had with the Commissioner caused him not to worry about strict time deadlines like the four hour rule for the OSHA 300A's and the OSHA 300 logs. Polansky's testimony as described herein was received as highly credible, and it was unchallenged and unrebutted.

30. No evidence was admitted to show that the CSHO ever became aware of the relationship between the voluntary compliance part of OSHA and the Respondent.

31. The OSHA forms and logs requested are helpful to the Department of Labor in addressing employers' hazards on their jobs and identifying trends from the data. Such data guides the inspections of CSHO's and is directly related to the health and safety of employees.

32. A "non-serious" violation in North Carolina is comparable to the "other-than-serious" terminology found in federal OSHA cases. *See e.g., Commissioner of Labor v. NC Piedmont Natural Gas Corporation,* No. OSHANC 98-3735, Sept. 28, 2000 and *Commissioner of Labor v. Britthaven, Inc.,* No. OSHANC 2005-4523, April 28, 2006 (demonstrating interchangeability of "other-than-serious" and "non-serious" terminology in North Carolina decisions).

33. An "other-than-serious" violation of OSHA regulations "is one in which 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." (*Crescent Wharf &Warehouse Co.,* 1 BNA OSHC 1219, 1222 (No.1, 1973) *cited in, Secretary of Labor v. Pro-Spec Corporation dba Pro-Spec Painting, p. 33,* Nos. 16-1746 & 17-0125 (August 22, 2018).

34. As stated in the opinion of an ALJ for the federal Occupational Safety and Health Review Commission, "Employee access to a hazard is not an element of the Secretary's burden of proof for a record keeping violation." Further, the ALJ cited *Gen. Dynamics Corp., 15 BNA OSHC 2122, 2132n.17 (No. 87-1195, 1993)* for the proposition that "The Secretary need not prove harm to any particular employee resulting from a violative record, to establish a violation." *Secretary of Labor v. Packers Sanitation Services, Inc.* OSHRC No.: 17-1376 (*Appeal denied, per curiam, No.*19-11537 (11th Cir. 2020) (unpublished)

35. The data required to be reported in 29 CFR 1904.40 provide "an important source of information for OSHA and enhance its enforcement efforts . . . so that OSHA can focus its inspection on the hazards revealed by the records." *Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness,* 81 FR 91792-01 (December 19, 2016).

36. The gravity based penalty, based on the criteria in the North Carolina Department of Labor's OSHA Field Operations Manual, for the citation in this case was discounted 10% for history and 10% for good faith thus reducing the proposed penalty of $1,000 to $800. The penalty would have been appropriate except for mitigating circumstances found herein and examined in the Discussion below.

37. The data for the content of the documents that are the focus of the citation are filed with the government in part or in whole by businesses the size of Respondent each January 31 for the previous calendar year. While Forrester's understanding of exactly what is done with the filings was unclear, he did not have access to the specific information in the filings of Respondent without the Respondent responding to his request.

38. Respondent officials, Brent Wood and Jay Polansky, mistakenly believed that they had fifteen days to respond to the request for documents received by their subordinate, Robert Cameron.

39. Polansky acknowledged that he was aware of the expectations of the regulation that is in question, but he did not remember it because he mistakenly treated this matter like one of the voluntary inspections he was accustomed to from the Department of Labor.

40. Had Wood and Polansky been correct that they had fifteen working days to provide Forrester with the records, then their initial responses on March 8 and March 13 would have been timely, but for the omission of the OSHA 300 logs.

41. When Brent Wood's attention was called to the omission of the OSHA 300 logs from the responses the company made to Forrester, the logs were submitted within four business hours.

42. Until Wood emailed Forrester on March 13, 2019, with purported copies of the OSHA 300A's, which had already been transmitted on March 8 by Cameron, all contacts between Respondent and Forrester were through Cameron.

43. Forrester's repeated warning from the telephone call referenced herein on March 5, 2019 and his email from 2:19 pm on March 6, 2019 that the OSHA 300A's and the 300 logs had four hour delivery deadlines was communicated only to Cameron.

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. Respondent is subject to the provisions of the Act and the requirements of Subpart E — Reporting Fatality, Injury and Illness Information to the Government. The purpose of the rules in Part 1904 "is to require employers to record and report work-related fatalities, injuries, and illnesses." *See,* 29 CFR 1904.0.

3. Complainant proved by a preponderance of the evidence that Respondent committed a non-serious violation of 29 CFR 1904.40(a).

4. Employee access to a hazard is not an element of the burden of proof for a record keeping violation. *Secretary of Labor v. Packers Sanitation Services, Inc.,* OSHRC No. 17-1376 (February 11, 2019) *(petition denied, per curiam, Case No. 19-11537 (11th Cir. 2020)(unpublished).* Likewise, to prove a violation, the Complainant "need not prove harm to any particular employee resulting from a violative record." *Id. (quoting Gen. Dynamics Corp.., 15 BNA OSHC 2122, 2132 n. 17 (No.87-1195, 1993)*

5. It is not necessary for Complainant to prove an underlying health and safety violation in order to prosecute a recordkeeping violation. *Secretary of Labor v. Fastrack Erectors,* OSHRC No. 04-0780 (November 19, 2004).

6. Recordkeeping violations are safety-and-health-related. *Id.*

7. While Complainant correctly calculated a gravity-based penalty for the citation, there exists a justification in the particular circumstances of this case to justify not imposing a monetary sanction.

8. When Respondent's dba name is properly stated in a citation and it receives notice of the citation and knew that the citation was against it, there is no prejudice suffered by the Respondent's formal name being misstated. *Commissioner of Labor v. McJast Inc. dba American Carolina Stamping*, SHRBNC, 02-4142 (April 17, 2003).

DISCUSSION

Recordkeeping and Relationship to Safety and Health of Employees

At first glance this case could appear to have no direct or immediate relationship to the safety and health of employees because the CSHO found only a recordkeeping violation of OSHA regulations; however, the job of inspectors is to consider the evidence they request and receive as well as what they observe and learn at the physical inspection. The CSHO could need to return to a site after receiving documents because of safety or health concerns s/he learns about from the review of records. Should the employer fail to cooperate, it would frustrate the CSHO's ability to enforce OSHA regulations by hindering his or her ability to discern patterns or trends in the documents that were requested.

Respondent contends, without any supporting precedent, that "under no circumstance could it be reasonably argued that failing to produce a log and a summary of injuries and illnesses for the previous four years within four hours could *create a hazardous condition* on a job site *or be a direct cause of an accident, injury or illness."* [emphasis added] Respondent is correct that such failure could not *"create"* or *"be a direct cause"* of an accident, injury or illness, but Respondent is reframing and narrowing the question to try to justify its claim that it should not be cited for the violation of the regulation. The concern for the Commissioner is getting the information in the hands of the authorized official quickly so s/he can evaluate as close to the time of the physical inspection as possible whether any trends or patterns are disclosed in the data to justify looking more closely and urgently at particular practices of the employer.

Remember that in this case the inspection was triggered by a complaint of hazardous conduct. No evidence was found of any such conduct, yet that does not rule out the possibility that hazardous conduct had occurred and been self-corrected before the inspector arrived. Similarly, the fact that the CSHO found no hazards does not rule out the possibility that the records would disclose practices that are hazardous.

The relationship to safety and health of a violation of 29 CFR 1904.40(a) is established. In December, 2016, OSHA published a clarification of the rules requiring recordkeeping in order to highlight that the duty of recordkeeping was a continuing duty. In the process, the clarification explained that among the purposes of the rule that is supporting the citation in this case was the need to provide OSHA with "an important source of information" and "enhance its enforcement efforts." In particular, the clarification noted that the information facilitated OSHA being able to "focus its inspection on the hazards revealed by the records." *Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness,* 81 FR 91792-01 (December 19, 2016) and *See, Secretary of Labor v. Packers Sanitation Services, Inc.,* OSHRC No.: 17-1376 (February 11, 2019) (no need to prove harm to any particular employee to establish a violation of a recordkeeping violation *citing, Gen. Dynamics Corp.,* 15 BNA OSHC 2122, 2132 n. 17(No. 87-1195, 1993). In summary, citations for violation of recordkeeping and reporting obligations is well justified both generally and in this case.

Respondent argues that there can be no violation of the record keeping regulation without an associated safety violation because the purpose of the rule in 29 CFR 1904.0 "is to require employers to record and report work-related fatalities, injuries and illnesses." Hence Respondent argues that without a fatality, injury or illness, there is no safety concern. As found herein, the records requested assist the CSHO in determining whether there are hazards occurring in the employer's workplace that affect employees' health or safety. As a result it is established that record keeping has a direct relationship to the safety or health of employees. Respondent cites no precedent in support of its argument. At least one case noted herein shows that recordkeeping citations can stand alone. *Secretary of Labor v. Fastrack Erectors,* OSHRC No. 04-0780 (November 19, 2004). This objection is likewise rejected.

Respondent argues further that the violation as alleged in this citation constitutes a *de minimis* violation that is insufficient to be the foundation for a non-serious citation. Respondent cites 29 CFR 1903.14(a) which says that after the CSHO has submitted the report of the inspection (internally), then if a requirement of the Act has been violated then either 1) a citation or 2) a notice of *de minimis* violation(s) which have no direct or immediate relationship to safety or health is issued.

Respondent contends, again without supporting precedent, that 1903.14(a) defines a so-called *de minimis* violation that is repeated in 29 CFR 1903.15(c) when that regulation refers to proposed penalties for violations:

> Penalties shall not be proposed for *de minimis* violations which have no direct or immediate relationship to safety or health.

Respondent notes that the North Carolina Administrative Code speaks to *de minimis* violations specifically:

> North Carolina does not have a procedure for issuance of a notice with respect To *de minimis* violations that have *no direct or immediate relationship to safety or health. [emphasis added]*

13 NCAC 07A.0301(h)(9)

Respondent uses this provision to argue that the North Carolina Administrative Code prohibits citations for violations that have no direct or immediate relationship to safety or health. As found and explained above, the failure to comply with 29 CFR 1904.40(a) *does* have a direct or immediate relationship with safety or health. Respondent claims that "Since North Carolina has no procedure for issuing citations for *de minimis* violations, no citation and no penalty can be issued against Respondent ...." This conclusion does not follow from the fact that North Carolina has no procedure for recognizing *de minimis* violations. The violation of the recordkeeping obligation is a non-serious violation that does relate to safety and health of employees and is properly found.

Reasons Other Than At Law, In Equity or In the Interest of Justice

Was the Complainant's enforcement of this citation so riddled with inconsistencies or technical imperfections that it is fundamentally unfair to hold the Respondent responsible for a violation of the regulation cited? The answer is no. Respondent notes that Complainant misnamed the Respondent on its Citation as well as the Complaint, but the name Complainant used had been given to it by Respondent's Safety Specialist, Robert Cameron, when he filled out the name of the employer on the Employer's Rights and Responsibilities form (a two-copy form with the original going to Respondent and the copy kept by the CSHO). Respondent suggests that when it submitted some of the documents requested that Complainant should have noticed the name was different and adjusted its records before it ever filed a Citation or a Complaint. Further, when Respondent submitted its request for an informal conference, it used stationery that identified a different (proper) name for the company. While Respondent is correct that the naming error was not caught, Respondent's own official representative was responsible for misstating the company name. Had Respondent called Complainant's attention to the error and corrected it and Complainant failed to fix its records after having been told specifically of the need for correction, then Respondent would have more of a reason to argue the application of the provisions of N.C. Gen. Stat. 95-137(b)(3) which provides that "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." In this case, after having contributed to Complainant's error, it would be fundamentally unfair for it to try to benefit from its own error going unrecognized by claiming that the Citation was not filed within six months after the occurrence of the violation solely because the Respondent was not named precisely. Respondent knew it had been cited (within six months of the violation) and was not prejudiced by the error, by its own admission, and by Judge Wetsch's finding when she allowed an amendment to the name of the Respondent. Consequently, this technical imperfection argument fails.

Respondent also asserts that it was inconsistent for Complainant to say that the violation was corrected during inspection when the records were not provided until after the physical site visit. The findings of fact show that Complainant treats corrective actions taken by Respondent prior to issuance of a citation (or in this case, supplying of documents requested), as having occurred during the inspection. Given that the physical inspection did not end until the end of the day and that Respondent did not offer the records during the visit, it is disingenuous that Respondent

objects to the Complainant's assertion that the violation was corrected during the inspection. Respondent offers no case precedent to justify this assertion of technical imperfection to avoid its responsibility for violating the regulation in question. Complainant's position that the violation was corrected during the visit is reasonable, and it worked no hardship or prejudice on the Respondent.

Finally, Respondent argues that having a violation on its record will hurt its ability to win bids for the work it needs to do to keep its workforce busy. It asserts that many owners will not work with a contractor who has a record of safety violations, and the competitive nature of the process by which Respondent obtains work means it starts the bidding process with a strike against it. This may or may not be true, but Respondent did not prove more probably than not that it is true. Consequently, this objection is also rejected.

The Penalty Calculation

Having addressed and rejected the objections voiced by Respondent, we turn to the penalty for the Citation at hand. The Respondent knew of the regulation by virtue of Forrester's oral and written notices of the time deadline to produce the records in question. Further, the company's Director of Health, Safety and Environment conceded that he knew of the regulation and its time deadline. The Complainant met its burden of proof to show that Respondent failed to meet the deadline and violated 29 CFR 1904.40(a). However, the penalty imposed is not justified. There are factors that argue for and against the imposition of the gravity-based penalty as adjusted, but the substantial weight of the evidence justifies no penalty. Following are the key factors relevant to this analysis:

1. At the time of the inspection, the CSHO gave Cameron a written list of the documents it wanted Respondent to produce, but the paper listing the documents did not specify that the OSHA 300 logs and the OSHA 300A forms were subject to the four hour rule of 29 CFR 1904.40(a). Forrester did inform Cameron of the four hour rule orally, but the paper did not state when *any* of the documents had to be produced.

2. On March 5, 2019, when Cameron telephoned and spoke to the CSHO and asked if he, Cameron, could hand deliver the documents that afternoon to the OSHA Lake Boone Trail offices, he was told that the documents were late. Cameron apologized.

3. On March 6, 2019, Cameron and Forrester exchanged a series of emails, the last of which noted clearly that the documents were due within four hours of the initial request or a citation could issue. In one of the emails, Cameron again apologized for the delay in production because the Vice President was reviewing the records.

4. No records were submitted until 11:24 am on March 8, 2019, and only one of the two requests was fulfilled.

5. An additional production of documents was made by Vice President Wood on March 13, 2019 which simply duplicated the production of March 8, 2019.

6. Forrester wrote back to Wood on March 13 and thanked him for the submission, but did not mention that the 300 logs were missing.

7. On April 3, 2019 Forrester wrote to Wood and explained that Complainant had still not received the OSHA 300 logs.

8. On April 4, 2019, within four business hours of the April 3, 2019 email from Forrester, Wood submitted the OSHA 300 logs.

9. Respondent had had frequent interaction with Complainant's voluntary compliance section over the previous five years and that unit had routinely allowed Respondent to take fifteen (15) days to supply Complainant with records that were requested.

10. Respondent's communications with the CSHO were, with one exception, all completed within 15 days of the site visit. The first contact by Respondent's representative, Cameron, concerning the records following the site visit was just 5 business days after the site visit.

11. Cameron demonstrated concern for timing on March 5 by apologizing for the delay then.

12. When Cameron did not deliver the records to Lake Boone Trail on March 5 as he implied he would do, he emailed the next day to say that Respondent's Vice President was reviewing the records and again apologized for the delay.

13. During the preceding five years, Respondent and Complainant had had a strong positive relationship that even included Complainant's asking Respondent to serve as a model for demonstrating proper safety practices.

14. Respondent's Director of Health, Safety and Environmental, Polansky, testified credibly concerning the relationship between the parties and his testimony was neither contested nor rebutted.

15. Polansky noted that he knew the requirements of 29 CFR 1904.40(a), but the fact that no hazard was found by the CSHO's physical inspection and the good relationship between the parties caused him not to appreciate the importance of the four-hour deadline.

16. There was no evidence entered to suggest that Respondent had failed to timely file its annual OSHA reports in any one of the years for which data was requested. Similarly, there was no evidence admitted to suggest that Respondent used the time between the site visit and the dates when production occurred to create the reports.

The evidence shows that Respondent's representative was told about the four hour deadline. On the other hand, the written request for the documents in question did not mention that there was a different deadline for the two types of OSHA reports that were on the Employer's Checklist of documents to produce. The failure of the checklist to state the deadline for the OSHA documents does not provide a sufficient basis to excuse Respondent's failure to respond within

four business hours.[1] The Respondent misunderstood the importance of the timing of its response to the CSHO's request. Because of the strong relationship Respondent had with the voluntary compliance part of OSHA, it did not realize that the same collaborative relationship with voluntary compliance did not extend to the enforcement side of OSHA. Respondent was used to having 15 days to respond to requests made by voluntary compliance officials.

Respondent's representative, Cameron, called Forrester on March 5 to ask if he could bring the documents to Forrester that afternoon. Forrester said yes but noted that the documents would be late, and Cameron apologized. The documents were not delivered that day, but the next day the parties exchanged several emails. Cameron explained that the documents were with the Vice President, and they would be delivered soon. Again, he apologized. Again, Forrester noted the lateness and stated that the documents needed to be delivered within four hours or a citation "may issue."

Despite the explicit warning on March 6 that a citation may issue if the documents were not delivered within four hours, Cameron did not deliver any documents in question until March 8. Forrester emailed a thank you upon receipt. Nothing was said by Forrester about any missing documents. Five days later Respondent's Vice President emailed the same set of documents to Forrester which again elicited a thank you. Again, nothing was said by Forrester about missing documents. Three weeks later, Forrester wrote the Vice President to say that the OSHA 300 logs were still not delivered. Within four business hours the logs were delivered with an apology.

Respondent's good relationship with the voluntary compliance arm of the OSHA office caused it not to take as seriously the time deadline for compliance with Forrester's request as it should have. The evidence of the good relationship was made more emphatic by the evidence that OSHA had asked Respondent to demonstrate to others how to excavate safely. This, and other testimony from Polansky relating to the strong relationship was neither challenged nor contested by Complainant. Polansky conceded that he knew of the requirements of the 1904.40(a) provisions, but his concern for the inspection by Forrester diminished when Forrester had found no hazards. Respondent's responses, if they had been measured by the timetable to which they were accustomed would have been timely except for the omitted OSHA logs. Had Forrester noticed the omitted records when he acknowledged the receipt on March 13, there is some reason to believe that the logs would have been produced right away then as they were after Forrester wrote on April 3. The rationale for this is that Respondent proved more probably than not that it had filed its annual reports timely each year for the years requested. The data was available to Respondent. It just did not meet the 1904.40(a) time table.

These facts speak persuasively for the Respondent. Any penalty, on these facts, would be inappropriate.

Based on the foregoing Findings of Fact and Conclusions of Law and considering the Discussion, IT IS ORDERED as follows:

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[1] Had the checklist noted what the deadline was, one wonders whether this dispute could have been prevented.

The citation for the non-serious violation of 29 CFR 1904.40(a) is AFFIRMED. The penalty for the violation is not affirmed and is REDUCED to zero dollars.

This the 24 day of August, 2020.

Reagan H. Weaver
Hearing Officer
North Carolina Occupational Safety and Health Review Commission

CERTIFICATE OF SERVICE

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

JAMES A. BECK, II
FSC II, LLC DBA
Fred Smith Company
701 Corporate Center Dr., STE 101
Raleigh, NC 27607

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

SAGE BOYD
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

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LEGAL AFFAIRS DIVISION
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By depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 27 DAY OF August 2020.

Karissa B. Sluss

Karissa B. Sluss
Docket and Office Administrator
NC OSH Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (919) 733-3589
FAX: (919) 733-3020