

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

FILED

SEP 21 2022

NC Occupational & Safety
Health Commission

COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA

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DOCKET NO: 2021 - 6350

Complainant,

)

INSPECTION
NO: 318195153

v.

)

CSHO ID: F1857

NCDPS, CASWELL CORRECTIONAL
CENTER
and its successors

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)
)

DECISION AND
ORDER REGARDING
MOTION TO DISMISS
BY NORTH CAROLINA
DEPARTMENT OF PUBLIC
SAFETY AND CASWELL
CORRECTINAL CENTER

Respondent

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Appearances:

Sage A. Boyd, Assistant Attorney General,
North Carolina Department of Justice, Raleigh, North Carolina

For Complainant

Sonya Calloway-Durham, Special Deputy Attorney General
North Carolina Department of Justice, Raleigh, North Carolina

For North Carolina Department of Public Safety
and Caswell Correctional Center

Before: R. Joyce Garrett – North Carolina Hearing Examiner

DECISION AND ORDER

I. PROCEDURAL HISTORY

In this matter:

- a Citation and Notification of Penalty was issued on November 6, 2020;
- an Informal Conference was held on December 11, 2020;
- a No Change letter was dated December 21, 2020;
- a letter stating “The North Carolina Department of Public Safety – Safety, Occupational and Environmental Office and Caswell Correction Center contest the citation, penalties and abatement dates” was filed January 11, 2021;
- a Notice of Docketing was filed January 12, 2021;
- a Statement of Position requesting formal pleadings was dated January 29, 2021;
- a Complaint was filed on April 20, 2021; (the “Complaint”)
- a Motion To Dismiss And Answer was filed on July 9, 2021, by Caswell Correctional Center and the North Carolina Department of Public Safety;
- Complainant filed a response to the motion to dismiss on July 15, 2021;
- On September 8, 2021 this Court denied the Motion to Dismiss;
- Caswell filed a Motion for Relief from Order on September 24, 2021;
- On November 1, 2021 Complainant filed its Response to Caswell’s Motion For Relief from Order;
- Complainant’s Response To Caswell Correctional Center’s First Set Of Discovery To Complainant was filed December 6, 2021;
- An Order Setting Aside Prior Order Denying Motion To Dismiss was filed on January 18, 2022;
- On January 18, 2022 a Briefing Notice was filed requesting that briefs be filed within 40 days;
- Complainant’s Brief in Response to Resp. Motion to Dismiss was filed on February 25, 2022;

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Caswell Correctional Center and N.C. Dept. of Public Safety Brief in Support of Motion to Dismiss was filed on February 25, 2022;

A Supplemental Briefing Notice was filed on April 11, 2022;

Complainant's Supplemental Brief in Response to Resp. Motion to Dismiss was filed May 11, 2022;

Caswell Correctional Center and NCDPS' Supplemental Brief in Support of Motion to Dismiss was filed May 12, 2022;

A Notice of Limited Evidentiary Hearing dated June 6, 2022;

A Notice of Hearing for August 18 and 19, 2022 was issued by the Review Commission on June 22, 2022;

Petition To Intervene By NCDPS filed July 6, 2022;

Complainant's Objection and Response To Petition To Intervene By NCDPS dated July 15, 2022 was filed;

Order Denying Petition To Intervene by NCDPS dated July 28, 2022;

Caswell Correctional Center filed a Petition To Intervene on August 3, 2022;

Complainant's Objection and Response To Petition To Intervene By Caswell Correctional Center dated August 10, 2022;

Order Regarding Petition To Intervene By Caswell Correctional Center dated August 14, 2022; and

Limited Evidentiary Hearing held on August 18 and 19, 2022 (the "Hearing").

The Hearing being a limited evidentiary hearing and extensive briefs on two occasions having been submitted by Attorney Boyd and by Attorney Calloway-Durham, opening statements were not permitted.

At the Hearing the following witnesses were called to testify by Attorney Calloway-Durham:

- Deputy Director Dr. James Coon;
- Warden Doris Daye;
- Chief of Staff NCDPS Jane Gilchrist;
- NCDOL-OSH Division District Supervisor Bruce Miles;
- Chief Medical Officer Dr. Arthur Campbell;
- RN Diane Dorey; and
- Herachio M. Haywood

The following witness was called to testify by Attorney Boyd:
NCDOL-OSH Division District Supervisor Bruce Miles.

This matter is before the Court on a motion by the North Carolina Department of Public Safety (“NCDPS”) and Caswell Correctional Center (“Caswell”) [collectively “Movants”] to dismiss this matter.

Movants raise three issues:

1st Issue. Whether this Court has jurisdiction over the subject matter of the claims raised in this action.

2nd Issue. Whether this Court has personal jurisdiction over NCDPS with respect to the matters raised in this action.

3rd Issue. Whether this Court has jurisdiction over this case based on the Citation and Notification of Penalty (the “Citation”) being issued more than 6 months after the occurrence of the alleged violations.

After carefully considering the case file, and the testimony, evidence and arguments of counsel presented at the Hearing, and the briefs submitted by counsel, the Court issues this Decision and Order.

II. INITIAL JOINT STIPULATIONS

Complainant and Respondent, at the beginning of the Hearing, agreed upon and stipulated to the following (“Initial Joint Stipulations”):

- (1) the Hearing in this matter shall be conducted via the video conferencing platform known as “Lifesize”;
- (2) the presence of a court reporter during the Hearing is waived;
- (3) the Hearing’s audio and video will be recorded through Lifesize (the “Recording”);
- (4) the Recording will be the official record of the Hearing;
- (5) the Recording will be made available to all counsel after the Hearing concludes (the Host will send a link to the Recording as soon as is practicable after the Hearing concludes);
- (6) the Administrative Law Judge shall control when the Hearing is ‘on’ and ‘off’ the record;
- (7) the Hearing will be deemed to have taken place in Raleigh, North Carolina.

III. 1st ISSUE. WHETHER THIS COURT HAS JURISDICTION OVER THE SUBJECT MATTER OF THE CLAIMS RAISED IN THIS ACTION.

Caswell Correctional Center and NCDPS filed a Motion To Dismiss the Citation for lack of subject matter jurisdiction. Complainant averred in the Complaint that the Respondent is NCDPS. Caswell Correctional Center and NCDPS assert that NCDPS is not the employer to whom a citation should have been issued. At the Hearing Caswell Correctional Center and NCDPS presented evidence through witnesses that NCDPS is so large that there is no way the Secretary, who is the head of NCDPS, could know of the day to day operations taking place at the worksite located at 444 Country Home Road, Blanch, North Carolina ("Worksite"). In Caswell Correctional Center and N.C. Dept. of Public Safety Brief In Support Of Motion To Dismiss Movants cite *In re A.B.D.*, 173 N.C. App. 77, 86-87, 617 S.E. 2d 707, 713-714 (2005), which in turn cited *In re McKinney*, 158 N.C.App. at 447, 581 S.E.2d at 797 for the proposition that "a trial court's general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action." Those cases are distinguishable from this matter.

Under the Occupational Safety and Health Act of North Carolina set forth in N.C.G.S. §95-126 et seq. ("NC Act") the North Carolina Review Commission ("NC Review Commission") has jurisdiction granted by statute.

The undisputed facts show that the Citation was issued, a notice of contest was filed, the matter was forwarded to the NC Review Commission, and a Notice of Docketing was issued.

Regarding subject matter jurisdiction the following is relevant:

N.C.G.S. § 95-135 grants the NC Review Commission authority to hear contested citations, penalties, and abatement periods issued by the Occupational Safety and Health Division of the North Carolina Department of Labor;

N.C.G.S. § 95-135(a) provides that "[a]ll occupational safety and health standards promulgated under the federal act by the Secretary, and any modifications, revision, amendments or revocations in accordance with the authority conferred by the federal act or any other federal act or agency relating to safety and health and adopted by the Secretary, shall be adopted as the rules of the Commissioner of this State...." Standards under the Occupational Safety and Health Act for General Industry, 29 CFR 1910, are among those standards adopted in North Carolina. 13 N.C.A.C. 07F .0101;

The Occupational Safety and Health Act of North Carolina applies to all employers in accordance with N.C.G.S. §95-128 and as defined in N.C.G.S. §95-127(11);

N.C.G.S. §95-127(11) defines an employer as a “person engaged in a business who has employees, including any state or political subdivision of a state....”;

The North Carolina Court of Appeals has held “that the State and its agencies can be issued citations for violations of the Occupational Safety & Health Act which are enforceable by proceedings before the Safety and Health Review Board.” Brooks v. North Carolina Department of Transportation, 115 N.C. App. 163, 165, 443 S.E.2d 897, 899 (1994); and

As stated on the face of the Citation and Notification of Penalty and as recited in the Complaint, the Citation was issued for alleged violations of the Occupational Safety and Health Standards for General Industry, under 29 CFR 1910.

Based on the facts in this case and the above analysis, the Undersigned concludes that with respect to the Motion To Dismiss and subject to the holding on the 3rd Issue (i.e. the defense based on 6-month statute of limitations), the Complainant has carried its burden of proof that the NC Review Commission has subject matter jurisdiction to hear the claims alleged in the contested Citation and Notification of Penalty.

IV. 2nd ISSUE. WHETHER THIS COURT HAS PERSONAL JURISDICTION OVER NCDPS WITH RESPECT TO THE MATTERS RAISED IN THIS ACTION.

The North Carolina Occupational Safety and Health Review Commission was established pursuant to NCGS 95-135(a), and is authorized to hear and issue decisions on appeals entered from citations pursuant to NCGS 95-135(b). A hearing examiner may make a determination upon any proceeding instituted before the NC Review Commission. NCGS 95-135(i).

NCGS 95-137(a) provides “If, upon inspection or investigation, the Director or his authorized representative has reasonable grounds to believe that an employer has not fulfilled his duties as prescribed in this Article, or has violated any standard, regulation, rule or order promulgated under this Article, he shall with reasonable promptness issue a citation to the employer.” The employer to whom the citation was issued has the right to contest the citation by notifying the Director (NCGS 95-137(b)). The Director shall immediately advise the NC Review Commission of such notification and “the Commission shall afford an opportunity for a hearing.” NCGS 95-137(b)(4) It is at that time that the NC Review Commission acquires jurisdiction over the matter and issues a Notice of Docketing.

In this matter, Complainant conducted an inspection (“Inspection”) of the Worksite located at 444 Country Home Road, Blanch, North Carolina. Subsequently a Citation was issued. The name for the Respondent designated on the Citation was “NCDPS, Caswell Correctional

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Center”. The evidence shows that (i) the Citation, at the request of Dr. Coon during the Inspection, was sent by U.S. Postal Service Certified Mail Receipt to “4215 Mail Service Center, Raleigh, NC 27699”, and (ii) Dr. Coon received the Citation.

Dr. Coon requested and participated in an informal conference with, among others, NCDOL-OSH Division District Supervisor Bruce Miles. Dr. Coon testified that he participated in the conference as the representative of Caswell; Supervisor Miles testified that it was his understanding that Dr. Coon was representing NCDPS at the conference. No evidence was presented that Dr. Coon informed Supervisor Miles that he was representing Caswell and not NCDPS.

Subsequently a notice of contest was submitted by Dr. Coon. The notice of contest was on North Carolina Department of Public Safety Safety, Occupational and Environmental Health letterhead, designating Dr. James W. Coon, Jr., Director. The letter stated in part the following:

“The North Carolina Department of Public Safety – Safety, Occupational and Environmental Office and Caswell Correctional Center contest the citations, penalties, and abatement dates for the above referenced citation.

The North Carolina Department of Public Safety – Safety, Occupational and Environmental Office additionally request a complete copy of the investigation file.

Please send all official correspondence/files to:
Dr. James W. Coon, Jr.
DPS Safety Director
2020 Yonkers Road
MSC-4215
Raleigh, NC 27699-4215

And by email to:
James (Chip) Coon at James.Coon@ncdps.gov

Cc: Jane Gilchrist, General Counsel, NC Department of Public Safety
Doris Daye, Caswell Correctional Center Warden”

In the letter Dr. Coon is referred to as the “DPS Safety Director” and his email address is “James.Coon@ncdps.gov”; further the General Counsel for NCDPS was listed as a “cc”.

The contested matter was referred to the NC Occupational Safety and Health Review Commission and a Notice of Docketing was issued. The Certificate of Service on the Notice of Docketing shows it was served on “James W. Coon, Jr., NC Dept of Public Safety, 4215 Mail Service Center, Raleigh, NC 27699.”

On April 20, 2021, Complainant issued a formal Complaint showing in the caption “NCDPS, Caswell Correctional Center and its successors” as the Respondent. Complainant averred in General Allegation #4 “Respondent, North Carolina Department of Public Safety (NCDPS), is a North Carolina agency, duly organized and existing under the laws of the State of North Carolina” and in General Allegations #5 “Respondent’s worksite, Caswell Correctional Center, is a medium security prison for adult males.”

Dr. Coon testified that the first time he realized that Caswell was not the intended employer respondent was when he received the Complaint. Movants assert that Complainant’s method of naming the employer respondent is not consistent.ⁱ

Complainant argues that its method of naming a public sector employer is not novel and is consistent with the guidance in the North Carolina Field Operation Manual.ⁱⁱ

There is no dispute between Complainant and Movants that:

NCDPS is a state agency duly organized under the laws of the State of North Carolina;
and

Caswell Correctional Center is a North Carolina government employer that is part of the Adult Prisons Section of the Department of Adult Corrections, which is a part of NCDPS.ⁱⁱⁱ

In this case, Complainant has identified the ‘employer’ of the employees referenced in the Citation as being NCDPS, the Principal State department. Testimony at the Hearing established that the employees at the Worksite were paid by NCDPS.^{iv}

Movants argue that NCDPS is not the employer who should be cited under the circumstances of this case – asserting that the Secretary who is the head of NCDPS could not have knowledge of the day-to-day events occurring at the Caswell Correctional Center. Several witnesses at the Hearing testified that there is a ‘chain of command’ which is followed when a matter is ‘reported up’ to the Secretary. However, no organization plan for NCDPS was introduced into evidence, and no clear evidence setting forth the responsibilities and authority of the various departments, divisions, sections, branches and units was presented at the Hearing. Further, no precedent has been brought to the attention of the Undersigned which expressly requires the Complainant to prove employer knowledge as a prerequisite for identifying the employer to be cited.

North Carolina Rules of Civil Procedure, Rule 4(j)(4) sets forth the manner of service to exercise personal jurisdiction over an agency of the State. No evidence was presented that there was a challenge to the sufficiency of service or service of process in this matter.

Based on the facts established as of this time and on the above analysis, the Undersigned concludes that Complainant, with respect to the Motion To Dismiss, has carried its burden of proof that the NC Review Commission has personal jurisdiction over NCDPS to hear the claims alleged in the contested Citation and Notification of Penalty.

V. 3rd ISSUE. WHETHER THIS COURT HAS JURISDICTION OVER THIS CASE BASED ON THE CITATION AND NOTIFICATION OF PENALTY (THE “CITATION”) BEING ISSUED MORE THAN 6 MONTHS AFTER THE OCCURRENCE OF THE ALLEGED VIOLATION.

Background

On July 9, 2021 Caswell and NCDPS filed in a single document a Motion To Dismiss and Answer. In the Motion To Dismiss Caswell and NCDPS asserted that this Court (i) does not have personal jurisdiction over NCDPS, and (ii) does not have subject matter jurisdiction over the claims raised in the Complaint.

Subsequently, in the Caswell Correctional Center and N.C. Dept. of Public Safety Brief in Support of Motion to Dismiss filed February 25, 2022, one of the arguments presented was that the citation had been issued more than six months after the occurrence of the alleged violations.

The Supplemental Briefing Notice filed April 11, 2022 stated

“One procedural issue argued to support the dismissal of this matter was that the issuance of the citation was time-barred pursuant to the six month statute of limitations set forth in N.C.G.S. § 137(b)(3). This issue was not directly/fully addressed in both briefs. Accordingly, if either party would like to submit a supplemental brief on whether the issuance of the Citation in this matter was timely it may do so.”

Caswell and NCDPS stated in its Supplemental Brief filed May 12, 2022, “...the violation(s) as alleged, occurred more than six months before the issuance of the citation on November 6, 2020” (page 31 ¶ 21) and “...this Court remains without subject matter jurisdiction, given the 6-month statute of limitations.” (page 31 ¶ 22)

Complainant stated the following in its Supplemental Brief filed May 11, 2022,:

“In OSH cases in federal jurisdiction, the Secretary is not required to affirmatively plead or prove compliance with the six-month limitation; noncompliance with six-month limitations period may be raised as defense in a contestment proceeding. See Secretary of Labor v Kaspar Electroplating Corp., 16 O.S.H. Cas. (BNA) 1517 (1993). Even if the Review Commission were to

consider this issue as a defense only (and not part of Complainant's burden to affirmatively plead), there is not a valid defense of noncompliance with N.C.G.S. 95-137(b)(3) because citation issuance was timely in compliance with the statute. See N.C.G.S. 95-137(b)(3)." (page 3)

and

"An alleged timeliness issue regarding citation issuance compliance with the six-month statute of limitation in N.C.G.S. 95-137(b)(3) was raised for the first time in 'Caswell Correctional Center and NCDPS' Brief in Support of Motion to Dismiss" (page 6)

At the commencement of the Hearing Attorney Boyd placed on record Complainant's objection to this Court considering the six-month limitation period.

The "Caswell Correctional Center and NCDPS' Brief in Support of Motion to Dismiss" referenced by Complainant was filed February 25, 2022. A review of the file, however, shows that Caswell raised the 6 month statute of limitations matter in October, 2021.¹

Complainant asserts that the Citation was issued in accordance with NCGS 95-137(b)(3) based on "the essential factor in deciding when the six-month limitation begins to run is OSHA's ability to discover the violation". (Complainant's Supplemental Brief in Response to Resp. Motion to Dismiss, page 4) At the Hearing NCDOL-OSH Division District Supervisor Bruce Miles testified that in issuing the Citation he relied on the wording "the time limitation begins at such time that the division learns or could have learned of the incident" contained in Chapter V of the NCDOL-OSH Field Operation Manual (FOM).

Applicable Law

The stated purpose and policy of the NC Act is "to ensure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions and to preserve our human resources". (NCGS 95-126(b)(2))

Under the NC Act, the Department of Labor has the authority to conduct inspections of worksites and to issue citations. With respect to citations, the NC Act expressly states

"If, upon inspection or investigation, the Director or his authorized representative has reasonable grounds to believe that an employer has not fulfilled his duties as prescribed in this Article, or has violated any standard, regulation, rule or order

¹The reference was in Request Number 76 of "Caswell Correctional Center's First Set of Discovery to Complainant" which was received by Complainant on October 20, 2021 (see Paragraph 4 of Complainant's Consent Motion For An Extension Of Time To File Responses To Caswell Correctional Center's First Set Of Discovery To Complainant filed October 26, 2021)

promulgated under this Article, he shall with reasonable promptness issue a citation to the employer.” (NCGS 95-137(a))

and

“No citation may be issued under this section after the expiration of six months following the occurrence of any violation.” (NCGS 95-137(b)(3))

NCGS 95-137(b)(3) is the same as Section 9(c) of Federal Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (the “Federal Act”)²

Guidance regarding the applicability of NCGS 95-137(b)(3) is provided in NCDOL-OSH Field Operation Manual (FOM), Chapter V - Citations:

“1. General. NCGS 95-137(a) of the act controls the writing of citations.

a. NCGS 95-137(a). “. . . the Director or his authorized representative . . . will with reasonable promptness issue a citation to the employer.” The time that has elapsed from the completion of the inspection or investigation until the issuance of citation(s) will be closely monitored and kept as short as possible by the director.

b. NCGS 95-137(b)(3). “No citation may be issued . . . after the expiration of six months following the occurrence of any violation.” Accordingly, a citation will not be issued where any violation alleged therein last occurred six months or more prior to the date on which the citation is actually signed and dated. Where the employer fails to report a fatality, accident, or punch press injury, the time limitation begins at such time that the division learns or could have learned of the incident. The AG's office will be consulted.”

The FOM was compiled as a guide for OSHA compliance personnel and does not ordinarily create rights or defenses for employers. Johnson Controls, Inc. , No. 89-2614, 1993 WL 35627, *13, n. 8 (OSHRC Feb. 3, 1993).

The Code of Federal Regulations Title 29 Subtitle B, Chapter XVII – Occupational Safety and Health Administration, Department of Labor – Part 1903.14(a) provides “No citation may be issued under this section after the expiration of 6 months following the occurrence of any alleged violation.” The North Carolina Administrative Code incorporated 29 CFR 1903 by reference. (13 NC Admin Code 07A.0301(a)(1))

² The Federal Act states “No citation may be issued under this section after the expiration of six months following the occurrence of any violation.” (29 U.S. C. § 658(c))

The orderly administration of the Federal Act, and the NC Act, requires that the administrative law judges follow precedent established by the NC Review Commission and by the Federal Review Commission (See *Gulf & W. Food Prods. Co.*, 4 BNA OSHC 1436, 1439 (No. 6804, 1976) (consolidated)), and by applicable federal and state courts.

In understanding the scope of the application of "no citation may be issued . . . after the expiration of six months following the occurrence of any violation" the following cases are relevant.

* a statute of limitations is tolled upon a fraudulent or deliberate concealment of material facts; *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Fitzerald v. Simmans*, 553 F. 2d 220, 228 (D.C. Cir. 1977);

* for section 9(c) purposes a violation "occurs" whenever a standard is not complied with and there is employee exposure; it does not matter if a violation first occurs more than six months before the citation is issued as long as the instances of noncompliance and employee exposure providing the basis for the citation occurred within six months of the issuance of the citation; *Central of Georgia R.R.*, 5 BNA OSHC 1209, 1211, 1977-78 CCH OSHD ¶ 21,688, at p. 26,035 (No. 11742, 1977);

* in *Yelvington Welding Service*, 6 BNA OSHC 2013, 2015-16, 1978 CCH OSHO ¶ 23,092, pp. 27,907-08 (No. 15958, 1978) the Commission found that the employer's failure to comply with a requirement to notify OSHA of a fatal accident deprived OSHA of the notice that would have alerted it to the violative condition within six months of its occurrence; having failed to report the accident and thereby having prevented OSHA from learning of the accident, the employer could not avail itself of the limitation period; the citation was not barred by the six-month statute of limitations;

* in *Secretary of Labor v Sun Ship Inc.*, 12 OSHC BNA 1185 (1985) the violation pertaining to recordkeeping disclosure occurred at specific times at and about the date of the inspection, but the citation was not issued for almost nine months; the Commission did not apply the discovery rule because the employer did not conceal the facts alleged to constitute the violation and the Secretary had full opportunity to learn, and did learn, the facts which were the basis of the alleged violation within six months of the alleged violation; the citation was issued more than six months after the violation occurred and was barred by the six-month limitation on issuance of citations;

* the North Carolina Review Commission has upheld the barring of a citation issued after the expiration of six months following the occurrence of a violation; *Brooks v Bethar, Inc.* 3 NCOSHD 635 (1990);

* violation first occurred more than 6 months before the issuance of a citation and the instances of noncompliance and employee access providing the basis for the citation

continued to occur within 6 months of the citation's issuance; General Dynamics Corp, Electric Board Div., 15 BNA OSHC 2122m 1991-93 CCH OSHD ¶29,952 (no. 87-1195, 1993);

* a record keeping violation which continued until the time of the OSHA inspection and was uncorrected at the time of the inspection may be cited six months from the time the Secretary discovers, or reasonably should have discovered, the facts necessary to issue a citation; the violation was uncorrected, continuing and existed at the time of the inspection; the citation was not barred by the six-month statute of limitation; Johnson Controls, Inc., 15 BNA OSHC 2132, 2136, 1993 CCH OSHD ¶ 29,953, p. 40,965 (No. 89-2614, 1993);

* in Kasper Electroplating Corp., 16 O.S.H. Cas. (BNA) 1517 (1993) the Secretary's first opportunity to discover the alleged violations was when the actual workplace inspection began and the citation was issued within six months of that date; the alleged violations existed at the time of the inspection; the citation was not barred by the six-month statute of limitations;

* a distinction was drawn between "discrete record-making violation", which qualify as "occurrences" that trigger the six month statute of limitations, and instances where "a company continues to subject its employees to unsafe situations," which "toll the statute of limitations on a continuing violations theory since the dangers created by the violations persist"; *AKM, LLC v. OSHRC*, 675 F.3d 752 (D.C. Cir. 2012);

* In *Gabelli v. SEC*, 568 U.S. 442, 448–54 (2013) the U.S. Supreme Court held that an SEC claim for a civil monetary penalty accrues for § 2462 purposes at the time of a defendant's securities law violation, rather than at the time the SEC discovers the violation; this decision has been interpreted to effectively eliminate the OSH Review Commission's 1993 decision in *Johnson Controls* which had approved the use of a discovery rule in OSHA recordkeeping cases.

Findings of Facts and Analysis

* Citation 01, Item 001 and Item 002 was issued based on alleged violative conditions and exposure of two employees occurring during the period of April 1, 2020 through April 9, 2020;

* Citation 01, Item 001 alleged a Serious violation of 29 CFR 1910.134(d)(1)(i) stating "The employer did not provide an appropriate respirator based on the respiratory hazard(s) to which the worker was exposed and workplace and user factors that affected respirator performance and reliability", assessing a proposed penalty of \$6,300.00;

* Citation 01, Item 002 alleged a Serious violation of 29 CFR 1910.134(f)(2) stating “Employee(s) using tight-fitting facepiece respirators were not fit tested prior to initial use of the respirator”, assessing a proposed penalty of \$ 4,000.00 (amended to \$4,500.00 by correcting a clerical error in the Adjustment Factors applied to the Gravity Based Penalty);

* one of the employees became infected with COVID-19, became ill and was admitted to a hospital; after 19 days of hospitalization the employee died in the hospital on May 7, 2020;

* the death of the employee was timely reported to the NCDOL OSH Complaint desk on May 7, 2020;

* on May 8, 2020 the investigation was opened for conducting an Inspection at the worksite located at 444 Country Home Road, Blanch, North Carolina;

* due to the Covid-19 pandemic, the Compliance Safety and Health Officer Cristina Almonte who conducted the Inspection (the “Inspector”) did not make a physical inspection of the Worksite, but conducted various phone conferences with, and requested documentation from, employer representative, and conducted phone conference interviews with employees and other relevant persons, all for the purpose of determining conditions and exposure at the Worksite;

* the alleged violative conditions and employee exposure which were the subject of the Citation did not occur during the period of the Inspection (i.e. did not occur from May 8, 2020 through November 5, 2020);

* the Inspection lasted almost 6 months (i.e. May 8, 2020 to November 5, 2020);

* NCDOL-OSH Division District Supervisor Bruce Miles testified that sufficient information had been gathered by/or during the 4th month of the Inspection to establish a sufficient basis for issuing the Citation;

* Complainant had full opportunity to learn, and did learn, the facts which were the basis of the allege violations within six months of occurrence of the alleged violations;

* the Citation was signed and dated, and issued on November 6, 2020;

* NCDOL-OSH Division District Supervisor Bruce Miles testified that he relied on the wording “the time limitation begins at such time that the division learns or could have learned of the incident” contained in Chapter V of the North Carolina FOM, and that the first time that the alleged conditions and exposure could have been learned was when the Inspection was conducted;

* no evidence was presented that would establish that there was fraud, deception or an attempt by the employer, or anyone, to conceal the alleged conditions and employee exposure.

Based on these facts, the alleged conditions and employee exposure occurred at a discrete period of time --- during the interval of April 1 through April 9, 2020 (the “Period of Alleged Violation”). The alleged violations were not uncorrected at the time of the commencement of the Inspection and did not exist at any time during the Inspection.

The death of the allegedly exposed employee occurred on May 7, 2020 (6 months before the issuance of the Citation on November 6, 2020³). The Inspection began on May 8, 2020, 1 month after the last day of the Period of Alleged Violation. The facts in this case differ from those in *Kasper Electroplating Corp.*, 16 O.S.H. Cas. (BNA) 1517 (1993). In this case the first opportunity to discover the alleged violation was when the actual Worksite Inspection began (May 8, 2020), but contrary to *Kasper Electroplating* the alleged violative conditions did not exist at the beginning of the Inspection.

In this case the violative conditions did not exist during the time of the Inspection. Complainant was fully aware and had all the necessary facts in its possession by/or during the 4th month of the Inspection to issue a citation. Had the Citation been issued at that time it would have been issued within the six month limitation period.⁴ However, the Citation was not issued at that time, reportedly due to the Inspector’s/supervisor’s workload.

NCDOL-OSH Division District Supervisor Bruce Miles testified that he relied on the wording “the time limitation begins at such time that the division learns or could have learned of the incident” contained in Chapter V of the North Carolina FOM. However, the relied upon provision is modified by the clause “Where the employer fails to report a fatality, accident or punch press injury”. In this case the fatality was timely reported. Accordingly, the referenced provision does not control when the time limitation begins.

In this case (i) the alleged noncompliance and employee exposure providing the basis for the Citation did not occur within six months of the issuance of the Citation, (ii) there was no failure to timely report the fatality, and (iii) there was no evidence of a fraudulent or deliberate concealment of material facts.

The Undersigned holds that N.C.G.S. 95-137(b)(3)’s six-month statute of limitation bars Citation 01, Item 001 and Item 002.


³ The time interval calculations were determined using <https://www.timeanddate.com/date/durationresult.htm>

⁴ The 4th month is the interval of approximately August 8, 2020 to September 8, 2020; considering only the last date, September 8, 2020 is 5 months after April 9, 2020, the last date of the existence of the alleged violative conditions.

NCDPS, Caswell Correctional Center
2021-6350

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that having held that NCGS §95-137(b)(3)'s six month statute of limitations bars Citation 01 with respect to Item 001 and Item 002, the **Citation is hereby VACATED.**

This the 21st day of September, 2022.



R. Joyce Garrett
Administrative Law Judge

ⁱ The following are some examples of naming of the employer respondent in some prior citations:

Example 1 – from citations issued in March, 2020; these are contested cases which are currently pending before the NC OSH Review Commission, and are unrelated to the inspection in this case.

As the result of Inspection Number 318183431 citations were issued to NC DPS Central Engineering Division; as a result of Inspection Number 318183100 citations were issued to NC Dept of Public Safety New Hanover Correctional. (Complainant’s Response to Caswell Correctional Center’s First Set of Discovery to Complainant, Response #13). [Hereinafter Caswell Correctional Center’s First Set of Discovery to Complainant will be referred to a “Request For Admissions” or “RFA”; and Complainant’s Response to Caswell Correctional Center’s First Set of Discovery To Complainant will be referred to as “Response To Request For Admissions” or “R-RFA”]

Question #14 in RFA stated “In March 2020, Complainant did not issue a citation against NCDPS as a result of Inspection Numbers 318183431 and 318183100.”

In response Complainant stated in relevant part “Complainant admits as a result of Inspection Number 318183431, citations were issued to NC DPS CENTRAL ENGINEERING DIVISION, and as a result of Inspection Number 318183100, citations were issued to NC DEPT OF PUBLIC SAFETY NEW HANOVER CORRECTIONAL that are both currently contested inspections before the NC OSH Review Commission that are unrelated to the inspection in this case. Excepted as admitted, denied.” (R-RFA Response #14)

Question #16 in RFA stated “Had Complainant issued 318183431 and 318183100 against NCDPS, it would not have the option to pursue the theory of multi-employer worksite liability”

In response Complainant stated in relevant part “Complainant admits if NCDPS had been considered the employer it would have been issued a single set of citations. Except as admitted, denied.” (R-RFA Response #16)

The caption for the Respondent’s name in each of Inspection Number 318183431 (NC DPS CENTRAL ENGINEERING DIVISION) and 318183100 (NC DEPT OF PUBLIC SAFETY NEW HANOVER CORRECTIONAL) is structured similarly to the caption in this case --- NCDPS, Caswell Correctional Center. Based on the responses to Question #14 and Question #16, considered in their entirety, it might be surmised that NCDPS was not the intended employer to be cited in Inspection Numbers 318183431 and 318183100.

Example 2 – from citations issued in April, 2018 (these were contested cases which have been resolved; the file in each case is held pursuant to a Protective Order; however, the Final Order in

these cases was not subject to the terms of the Protective Orders; the information below is derived from the Final Order; the Final Order is of public record)

As a result of Inspection Number 318120664 a citation was issued to NC DEPARTMENT OF PUBLIC SAFETY-ADULT CORRECTION PASQUOTANK CORRECTIONAL INSTITUTION; as a result of Inspection Number 318120771 a citation was issued to DIVISION OF ADULT CORRECTIONS OF DEPT. OF PUBLIC SAFETY D/B/A CORRECTION ENTERPRISES.

Stipulations Paragraph 3 provides: “Respondent, cited as NC Department of Public Safety-Adult Correction Pasquotank Correctional Institution (“PCI”), is a state agency that operates a facility that is part of the Section of Prisons of the Division of Adult Corrections (“DAC”) of the North Carolina Department of Public Safety, duly established under the provisions of N.C.G.S. Section 143B-711, which does business in the State of North Carolina and maintains a place of business in Elizabeth City, North Carolina. Respondent PCI is a facility of the Section of Prisons tasked with providing care, custody and supervision of adults in minimum and close custody who are serving active sentences after conviction for violations of North Carolina law.” (See Stipulations paragraph 3 of Final Order)

Stipulations Paragraph 4 provides: “ Respondent, cited as Division of Adult Correction Of Department of Public Safety D/B/A Correction Enterprises (“CE”), is a state agency known as the Section of Correction Enterprises of the DAC of the North Carolina Department of Public Safety, duly established under the provisions of N.C.G.S. Section 148-128, which does business in the State of North Carolina and maintained a place of business in Elizabeth City, North Carolina, up until October 12, 2017. Respondent CE develops and operates industrial, agricultural, and service enterprises that employ incarcerated offenders in an effort to provide them with meaningful work experiences and rehabilitative opportunities that will increase their employability upon release from prison.” (See Stipulations paragraph 4 of Final Order)

The caption for the Respondent’s name in Inspection Number 318120664 (NC Department of Public Safety-Adult Correction Pasquotank Correctional Institution) is structured similarly to the caption in this case --- NCDPS, Caswell Correctional Center. Based on Stipulations Paragraphs 3 and 4, considered in their entirety, it might be surmised that NCDPS was not the intended employer to be cited in Inspection Numbers 318120664 and 318120771.

ii Complainant’s Method For Naming Of A Respondent

Complainant, in Complainant’s Brief In Response To Resp. Motion To Dismiss, discussed briefly its manner of naming the respondent:

“The establishment name as North Carolina Department of Public Safety or some abbreviation of that, followed by the facility (or worksite) name is not a novel format for the phrasing of the establishment name issued by the Complainant to this State agency. By way of example, the Complainant points out the following information available to the public on the United States Department of Labor Occupational Safety & Health establishment search results: that ‘Nc Department of Public Safety – Pender Correction’

was issued citations under General Industry Standards, in 29 CFR 1910, and the parties settled the matter in an informal settlement. Not only is the construct of the establishment name similar to the case at bar, but the subject matter is similar in that the cited standards fall under 29 CFR 1910. There was not a personal or subject matter jurisdiction issue then; as such, there is not a personal or subject matter jurisdiction issue now. Additionally, it is not novel for citations to be case-captioned to NCDPS hyphen or comma [e.g. NCDPS-Caswell Correction Center or NCDPS, Caswell Correctional Center] a particular correctional institution. Complainant asserts that any variation in the punctuation, abbreviations, or phrasing between citations that NCDPS has received in other matters does not give rise to a personal or subject matter jurisdiction issue in this case.” (page 8 – footnotes omitted)

Caswell, however, appears to believe that Complainant’s citing of employers is not consistent. Question #9 in the RFA stated: “Complainant’s decision to cite NCDPS or an individual department at NCDPS are not consistently applied.” In response Complainant stated in relevant part:

“Complainant further admits that an employer’s establishment name is selected based on several potential sources of establishment information, NCDOL-FOM Chapter 3, Appendix III-A lists a number of sources Compliance Safety and Health Officers can use to get a legal name of the entity they are inspecting including, but not limited to the name that the employer management provides and the name associated with the Unemployment ID numbers listed with the Employment Security Division (some public sector entities have one or more Unemployment ID numbers, some do not have a number); Complainant further admits that the Public Sector (PS) survey is administered by the NCDOL Planning, Statistics and Information Bureau (PSIM) to gather public sector injury and illness data. Pursuant to N.C.G.S. 95-148(6), each public sector agency is required to provide NCDOL with annual data associated with their accidents and injuries. The PS Survey is conducted by PSIM to help employers comply with this requirement and to provide NCDOL with data for targeting employer/sites with higher than average injury/illness rates for programmed inspections. OSH targets specific public sector employers, establishments or departments (depending on how they provided data) which have a calculated DART rate that is at or above the target rate for their specific category. As discussed in Operating Procedure Notice (OPN) 128U (effective September 17, 2019) and 128V (effective September 25, 2020), in 2004, public sector survey responders, including NCDPS, were given a one-time option as to how they would submit their injury/illness data. Data can be submitted by individual establishments (as defined in 29 CFR 1904 – Recording and Reporting Occupational Injuries and Illnesses), by department/division, or for the employer, as a whole; ... NCDPS submits PS surveys to NCDOL; Respondent has identified itself as “NC Department of Public Safety – Adult Correction” as the business name for its worksite or survey site, Caswell Correctional Center;...” (R-RFA Response #9)

iii Comments Concerning NCDPS

A brief historical review may be helpful in understanding the structure of NCDPS.

In 1969 the government of North Carolina consisted of more than 300 administrative departments, agencies and offices. Governor Robert W. Scott promoted the idea that a consolidation of such departments, agencies and offices would result in more efficient government operation. Several proposed amendments to the state constitution were approved by The General Assembly of 1969, one of which was to require legislation to reduce the size of government to no more than 25 principal departments. This amendment was accepted by the voters in 1970.

To accomplish the goal of consolidation, The General Assembly enacted the Executive Organization Act of 1971 which created 19 principal offices or departments (10 of which the head would be elected by the citizens; 9 of which would be gubernatorial appointees). The governor would be elected by the voters. Subsequently the Executive Organization Act of 1973 was enacted which made further organizational changes.

The Executive Organization Act of 1973 is codified in N.C. G. S. Chapter 143B and contains law applicable during the time of the Inspection in this case.

NCGS § 143B-3 sets forth certain definitions as follows:

(1) Agency: whenever the term “agency” is used it shall mean and include, as the context may require, an existing department, institution, commission, committee, board, division, bureau, officer or official.

(6) Division: the principal subunit of a principal State department.

(7) Head of department: head of one of the principal State departments.

(9) Principal State department: one of the departments created by the General Assembly in compliance with Article III, Sec. 11, of the Constitution of North Carolina.

The Department of Public Safety is a Principal State department. The current department is the result of mergers of other departments. NCDPS is considered to be an ‘umbrella agency’ -- it is broken into sections which carry out many of the state’s regulatory and law enforcement tasks.

The Head of NCDPS is appointed by the Governor. NCGS 143B-10(a) provides that “the head of each principal State department may assign or reassign any function vested in him or in his department to any subordinate officer or employee of his department.”

NCGS 143B-10(b) provides in relevant part:

(b) Reorganization by Department Heads. – With the approval of the Governor, each head of a principal State department may establish or abolish within his department any division. Each head of a principal State department may establish or abolish within his department any other administrative unit to achieve economy and efficiency and in accordance with sound administrative principles, practices, and procedures except as otherwise provided by law.

NCGS 143B-10(c) provides in relevant part:

(c) Department Staffs. – The head of each principal State department may establish necessary subordinate positions within the department, make appointments to those positions, and remove persons appointed to those positions, all within the limitations of appropriations and subject to the State Budget Act and the North Carolina Human Resources Act. All employees within a principal State department shall be under the supervision, direction, and control of the head of that department. The head of each principal State

department may establish or abolish positions, transfer officers and employees between positions, and change the duties, titles, and compensation of existing offices and positions as the head of the department deems necessary for the efficient functioning of the department ...

NCGS 143B-10(e) provides in relevant part:

(e) Departmental Management Functions. – All management functions of a principal State department shall be performed by or under the direction and supervision of the head of that principal State department. Management functions shall include planning, organizing, staffing, directing, coordinating, reporting, and budgeting.

NCGS 143B-11 provides as follows:

§ 143B-11. Subunit nomenclature.

(a) The principal subunit of a department is a division. Each division shall be headed by a director.

(b) The principal subunit of a division is a section. Each section shall be headed by a chief.

(c) If further subdivision is necessary, sections may be divided into subunits which shall be known as branches and which shall be headed by heads, and branches may be divided into subunits which shall be known as units and which shall be headed by supervisors.

NCDPS is, or is one of, the largest state agencies in North Carolina --- structurally NCDPS has numerous departments, divisions, sections, branches and units.

^{iv} Movants argue that the entity which should be cited is the ‘employer’ who has day-to-day supervision of the facility where the alleged violations occurred, knowledge of the activities of employees at that facility, and the ability to correct conditions which exist. Movants acknowledge that NCDPS is the ‘employer’ who actually pays the employees working at Caswell Correctional Center but asserts that NCDPS receives information about the day-to-day activities at Caswell Correctional Center only through a lengthy ‘chain of command’.

The Movants’ approach is similar to that used in determining the employer for purposes of the Fair Labor Standards Act: whether the alleged employer possesses the power to control the workers – has the power to hire and fire; supervises and controls employee work schedules and conditions of employment; determines the rate of payment; maintains employment records. See *Herman v RSR Security Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999); *Bonnette v California Health and Welfare Agency*, 704 F2d 1465, 1470 (9th Cir 1983).

‘Employer’ has also been interpreted to mean any person responsible for the management, supervision and control at the workplace. Control over an employee "is the prime indicia of an employer-employee relationship." *Employees Retirement System v. Baughman*, 241 Ga. 339, 340, 245 S.E.2d 282 (1978); See *Griffin v. Hardware Mutual Insurance Co.*, 93 Ga.App. 801, 803-04, 92 S.E.2d 871 (1956).

Movants argue that the definition of employer under the NC Act has been expanded to be not just an employer under the economic reality test, but also an employer under a ‘creating, controlling, correcting, exposing’ test. (see *Commissioner of Labor v Weekley Homes*, 609 S.E.2d 407, 2005)

CERTIFICATE OF SERVICE

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

SONYA CALLOWAY DURHAM
NC DEPARTMENT OF JUSTICE
PUBLIC SAFETY SECTION
PO BOX 629
RALEIGH NC 27602-0629

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

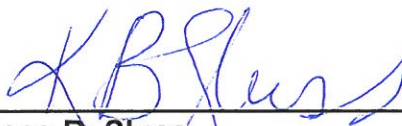
SAGE BOYD
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

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 5 DAY OF October 2022.



Karissa B. Sluss
Docket and Office Administrator
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