

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

FILED

MAY 23 2023

NC OSH Review Commission

COMMISSIONER OF LABOR OF THE )	DOCKET NO.: OSHANC 2023-6522
STATE OF NORTH CAROLINA, )	INSPECTION NUMBER: 318247954
)	CSHO ID: M3094
Complainant, )	)
-vs- )	ORDER ON COMPLAINANT'S
)	(SECOND) MOTION FOR EXTENSION
MAINSCAPE, INC., )	OF TIME TO FILE COMPLAINT
<i>and its successors,</i> )	<i>and</i>
)	ORDER ON RESPONDENT'S
Respondent. )	MOTION TO EXTEND TIME TO
)	ANSWER or OTHERWISE RESPOND
)	TO COMPLAINT

This matter is before the undersigned Hearing Examiner on the Complainant's second Motion for Extension of Time to File Complaint, filed May 3, 2023, and Respondent's Motion to Extend Time to Answer or Otherwise Respond to Complaint, filed May 22, 2023. According to the documents filed with the North Carolina Occupational Safety and Health Review Commission (hereinafter "Review Commission"):

(a) Complainant inspected the Respondent's worksite in Leland, NC from July 7, 2022 through December 22, 2022, and issued its Citation and Notification of Penalty on January 4, 2023, asserting a willful serious violation of N.C.Gen.Stat. § 95-129(01), and a serious violation of 1910.133(a)(3)).

(b) On January 30, 2023, the Complainant held an informal conference with the Respondent where Complainant declined to modify its citations, and on January 31, 2023, the Complainant emailed a letter to Respondent, notifying the Respondent of the same.

(c) On February 1, 2023, Respondent emailed its informal Notice of Contest to Respondent and requested formal pleadings.

(d) On February 8, 2023, the matter was docketed with the Review Commission.

(e) On February 27, 2023, Respondent completed its Statement of Employer's/ Respondent's Position, again contesting the citations and requesting formal pleadings; this document was filed with the Review Commission on March 3, 2023.

(f) On March 22, 2023, Complainant filed a Motion for Extension of Time to File Complaint, which was granted, allowing the Complainant until Friday, April 21, 2023, to file its Complaint.

(g) On Wednesday, May 3, 2023, Complainant filed its Complaint, together with its second Motion for Extension of Time to File Complaint, now before the undersigned.

(h) On May 22, 2023, Respondent filed its own Motion to Extend Time to Answer or Otherwise Respond to Complaint, pointing out the uncertainty of the case as the Review Commission had not yet ruled on Complainant's second Motion for Extension of Time, and seeking thirty (30) days to file its Answer or other response.

In support of its second Motion for Extension of Time, Complainant admits that its Complaint was due on April 21, 2023, but asserts that it believed it had served the Complaint on Respondent prior to that date, that Complainant realized its failure to file/serve a Complaint when Respondent's counsel contacted it on Friday, April 28, 2023, and asserts that it offered to send the Complaint to Respondent that day, but Respondent asked Complainant to hold the Complaint while it considered Complainant's request that Respondent consent to an extension of time to file. Notably, however, Complainant does not say when its Complaint was ready, nor does it explain why it did not timely *file* its Complaint, as required by the Review Commission Rule .0304(1)(a).

According to Review Commission Rule .0105, a request for an extension of time must be received by the Review Commission three days in advance of the date on which the pleading is due to be filed. The Review Commission's Rule does not address belated requests for extension of time, but the North Carolina Rules of Civil Procedure require that the moving party demonstrate excusable neglect. N.C.Gen.Stat. § 1A-1, Rule 6(b). *See also* Review Commission Rule .0102 (2)(in absence of specific provision, procedure shall be in accordance with the North Carolina Rules of Civil Procedure). "Excusable neglect" depends on what may be reasonably expected of a party paying proper attention to his case under all the surrounding circumstances, *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552 (1986), and does not include inattention of a party and/or its counsel, *Estate of Teel by Naddeo v. Darby*, 129 N.C.App. 604, 608-09, 500 S.E.2d 759 (1998).

While there may be facts that support a finding of excusable neglect in this case, the Complainant has not asserted them, so a strict application of the Rules would appear to require denial of its motion. However, denial of the Complainant's motion necessarily requires the undersigned to consider what happens next:

Respondent would undoubtedly feel compelled to file a motion to dismiss pursuant to Review Commission Rule .0309(a), perhaps supporting its position with citations to federal OSH decisions: *see, e.g., Chartwell Corp.*, No. 91-2097, 15 OSH Cas. (BNA) 1881, 1992 OSAHRC LEXIS 103 (O.S.H.R.C. Aug. 28, 1992) (judge did not abuse discretion in dismissing citations where Secretary obtained extension of time to file formal complaint, and then missed deadline to file either complaint or settlement agreement); *TRG Drilling Corp.*, No. 80-6008, 10 OSH Cas. (BNA) 1268, 1981 OSAHRC LEXIS 3 (OSHRC Dec. 31, 1981) (judge did not abuse discretion in vacating citation due to Secretary's unexplained failure to comply with procedural rules, including filing complaint 39 days late).

Complainant would then be forced to defend, reiterating its position that Respondent was not prejudiced by Complainant's delay, and Complainant's conduct was not contumacious (among other possible arguments), and citing its own raft of federal OSH decisions: *see, e.g., Jensen*

*Constr. v. OSHRC*, 597 F.2d 246, 247 (10th Cir. 1979)(judge did not abuse discretion by excusing untimely filing where Secretary filed complaint 48 days late due to “extraordinary caseload”); *Pitt-Des Moines, Inc.*, 16 OSH Cas. (BNA) 1429, 1993 OSAHRC LEXIS 146 (OSHRC Sep. 30, 1993) (judge did not abuse discretion when he declined to dismiss citations based on lack of prejudice resulting from Secretary filing complaint six days late); *Ford Dev. Corp.*, No. 90-1505, 15 OSH Cas. (BNA) 2003, 1992 OSAHRC LEXIS 155 (OSHRC Dec. 29, 1992) (demonstration of prejudice to employer or contumacious conduct by Secretary are among more significant factors identified in *Duquesne Light Co.*, No. 78-5034, 8 OSH Cas. (BNA) 1218, 1980 OSAHRC LEXIS 496 (OSHRC Apr. 16, 1980) (listing (1) amount of time used by trial court, (2) whether plaintiff’s claim lacks substance, (3) prejudice to defendant, (4) record of delay, (5) contumacious conduct by plaintiff, (6) showing of willful default, (7) defendant’s right to be free from costly/harassing litigation, (8) time/energies of court and delay to would-be litigants)); *Pennsylvania Elec. Co.*, No. 80-5211, 11 OSHC (BNA) 1235, 1983 OSAHRC LEXIS 182 (OSHRC Feb. 28, 1983)(in absence of contumacious conduct, dismissal for failure to comply with procedural rule was only appropriate if there is prejudice to opposing party; no finding of contumacy despite 7-month delay in Secretary’s transmittal of employer’s Notice of Contest).

At that point, absent further information, the undersigned would likely decide that while the Complainant did violate Commission Rule .0309(a), dismissal of its citations is too harsh a sanction for a procedural violation that, ultimately, did not prejudice either the Respondent, the operation of the Review Commission, or other litigants awaiting their turn to be heard, and that the countervailing interest in having cases heard on their merits – especially when employee safety issues are involved, *see* N.C.Gen.Stat. § 95-126(b) -- outweighs the Complainant’s brief dereliction.

Accordingly, in order to short-circuit the foregoing process and prevent further delay and expense to the parties, *see* Review Commission Rule .0709 (rules to be construed to secure expeditious, just and inexpensive determination of every case), the undersigned exercises her discretion to GRANT the Complainant’s second Motion for Extension of Time. Additionally, the undersigned GRANTS the Respondent’s Motion to Extend Time to file its Answer or other response, which now shall be due on Thursday, June 22, 2023.

This the 23rd day of May, 2023.

Laura J. Wetsch

Digitally signed by Laura J. Wetsch  
DN: cn=Laura J. Wetsch, o=NC OSH Review  
Commission, ou=Hearing Examiner,  
email=lwetsch@winstlow-wetsch.com, c=US  
Date: 2023.05.23 16:21:00 -04'00'

Hearing Examiner

CERTIFICATE OF SERVICE

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

NEIL A RIEMANN  
PARRY LAW PLLC  
100 EUROPA DR STE 351  
CHAPEL HILL NC 27517  
nar@parryfirm.com

By depositing same in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid at Raleigh, North Carolina, and upon:

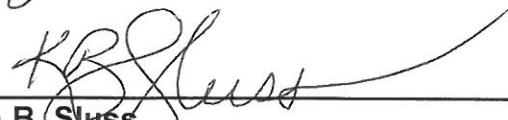
RORY AGAN  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
PO BOX 629  
RALEIGH, NC 27602-0629  
ragan@ncdoj.gov

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  
carla.rose@labor.nc.gov

via email.

THIS THE 24 DAY OF May 2023.



---

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