

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

FILED

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

COMPLAINANT,

v.

HICAPS, INC.

and its successors,

RESPONDENT.

JUL 17 2025

NC OSH Review Commission

) **OSHANC NOs: 2023-6586**

) **INSPECTION NO.: 318260999**

) **CSHO ID: A3277**

ORDER ON MOTION TO DISMISS

Respondent asks the Court to dismiss the citations against HICAPS, Inc., as a matter of law, because it contends HICAPS, Inc. was not the proper employer to have cited. More specifically, Respondent argues that a joint venture, consisting of HICAPS, Inc. and C2 Contractors, LLC (and identifying itself as "HICAPS, Inc./C2") was the proper party against whom to issue the citations.

As an initial matter, Respondent has framed its motion as a "motion for judgment as a matter of law," but has not specifically identified a Rule of Civil Procedure or a Rule of the Commission which establishes the criteria for deciding whether Respondent is entitled to "judgment as a matter of law." Since Respondent has asked that the Court review documents outside the pleadings, the Court will treat this as a motion under N.C. Civ. P. Rule 56. The Court must determine whether there is any genuine issue of material fact as to whether HICAPS, Inc. should not be party to this action. *Fox v. City of Greensboro*, 279 N.C. App. 301, 313, 866 S.E.2d 270, 283 (2021).

According to the pleadings in the record and documents submitted by the Respondent, this case arose because of an industrial accident that occurred at 628 Green Valley Road in Greensboro, North Carolina on February 25, 2023. Two employees were killed. Compl. ¶8. The owner of the site was ITG Brands and the project involved renovation of office space at the aforementioned address. Resp.

Mot., Ex. A. This was a multi-employer worksite. Compl. ¶¶ 14-15. Respondent's Answer to the Complaint also contains the following relevant statement:

It is admitted that representatives of HICAPS/C2 were present at the conference on February 25, 2023 and that these representatives were Jennifer Moore, Kelly Root, Peyton Fairbank, Daniel Hood, and Avery Owens.

Resp. Answ., ¶23.

Respondent has included as an attachment to its motion the "Standard Form of Agreement Between Owner and Design-Builder" ("Agreement") for the renovation project:

(1) The parties to the Agreement are identified as the Owner, "ITG Brands" and Design-Builder, "HICAPS/C2 JV" and the subject-matter of the Agreement is "[to] design and construct corporate headquarters office, including furnishings and interior design." Resp. Mot., Ex. A, p 1.

(2) On behalf of the Design-Builder, the signatory to the Agreement is Peyton Fairbank, whose title is "Vice President" and whose email address is "peyton@hicaps.com." *Id.*, p 36.

(3) The Agreement also contains an Exhibit, identified as "Document A141- 2014 Exhibit B" which is titled "Insurance and Bonds."¹ The document recites that it is "part of the accompanying agreement for the project" The Design-Builder in this document is identified as "HICAPS, Inc." In Section B.2.1.4 of the Insurance and Bonds document HICAPS, Inc. agrees to provide Workers' Compensation insurance during the entirety of the project, including the one year period following substantial completion of "the Work" (referencing Section 11 of the Agreement).

Rule 201 of the North Carolina Rules of Evidence permits a Court to take judicial notice of adjudicative facts "whether requested or not" by a party and at any stage of a proceeding. N.C. R. Evid. 201(c) and (f). An adjudicative fact may be judicially noticed when it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. R. Evid. 201(b).

The contents of the North Carolina Secretary of State's website is one such source that Courts have found to meet the criteria for accuracy appropriate for taking judicial notice. See, e.g., *Banc of Am. Merch. Servs., LLC v. Arby's Rest. Grp, Inc.*,

¹ This document is five pages, numbered pages 1 through 5, but attached to Respondent's Motion as pp 49-53 of the .pdf document submitted.

2021 NCBC LEXIS 60 at *5 n.3 (N.C. Super. Ct. June 30, 2021). (taking judicial notice of public filings on N.C. Secretary of State's official website, citing N.C. R. Evid. 201(b) and (c)). *Concrete v. Ironplanet, Inc.*, No. 5:24-cv-00256-M-BM, 2025 U.S. Dist. LEXIS 37996 (E.D.N.C. Jan. 31, 2025), at *23, adopted by *Concrete v. Ironplant, Inc.*, 2025 U.S. Dist. LEXIS 37895 (E.D.N.C. Mar 3 2025) (taking judicial notice of information on the N.C. Secretary of State's website). *Hilton v. Ct. Gossard*, 702 F. Supp. 3d 425, 430 (taking judicial notice of information on S.C. Secretary of State's website).

Pertinent to the entities which Respondent seeks to distinguish herein, the following are public filings available from the North Carolina Secretary of State's website of which the Court will take judicial notice:

(1) HICAPS, Inc.'s Business Corporation Annual Report, filed April 13, 2023 for the fiscal year ending December 31, 2022. The officers of the corporation are identified as: Peyton S. Fairbank, Vice President, R. Wayne McGee, Vice President, and, Daniel M. Hood, President.

https://sosnc.gov/online_services/search/profile_filings/46267851_72189403_26a968482448425a925807875b9bbc4a.pdf

(2) HICAPS, Inc.'s Business Corporation Annual Report, filed March 13, 2024 for the fiscal year ending December 31, 2023. The officers of the corporation are identified as: Peyton S. Fairbank, Vice President, R. Wayne McGee, Vice President, and, Daniel M. Hood, President.

https://sosnc.gov/online_services/search/profile_filings/46267851_76870199_a7503cc803e145ec932693c71402fb46.pdf

(3) An Assumed Name Certificate registering the joint venture HICAPS / C2 as an assumed business name. The document states, "The real name of the person or entity engaging in business under the assumed name is: HICAPS, Inc. [SOSID] 0203231 and C2 Contractors, LLC [SOSID] 0999447." The document is signed by Peyton S. Fairbank who identified himself as "Vice President of HCAPS, Inc., a joint venture member of the HICAPS/C2 joint venture."

https://sosnc.gov/Online_Services/Assumed_Name/Search_SubmitHicapsc_2148050_59750615_a8e11c17ce594cd780dfcbd817c51408.pdf

(4) The physical address for HICAPS/C2 and HICAPS, Inc. is the same, according to the above three documents filed with the N.C. Secretary of State.

The purpose for filing an Assumed Name Certificate is "to afford the public a means of ascertaining the *real* name of persons engaging in business in this State under an assumed name" N.C. Gen. Stat. §66-71.2. *Emphasis supplied*. Entities that engage in business under an assumed name may not use terms that are identified with legally recognized organizational entities in the State, such as "Corporation,"

"Limited Liability Company," or, "Limited Partnership" unless the assumed name entity is also organized in accordance with Chapter 55, Chapter 55A, Chapter 55D, or Chapter 59 of the North Carolina General Statutes. In other words, unless organized pursuant to one of these chapters, the joint venture is not actually a separate legal entity from its members.

Based upon the foregoing information, the Court cannot hold, as a matter of law, that HICAPS, Inc. is not the proper party to this action. HICAPS/C2 appears to be only a d/b/a for HICAPS, Inc. and C2 Contractors, LLC.

Respondent's argument is that the association identified as HICAPS/C2 is the employer as that term is used in N.C. Gen. Stat. §95-127. Yet, the workers compensation insurance policy is maintained by HICAPS, Inc. The information also suggests that HICAPS/C2 and HICAPS, Inc. share an identity of interests. Mr. Fairbank is a principal of the corporation but has made required filings with the N.C. Secretary of State on behalf of both the corporation and the joint venture. The physical location for the joint venture and the corporation are the same. Both Mr. Fairbank, vice-president for HICAPS, Inc. and, Mr. Hood, president of HICAPS, Inc. participated in the opening conference as representatives for HICAPS/C2. Because the issue raised by Respondent cannot be definitively resolved based upon the instant motion and the parties should have an opportunity to develop facts and argument concerning the legal relationship between the three entities involved, Respondent's motion will be DENIED WITHOUT PREJUDICE.

However, in anticipation of how this issue may develop, the Court wishes to remind the parties of salient legal precedent which may inform further evaluation of the issue. First, Respondent seems to have the impression that the Commission's jurisdiction over HICAPS/C2 is based upon service of the citations specifically naming the employer as HICAPS/C2. This is incorrect.

The Commission's jurisdiction is not invoked through service of process initiated by the Commission with requirements analogous to N.C. R. Civ. P. Rule 4. Instead, the Commission's jurisdiction is invoked by the employer's filing of a notice of contest. N.C. Gen. Stat. §95-135(b) ("The Commission shall hear and issue decisions on appeals entered from citations") See also, N.C. Gen. Stat §95-137(b) (describing the procedure for enforcement of citations and proposed penalties, including that "the Director issues a citation," and the employer has fifteen working days to notify the Director of its wish to contest. Once the employer notifies the Director of its intention to contest a citation, then the Commission is notified and an opportunity for hearing is afforded to the employer).

This issue was also addressed in *P & Z Co., Inc., J.F. Shea Co., Inc., and, P & Z Co., Inc., and, J.F. Shea Co., Inc. (A Joint Venture)*, OSHRC Docket No. 14822, 1979 OSAHRC LEXIS 299 at *8 (Jul. 31, 1979), where the Court stated:

A citation, however, does not institute an action before the Commission and is therefore not "process" within the meaning of Rule 4. Instead, the citation serves as notice to the employer that the Secretary alleges it has committed a violation. The employer may then invoke the Commission's jurisdiction by filing a notice of contest.

In North Carolina, the notice of contest is established by return of the Employer's Position statement. In this case, the signature on the notice of contest identifies the employer as HICAPS, Inc.

Second, there is consistent authority holding that a party who receives actual notice of the citations has received sufficient notice, regardless of misnomer or other technical omission in the notice. *P & Z Co., Inc.*, OSHRC Docket No. 14822, at *9-10 ("if an employer receives actual notice of a citation, it is immaterial to the exercise of the Commission's jurisdiction that the manner in which the citation was sent was not technically perfect"). *Blanchett*, OSHRC Docket No. 13085, 1977 OSAHRC LEXIS 1239 at *2-3 (Jan 24, 1977) (affirming ALJ's *sua sponte* addition of bankruptcy trustees as parties where trustees were fully knowledgeable of the proceeding and had actively participated in all aspects of the litigation). *CMH Co.*, OSHRC Docket No. 78-5954, 1980 OSAHRC LEXIS 77 at *7-9; 21 (Nov. 24, 1980) (where it became clear at hearing the wrong employer had been cited the ALJ erred by denying substitution of correct employer since there was an identity of interests, the correct employer's officer admitted receiving notice of the citations, knew or should have known of the mistake in identifying the proper party and was not prejudiced by substitution). See also, *House of Raeford Farms, Inc. v. Brooks*, 63 N.C. App. 106, 304 S.E.2d 619 (1983) (holding, albeit in a different procedural context, that the statute requires only that the employer be *notified* of the citations by the means set out in N.C. Gen. Stat. §95-137(b)(1) and that when the document has been accepted by an agent of the corporation possessing authority to do so, there has been receipt of the citations.)

Third, Respondent's citation to *Bloomfield Mech. Contr. v. OSHRC*, 519 F.2d 1257 (3d Cir. 1975) does not actually support the proposition that Respondent seeks to advance. In *Bloomfield* the Administrative Law Judge dismissed Bloomfield from the proceeding after the parties stipulated that the joint venture, not Bloomfield was the employer. Following the enforcement hearing, an order was entered against Bloomfield on the grounds that Bloomfield, as a member of the joint venture, would be liable for the conduct of the joint venture. The Third Circuit found error with the assumption that an order against Bloomfield merely recited the fact that there was vicarious liability. After having been dismissed, an Order against Bloomfield would have the effect of subjecting it to heightened future penalties without having been a party to the litigation which created that risk. *Id.*, at 1261, including fn 1:


we emphasize that the dismissal of the complaint against Bloomfield by the administrative law judge is the basis of setting aside this order. We do not decide whether, in an appropriate case, participants in a joint venture might be held individually liable for violations of the Act by such joint venture when individually cited for actions by the joint venture.

The Third Circuit remanded *Bloomfield* to the Commission for a determination as to whether Rule 15(c) of the Rules of Civil Procedure would permit an amendment to the citations, adding Bloomfield as a party. *Id.* at 1263.

Since *Bloomfield*, Rule 15(c) has been regularly used as a vehicle to determine whether a party can be added to citations after the expiration of the limitations period. See, e.g, *CMH Co.*, OSHRC Docket No. 78-5954 at *15 (noting the statute of limitations applies to the issuance of new citations, not to the amendment of citations and remanding for fact-finding by the Commission to determine whether the proposed amendment of a new party met the criteria established in Rule 15(c)). *Dexter Processing, Inc.*, OSHRC Docket No. 79-5707, 1980 OSAHRC LEXIS 211 at *4-8 (affirming reliance on Rule 15(c) to amend citation after expiration of limitations period). *P & Z Co., Inc.*, OSHRC Docket No. 14822, at *13 (Holding that Rule 15(c) amendment should be permitted "unless there is a substantial reason for disallowing it, such as bad faith on the part of the moving party, undue prejudice to the nonmoving party, or undue delay in making the motion to amend"). See also, *Cornell & Co. v. OSHRC*, 573 F.2d 820, 823-824 (2d Cir. 1978) (denying Rule 15(c) motion where Secretary sought to amend the standards which were the basis for finding violations, noting that the amendment "completely changed the nature of the charges").

In summary, Respondent's Motion to Dismiss HICAPS, Inc. as a party to the litigation is DENIED WITHOUT PREJUDICE. Although this Order means that Respondent may again raise the issue once additional facts have been developed and that Complainant may ask the Court to evaluate a motion pursuant to Rule 15(c), it does not appear that either or both procedural undertaking(s) should cause delay of the enforcement hearing. An Order for Prehearing Reports will follow this Order.

SO ORDERED, this the 17th day of July 2025.



Mary-Ann Leon
Administrative Law Judge, presiding

CERTIFICATE OF SERVICE

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

RACHEL SCOTT DECKER
CARRUTHERS & ROTH, PA
235 N. EDGEWORTH ST.
GREENSBORO, NC 27401

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

JONATHAN D. JONES
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.

THIS THE 18 DAY OF July, 2025.



Karissa B. Sluss
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