

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

FILED

JUL 23 2024

NC OSH Review Commission

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

COMPLAINANT,)

v.)

HARRIS TEETER, LLC)

and its successors,)

RESPONDENT.)

**ORDER RELATING TO
RESPONDENT'S MOTION FOR
SUMMARY JUDGMENT**

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 the January 8, 2024 motion of the Respondent for partial summary judgment in the above four consolidated cases. Respondent argues that two OSHA violations from the inspection related to Case No. 2022-6486 should be dismissed because Complainant failed to issue citations for the violations within the six-month proscribed period provided by N.C. Gen. Stat. 95-137. The violations concern 29 CFR §1910.22(a)(3) and 29 CFR §1910.22(d)(1). Respondent accuses the Complainant of not exercising due diligence in prosecuting all observed violations during its initial inspection associated with the first case of the four consolidated cases before the Commission (2022-6438). Respondent contends that the inspector in the initial case observed the conditions that were subsequently cited more than six months later, in the second case (2022-6486) and was not entitled because of time-barring to cite the Respondent for those two violations. Complainant argues that it was not lacking in due diligence and that Respondent is wrong on both the facts and the law. It contends that the two violations in question were observed as part of the subsequent inspection for the violations cited in the second case and the subsequent inspection provides legal authority to cite conditions observed in the subsequent inspection even when they were observed in an earlier inspection.

Respondent replied to the Complainant's response to its motion and brief and the issue has been sufficiently argued such that the oral argument requested by the Respondent is not necessary to the adjudication of the motion.

After thorough consideration of the contentions of the parties, the undersigned concludes the motion of the Respondent should be DENIED. There is no applicable North Carolina case that

relates to the decision of the motion so the parties have looked to other OSHA decisions for support. The *Safeway Store No. 914*, 16 O.S.H. Cas. (BNA) ¶ 1504, 1993 WL 522458, at *5 (O.S.H.R.C. Dec. 16, 1993) case asserts that the failure to issue a citation does not establish that the Respondent is in compliance. (Complainant's Response, p. 5) And, "so long as there is a subsequent inspection in which violations were present, Complainant may cite an employer for 'the same or similar violations [which] were observed, but not cited, during an earlier inspection.'" *Dayton Tire*, 1997 OSAHRC LEXIS 167 at *26 (O.S.H.R.C. February 21, 1997). *Id.* These decisions of the federal Commission support the decision herein, but it should be noted that Respondent cites a 1988 decision that concludes that "Complainant should be precluded from issuing citation items it discovered or reasonably should have discovered in a previous inspection and outside the initial limitations period." (Respondent's Reply, pp. 5-6, citing *Kaspar Wire Works, Inc.*, 13 O.S.H. Cas. (BNA) ¶ 1785, 1988 WL 212719 (O.S.H.R.C.A.L.J. Apr. 29, 1988)).

In *Kaspar*, previous inspectors had reviewed the employer's accident reports which showed prior employee injuries, but there was no citation issued for failing to report the injuries until more than six months had passed since the review of the reports. In the case *sub judice*, Complainant judicially admitted that its first inspector had observed cracking, pitting and spalling of Respondent's warehouse floor when it conducted its first inspection (See Respondent's Requests for Admission #120). No citation for this observation was issued. Following the first inspection, Respondent was cited within the six month limitations period for, among other things, allowing ice to build up on presumably the same floor that it also had observed was cracking, pitting and spalling. Later, more than six months after observing the cracking, pitting and spalling of the floor in a subsequent inspection, Respondent was cited for the cracking, pitting and spalling having "not been repaired." This was Citation 01 Item 002 issued August 12, 2022. The holdings of *Safeway* and *Dayton Tire*, justify the finding that because a subsequent inspection was initiated, there was no violation of the statute of limitations. Also, as this is a decision in a summary judgment motion, it should be noted that there is a question of fact as to whether, in the first inspection, the inspector found the floor to be in sufficient disrepair to justify finding a violation.

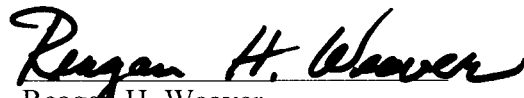
Also in this case, Complainant admitted that it had observed icy buildup on Respondent's freezer floors when it conducted its first inspection (See Respondent's Requests for Admission # 119). Following the first inspection, Respondent was cited more than six months later, in Citation 01 Item 001a issued August 12, 2022, for, among other things, allowing ice to build up on the walls and ceiling of the freezer creating a struck-by hazard from falling ice. Respondent contended that ice build up on the walls and ceiling creating a struck by hazard was the same hazard as ice buildup on the floor thus it contends the statute of limitations is violated again. Applying again the holdings of *Safeway* and *Dayton Tire*, justifies the finding that because a subsequent inspection was initiated, there was no violation of the statute of limitations. Further, there is a question of fact, putting aside the statute of limitations question, as to what the inspector saw on

the first inspection. The admission that Respondent garnered did not settle the issue of whether the inspector saw ice on the walls and the ceiling and whether he observed evidence of falling ice.

Accordingly, the statute of limitations was not violated in either of the two items noted by Respondent in the August 12, 2022 Citation and there are genuine issues of material fact relating to the Items addressed.

WHEREUPON, Respondent's Motion for Partial Summary Judgment is DENIED.

This the 23 day of July, 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 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 24 DAY OF July 2024.

PAUL E. SMITH
CHAIRMAN


Karissa B. Sluss
Docket Administrator
NC Occupational Safety &
Health Review Commission
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