

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

**FILED**

OCT 31 2024

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

NC OSH Review Commission

**COMPLAINANT,** )

**ORDER REGARDING  
MOTION TO DISMISS**

**v.** )

**DOCKET NO.: 2024-6625  
INSPECTION NO.: 318265501  
CSHO ID: J0504**

**BOTTOMLEY EVERGREENS &  
FARMS, INC.  
and its successors,** )

**RESPONDENT.** )

**THIS MATTER** comes before the Commission as a Motion to Dismiss filed with Respondent's Answer on April 24, 2024. Complainant filed an Objection and Response to the Motion to Dismiss on May 6, 2024. Respondent filed a Response to the Complainant's Objection to the Motion to Dismiss on May 13, 2024. No request for oral argument was made and the matter is ripe for decision on the basis of the arguments presented.

Respondent moves to dismiss based on an alleged failure of the Complainant to issue the Citation with reasonable promptness as required by N.C.G.S. §95-137(a) and, in addition, based on a failure to issue the Citation within 180 days<sup>1</sup> from initiation of an investigation as required by the version of N.C.G.S. §95-137(b)(3) in effect at the time of the Citation issuance. The investigation began on May 12, 2023, and the Citation was not allegedly delivered, mailed, or emailed to Respondent until December 28, 2023, a date more than six months from the initiation of the investigation.

As both parties have submitted affidavits in support of their positions, the Motion to Dismiss is converted to a Motion for Summary Judgment. *King v. Cape Fear Mem. Ho sp.*, 96 N.C. App. 338, 342, 385 S.E.2d 812, 814-815 (1989), disc. review denied, 326 N.C. 265, 389 S.E.2d 114 (1990) (citations omitted) (“... motion to dismiss for failure to state a claim is converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and

---

<sup>1</sup> The statute, N.C.G.S. §95-137(b)(3), in effect at the time the investigation was begun used the terminology “six months” rather than “180 days.”

not excluded by the court."); N.C.G.S. §1A-1, Rule 12(b). The evidence is viewed in the light most favorable to the non-moving party (*Hinson v. Hinson*, 80 N.C. App. 561, 563 (1986).

Respondent's Motion tests the timeliness of the Citation. From the affidavits submitted by the parties, the following facts appear, for the purpose of this motion, to be established:

1. Complainant initiated an investigation on May 12, 2023 of an accident occurring May 5, 2023, involving an employee who operated a farm tractor and in the process of operating the tractor incurred an injury for which he was hospitalized.
2. Complainant conducted a closing conference with Respondent and closed the investigation on October 5, 2023.
3. Complainant cited Respondent for a violation of 29 CFR 1928.51(d) alleging that the employee in question had not been trained in the safe operation of the tractor at the time of his initial assignment and at least annually thereafter.
4. Complainant's Citation against Respondent was issued on October 9, 2023.
5. The Citation was mailed by USPS certified mail, return receipt requested, to Respondent, Bottomley Evergreens & Farms, Inc., 140 South Sparta Parkway, Sparta, NC 28675 (Affidavit of Beth Rodman, Bureau Chief for the NC Department of Labor (NCDOL) Occupational Safety and Health (OSH) Division, Agricultural Safety & Health Bureau, Paragraph 7 and Exhibit B thereto); Affidavit of Carla Delgado, Paragraph 3.
6. Respondent did not contest the address used for the mailing of the citation packet.
7. The Citation packet was delivered on October 13, 2023 at 9:58 am according to USPS Tracking of certified mail that bears the same tracking number as the Certified Mail Receipt which documents the mailing of the packet to Respondent in Exhibit B to the Rodman Affidavit (Rodman Affidavit, Exhibit C; Comeford Affidavit, Paragraphs 3&4).
8. USPS Tracking provided Complainant with a copy of the signature information for the recipient of the citation packet and Complainant emailed this signature information to Respondent (Rodman Affidavit, Exhibit G; Comeford Affidavit, Paragraphs 3&4). The writing on the signature card is illegible.
9. Respondent contends that it did not receive the subject packet until December 28, 2023, which, except for the above facts, would not be issuance of the Citation within six months of the initiation of the investigation.

The salient points of law relating to the examination of Respondent's contentions are as follows: First, the law of North Carolina provides that,

"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.*" (N.C.G.S. §95-137(a) (2023)(emphasis added).

Second, the law of North Carolina at the time of the issuance of the Citation in this matter stated, “No citation may be issued under this section after the expiration of six months following the initiation [of] an inspection by the Director” (N.C.G.S. §95-137(b)(3)).

Third, North Carolina law requires that if the Director issues a citation under the law enforced by Complainant, then “within a reasonable time after the termination of such inspection or investigation, notify the employer [(1)] *by certified mail with return receipt by signature confirmation as provided by the U.S. Postal [Service]*” or (2) by a designated delivery service or (3) via hand delivery of any penalty recommended to be proposed under the provisions of North Carolina’s Occupational Safety and Health Act, N.C.G.S. §95-126, *et seq.* (N.C.G.S. §95-137(b)(1), (emphasis added).

**Reasonable promptness**

The Affidavits of the Complainant establish that Complainant closed its investigation of this matter on October 5, 2023 and had a closing conference with the employer on the same date. Then it mailed, by certified mail, return receipt requested, the Citation in this case to the Respondent on October 9, 2023. Further, the United States Postal Service tracking system shows that the packet in question was delivered on October 13, 2023. The issuance of the Citation just four days after closing of the investigation and well within the statute of limitations is convincing evidence that Complainant acted with reasonable promptness.

In addition, it is likely that “reasonable promptness” is coterminous with the six month limitation unless the Respondent shows how it is prejudiced by delaying the issuance.” *Brooks v. Miller Brewing Co.*,<sup>2</sup> NCOSHD 365 (RB 1982). Respondent did not allege that there was an unreasonable delay in the time between inspection and issuance of the October 9, 2023 Citation whose issuance is, for the purposes of this motion, established as being on October 9, 2023. Consequently, Respondent’s first contention is rejected.

**Issuance within six months**

The next question to consider is whether the Citation was issued within six months of the initiation of the investigation. In fact, October 9, 2023 is 150 days following May 12, 2023, or just under *five* months following the initiation of the investigation. These observations, in conjunction with the above rejection of the first contention, justify the denial of Respondent’s motion to dismiss, but Respondent contends the matter does not end there.

Respondent argues incorrectly that Complainant’s reliance upon *House of Raeford Farms, Inc. v. Brooks*, 63 N.C.App. 106 (1983) was misplaced. Respondent notes that in that case, the Complainant moved to dismiss the Respondent’s tardy notice of contest, and the Court of Appeals affirmed the decision to dismiss by the Hearing Examiner as well as the decision by the Review Board and the Superior Court. In that case, the return receipt card had been signed by a company official who had actually attended the opening and closing conferences with the OSHA inspector. Respondent argues that the decision of that case is supportive of its position because

there was timely and proper notice and service; however, in the case at hand, there was no corporate official named on the notice, and Complainant cannot prove by the return receipt card's illegibility either the address served or who signed for the packet. Thus, Respondent contends that service was defective. Respondent's argument essentially stretches the meaning of the statute to try to increase the burden on Complainant to prove receipt. The statute governing what the Complainant must do to serve the Citation requires, if certified mail is used, only "return receipt by signature confirmation ...."

The statute does not require Complainant to name a corporate official as addressee nor does it require proof upon whom the service was effected nor does it require proof of the address where the packet was received. It simply instructs the Director to use, if the first service option is chosen, certified mail with a return receipt. In this case the affidavits of the Complainant, taken as true, establish that the Citation packet was sent to the employer and was received as confirmed by the return receipt. The expectations of the statute appear to have been fulfilled. The statute does not say that the Director must prove who received the packet. If it required the Director to prove where the packet was served, there are sufficient indications that the packet was served at the address to which it was addressed. Notably, Respondent did not say that the address used failed to be the employer's address.


Respondent argues one final point based on a federal case, *Secretary of Labor v. Earth Developers*, OSHRC Docket No. 17-1120 (2017). In *Earth Developers* the Complainant argued that it met its responsibility when it allegedly printed, signed and mailed the Citation before the statute of limitations expired. The employer said it did not receive a citation until two months after the statute had run. The Commission noted that employers in other cases had argued that it was excusable neglect when they failed to file their Notice of Contest within the time deadline following service of a citation packet, and the Commission noted that "internal mishandling of a citation, or lack of proper mail handling procedures" by an employer does not constitute excusable neglect. Notably, the Complainant in the case at hand could only say that its *usual practice* was to inform the Respondent in the closing conference of the citation the Respondent would be receiving. Its declaration in support of its position did not specifically state that Respondent was notified of a citation coming.

The Commission in *Earth Developers* ruled that Complainant needed to be able to use the same level of care in its mail handling procedures as is expected of employers. The decision found that the Complainant failed to prove that it put the Citation in the mail on the date alleged (before the six month statute of limitations expired). Consequently, the ruling of the Commission was in favor of the employer.

Respondent tried to say that *Earth Developers* provides guidance because in that case the Complainant failed to use proper mail handling procedures. If that were the case in the case at hand, the guidance would be instructive, but the affidavits of the parties establish that Complainant did exactly what the statute requires.

The Motion to Dismiss is DENIED.

This the 31 day of October, 2024.

A handwritten signature in black ink that reads "Reagan H. Weaver". The signature is written in a cursive style with a horizontal line underneath the name.

Reagan H. Weaver  
Hearing Examiner

**CERTIFICATE OF SERVICE**

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

C. DANIEL BARRETT  
BARRETT LAW FIRM  
3540 CLEMMONS RD.  
SUITE 104  
CLEMMONS, NC 27012

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:

SAGE A. BOYD  
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 4 DAY OF November 2024.

PAUL E. SMITH  
CHAIRMAN

  
\_\_\_\_\_  
Karissa B. Sluss  
Docket Administrator  
NC Occupational Safety &  
Health Review Commission  
1101 Mail Service Center  
Raleigh, NC 27699-1101  
TEL.: (984) 389-4132  
NCOSHRC@oshrc.labor.nc.gov