

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

FILED

COMMISSIONER OF LABOR OF)
THE STATE OF NORTH CAROLINA,)
)
 COMPLAINANT,)
)
 v.)
)
TIMOTHY JOSEPH STANCIL, dba)
JOE'S ROOFING)
and its successors,)
)
 RESPONDENT.)

SEP - 6 2022

NC Occupational & Safety
Health Commission
FINAL ORDER
(Revised from June 23, 2022 Hearing)

OSHANC NO.: 2020-6222
INSPECTION NO.'s: 318168929
CSHO ID: P3114

HAVING HEARD arguments of Complainant's counsel, Stacey A. Phipps, in a hearing on June 23, 2022, on Complainant's Second Motion to Dismiss the Notice of Contest of Respondent, Timothy Joseph Stancil, dba Joe's Roofing, this Court finds that its oral order at that hearing was in error. Despite Complainant's stipulation that it would not attempt to collect any penalty imposed by the Court, this Court finds that it is unreasonable to dismiss Respondent's Notice of Contest. Respondent's death while the case was pending moots the Complainant's citations.

Respondent's First Motion to Dismiss was denied by the undersigned because there was no evidence offered to show that the Motion had been served on Respondent. The denial of the motion on April 29, 2021, was *without prejudice* to reconsideration once the Complainant could prove service. Subsequently, on May 10, 2021, Complainant filed a new motion for dismissal of the Notice of Contest that was identical in its pleadings to the first motion except for two additional paragraphs in which the dismissal from April 29, 2021, was noted and it added that Complainant had learned that Respondent, Mr. Stancil, had died in a car accident on September 30, 2020. Not surprisingly, Complainant offered no evidence to show that the first motion to dismiss the Notice of Contest was served, as Mr. Stancil was deceased at the time of the first motion which was filed February 22, 2021. Needless to say, the terms were not met by which the undersigned agreed the motion to dismiss the Notice of Contest could be reconsidered.

Complainant moved to dismiss the Notice of Contest in its two motions for the same reason — that Mr. Stancil failed to respond to Requests for Admission. Complainant was able to prove receipt of the Requests for Admission via the receipt of the certified mail return receipt. Responses to the Requests for Admission would have been due some weeks prior to Mr. Stancil's demise. Commissioner moved to dismiss approximately five months after Respondent's demise. When it moved to dismiss in its first motion, Commissioner again used

certified mail return receipt requested to serve the motion, but did not offer proof of receipt.¹ The undersigned notes that the Respondent had filed a handwritten defense of himself with his Statement of Position. Respondent alleged, credibly or not, that he was not the employer on the site of the inspection. The undersigned declined to consider the motion to dismiss without assurance that Respondent had actual notice of the motion.

Counsel for Complainant argued at hearing that there was nothing at that point in time to challenge the validity of the Citations in the case, but Counsel acknowledged that she had no precedent to cite in support of her position. Initially, the undersigned intended to grant the relief requested.

Three issues trouble the Court. First, it is not correct to say that there was nothing as of the time of the hearing to challenge the validity of the Citations because there was in fact a document of record in the court file showing that Respondent gave Notice of Contest as well as a Statement of Position. One of the options given the Court when considering a motion to Dismiss for failure to respond to Requests for Admission is to dismiss the Notice of Contest, but it is not the only relief that the Court can grant and is not mandatory. *Review Commission Rules of Procedure* .0405.

Second, there is a non-controlling precedent in a similar situation. Research of prior decisions of the Commission's hearing officers disclosed an instance of the Commissioner moving to withdraw its Citation against a sole proprietor who died before a hearing was had of his case. *John C. Brooks, Commissioner of Labor of North Carolina v. Debruhl's Foodlane & Debruhl's Restaurant*, OSHANC No. 81-831 (treating the Complainant's motion to withdraw as a motion to dismiss under Rule 41 and granting the motion) (Garrett, Sept. 24, 1985).

Third, there is a fundamental problem of proceeding against an individual sole proprietor Respondent, not a company with permanent existence, who has died. This is highlighted by the technical pleading fallacy of the Motion reporting in paragraph 3 that "Respondent *is* an "employer" Respondent no longer existed as of the date of either of Complainant's Motions.

WHEREFORE, for the above reasons, the decision announced at the oral hearing is stricken and the Citations are dismissed.

This the 6 day of September, 2022.



Reagan Weaver
Hearing Office

¹ Complainant also used email service, but email service is available only if the provisions of Rule 5(b)(2)c of the North Carolina Rules of Civil Procedure are followed. There was no evidence offered, or in the file, to show compliance with the Rule cited. The NCRCP apply in the absence of an applicable Review Commission Rule of Procedure.

CERTIFICATE OF SERVICE

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

ESTATE OF TIMOTHY JOSEPH STANCIL
9433 HWY 218
PEACHLAND NC 28133

By depositing a copy of same in the United States Mail, Certified Mail, return receipt requested, at Raleigh, North Carolina, and upon:

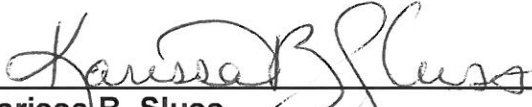
STACEY PHIPPS
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

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 7 DAY OF September 2022.



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