

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

MOUNTAIN STATES CONTRACTORS,
LLC.,

Respondent.

OSHRC Docket No. 13-2043

ORDER ON RESPONDENT'S MOTION FOR SANCTIONS

This matter comes before the Court on Respondent's *Motion for Sanctions* pursuant to Commission rules 101(a) and 104(c). *See* 29 C.F.R. §§ 2200.101(a), 104(c). Specifically, Respondent contends that Complainant pursued an alleged violation as to the auxiliary cable on the Terex HC 165 crane even though he had information that the violation was remedied on a date outside of the Act's six-month statute of limitations. Accordingly, Respondent requests the Court to strike the Complaint and seeks personal sanctions of suspension and disbarment against Complainant's counsel. The Court has reviewed the record and the parties' respective briefs and finds that Respondent has failed to prove that Complainant's conduct justifies the imposition of sanctions.

"The Commission has held that the ultimate sanction of dismissal should be imposed on a party only when that party has been guilty of contumacious conduct or the other party has been prejudiced in preparing or presenting its case by the conduct of the noncomplying party." *Sealtite Corp.*, 15 BNA OSHC 1130 (No. 88-1431, 1991) (citing *Noranda Aluminum, Inc.*, 9 BNA OSHC 1187, 1189 (No. 79-1059, 1980)). The Fifth Circuit has noted that "it is not a

party's negligence—regardless of how careless, inconsiderate, or understandably exasperating—that makes conduct contumacious; instead it is the 'stubborn resistance to authority' which justifies a dismissal with prejudice." *Millan v. USAA Gen. Indem. Co.*, 546 F.3d 321 (5th Cir. 2008) (internal citations omitted).

The facts that bear on the issue of whether Complainant committed contumacious conduct warranting sanctions is as follows: During the course of her inspection, CSHO Sotak was apparently told that the auxiliary cable had been replaced. She made a note of this on a copy of Respondent's Daily Crane Inspection report dated February 19, 2013. At some point thereafter, CSHO Sotak was contacted by Respondent's safety manager, who told her that the cable had not been replaced since it was purchased in 2011. On the basis of that information, Complainant pursued a violation of both the boom cable, which broke on May 21, 2013, and the auxiliary cable. At trial, evidence was introduced that definitively showed the auxiliary cable being repaired on April 26, 2013.

First, merely because Respondent has had to spend extra time and money to defend its legal position does not constitute prejudice. "[A]s long as the party opposing an amendment has adequate opportunity to prepare and present its defense to the amended allegations, any delay in making an amendment, *even though trial-preparation time and expense* may have been directed to issues eliminated from the case, does not constitute prejudice that warrants denying the amendment." *See Brown & Root, Inc.*, 8 BNA OSHC 1055 (No. 76-3942, 1980). Respondent had ample opportunity to prepare and present its defense; in fact, it had enough time to file an amended *Answer* to the *Complaint*. Thus, the Court finds no prejudice on this basis.

Second, the Court does not find that the actions of CSHO Sotak rise to the level of contumacious conduct. She was presented with conflicting stories regarding the condition of the

cable and chose to rely on the information provided by the safety manager. As is the case in many investigations, the CSHO must weigh conflicting evidence and gauge credibility. That she chose one story over another and happened to be wrong does not constitute contumacious conduct.

Third, the Court does not find that Complainant attempted to purposefully conceal exculpatory evidence from Respondent. The Court accepts as reasonable Complainant's explanation regarding the redaction of the CSHO's notes from the daily inspection logs; namely, that he provided the Court with a clean and authentic copy of the examination record acquired by CSHO Sotak during her investigation. Further, Respondent was in no way prejudiced by this fact. First, Respondent had been provided with the document with CSHO Sotak's notes indicating that the auxiliary cable had been replaced and introduced that document into evidence. Second, Respondent was in possession of documents that clearly indicated when the auxiliary cable was ordered, purchased, and installed. All of those documents say far more than an unidentified hearsay statement that is memorialized in the margins of a document procured during an investigation. While Complainant's actions in this regard certainly have the outward appearance of questionable conduct, the Court does not find that it rises to the level of contumacy. Further, the Court finds that Respondent was not prejudiced by its use.

Fourth, CSHO Sotak's answers and explanations in response to direct- and cross-examination at trial do not illustrate contumacious conduct. While CSHO Sotak may not have stated the complete truth in response to whether someone had ever told her the auxiliary cable had been replaced, that could be attributable to faulty memory as much as it could be to a purposeful intent to deceive. Further, Respondent had the opportunity (and took it) to cross-examine CSHO Sotak as to what she was told, whereupon she admitted that she had been told

that the auxiliary cable had been replaced, but that she had not received any documentation supporting that assertion. The structure of a trial allows for both direct- and cross-examination for just this reason. Accordingly, the Court finds that Complainant did not engage in contumacious conduct and that Respondent was not prejudiced as to this issue.

Finally, the Court finds that Complainant's decision to pursue its allegation that a violation existed on the auxiliary cable does not warrant sanctions. To be sure, the Court made clear its inclinations regarding an extension or tolling of the statute of limitations in this case. That said, Complainant was not obligated thereby to abandon those theories merely because the Court provided him with additional time to reconsider such arguments. In light of the decisions of the D.C. Circuit in *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 755 (D.C. Cir. 2012) and the Supreme Court in *Gabelli v. S.E.C.*, 133 S. Ct. 1216 (2013), it would appear that the determination of whether and how the Act's statute of limitations can be tolled or extended is ripe for discussion in the context of this case. According to the Model Rules of Professional Conduct, which are referenced in Commission Rule 104, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, *unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.*" Model Rules of Professional Conduct 3.1 (emphasis added); *see also* 29 C.F.R. § 2200.104. There is clearly a basis in Commission case law for tolling or extending the statute of limitations. *See, e.g., Sun Ship, Inc.*, 12 BNA OSHC 1185 (No. 80-3192, 1985); *see also Yelvington Welding Svc.*, 6 BNA OSHC 2013 (No. 15958, 1978). That Complainant's argument may rest on tenuous grounds, especially in light of the Supreme Court's decision in *Gabelli*, does not make it frivolous. To hold otherwise would serve to put a damper on another attorney obligation—zealously advocating for your client.

In light of the foregoing, the Court finds that Respondent's claim that Complainant engaged in contumacious conduct is without merit. Further, the Court finds that Respondent will not be prejudiced by allowing this case to be decided on the merits. Accordingly, Respondent's *Motion for Sanctions* is DENIED.

SO ORDERED

/s/ Patrick B. Augustine

Patrick B. Augustine
Judge, OSHRC

Date: March 31, 2015
Denver, Colorado