

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

FILED

DEC 17 2024

NC Occupational Safety & Health
Review Commission

**COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,**)

COMPLAINANT,)

v.)

HARRIS TEETER, LLC)
and its successors,)
RESPONDENT.)

**ORDER REGARDING
MOTION TO SUPPLEMENT
THE RECORD**

OSHANC NO.'s: 2022-6438, 2022-6486,
2022-6492, 2023-6531
INSPECTION NO.'s: 318230059, 318244522,
318247434, 318253200
CSHO ID: Y3077, A3277
A3277, E1150

THIS MATTER is before the Commission on “Complainant’s Motion to Supplement the Record Regarding Respondent’s Motions for Adverse Inference or to Dismiss.” Complainant claims surprise evidence was admitted over its objection on the last day of the hearing and moves the admission of various documents related to FAME reports for Tennessee and North Carolina. Complainant contends that under North Carolina Rule of Evidence 106 (N.C.G.S. §8C-1, Rule 106), commonly known as the “Rule of Completeness,” that Complainant is entitled to submit additional documents to supplement the record of the hearing which concluded on November 25, 2024. Complainant expresses concern that the court might have developed an inaccurate impression of Respondent’s Exhibit 138.

Respondent’s Exhibit 138 was the Federal Annual Monitoring and Evaluation Report (FAME) for FY 2023 concerning the State of Tennessee’s OSHA program. Respondent offered the exhibit after Complainant’s counsel asked the witness, Scott Mabry, if he knew whether Respondent’s counsel was accurate in referencing Tennessee OSHA’s policy about destruction of field notes. Overruling a relevancy objection by Complainant’s counsel, the court allowed admission of Respondent’s Exhibit 138. Respondent’s counsel was entitled to show the basis for his earlier question concerning Tennessee’s practice regarding field notes. The document was admitted by taking judicial notice.

Respondent highlights the language of Rule 106 that expects an adverse party to require any other part of a document to be admitted “at that time” which ought in fairness be offered. Although Complainant may have been surprised by the offering of the document, it did not ask

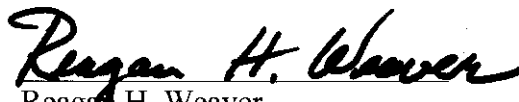
for time to evaluate its position with respect to offering context as Rule 106 would allow. Instead, it requests the court to allow it to offer six additional exhibits *after the conclusion of the hearing* to provide context for Respondent's Exhibit 138. Additionally, it moves for judicial notice to be taken of the proposed exhibits.

To order the relief moved by Complainant would deprive Respondent of its right to cross-examine the witness about the additional documents since testimony has concluded. Further, the relevance of additional evidence would be limited because of what the witness already said on the stand. Mr. Mabry testified that there were different levels of concern that could be and were expressed by federal OSHA in FAME reports. In the FAME report that was Exhibit 138 he noted that the level of concern for Tennessee's field notes procedure was a lower level concern—an "observation"—compared to a "finding." A "finding" requires action by the state. An observation, according to the witness, does not. Consequently, the seriousness of the "observation" about field notes in Exhibit 138 was less.

The court appreciates the concern of both parties for prejudice from either inadequate context for Respondent's Exhibit 138 or from a missed opportunity to examine the witness about proposed additional Complainant exhibits. The decision of Respondent's motion to dismiss is not going to be dependent on what Tennessee's field notes practice is or has been. It is noteworthy, too, that the witness testified that he was unaware of any conversations between federal OSHA and NCOSHA about field notes.

The supplementation moved by Complainant will offer too little of relevance to the decision of the case and was not timely. For those reasons the motion is DENIED.

This the 17 day of December, 2024.



Reagan H. Weaver
Hearing Examiner

CERTIFICATE OF SERVICE

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

TRAVIS W. VANCE
FISHER & PHILLIPS
227 WEST TRADE ST STE 2020
CHARLOTTE, NC 28202

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

STACEY A. PHIPPS
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH NC 27602

By depositing a copy of the 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

via email.

THIS THE 18 DAY OF December 2024.

PAUL E. SMITH
CHAIRMAN



Karissa B. Sluss
Docket Administrator
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