UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. CLEARVIEW CONSTRUCTION, LLC, and its Successors, Respondent.	OSHRC DOCKET NO. 14-0951

ORDER ON RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS

The present matter before the Court is Respondent's *Motion for Judgment on the Pleadings*, which was filed on January 14, 2015. Respondent contends that Complainant failed to issue the *Citation and Notification of Complaint* within the six-month statute of limitations set forth in Section 9(c) of the OSH Act. 29 U.S.C. § 658(c). On January 26, 2015, Complainant filed a *Response*, in which he contends that the motion should be denied because Respondent actively prevented Complainant from gathering the necessary information to issue a citation in the first instance. The Court has reviewed the parties' respective filings, associated exhibits, and the record. For the reasons stated below, Respondent's motion is DENIED.

Background

On June 28, 2013, Area Director Thomas Bielema observed workers performing construction activities without proper fall protection at a worksite located at 1280 Independence Court, Washington, Illinois.[1] Once AD Bielema arrived at the site, Paul Yoder, owner of Clearview Construction, asserted his Fourth Amendment rights and did not consent to the

1. As noted in Respondent's *Motion*, there was a discrepancy regarding the actual location of the worksite. The initial location identified by Complainant was 1285 Independence Court. According to Complainant, the area encompassing both 1280 and 1285 Independence Court was under construction, and multiple structures were being built at the site.

inspection. (Declaration of AD Thomas Bielema, Ex. AA).[2] AD Bielema returned to the worksite on July 2, 2013, at which point the Project Manager of the worksite granted consent to the inspection. (*Id.*). Nevertheless, according to AD Bielema, Mr. Yoder expressed that he was unwilling to participate in the inspection. (*Id.*).[3]

Due to Mr. Yoder's failure to cooperate, Complainant was unable to gather information necessary to determine whether, and to whom, a citation should be issued. In order to gather the requisite information, Complainant issued a subpoena to Mr. Yoder on July 9, 2013, requesting him to appear at the OSHA Peoria Office on July 24, 2013, and to produce documents relevant to the work being conducted and the violations observed at the worksite. (Subpoena *Duces Tecum* issued to Paul Yoder d/b/a Lincoln Land Builders, Ex. BB). The subpoena was personally served on Mr. Yoder on July 10, 2013. (*Id.*). Mr. Yoder failed to appear. In response, Mark Henry Ishu, attorney for Complainant, sent a certified letter to Mr. Yoder requesting his compliance with the July 9, 2013 subpoena. (Declaration of Mark Henry Ishu, Ex. CC). The Postal Service returned the letter, indicating that Mr. Yoder's wife, Leanne, refused to accept the letter on August 23, 2013. (*Id.*).

In light of Mr. Yoder's failure to comply, on September 26, 2013, Complainant sought to enforce the subpoena in the United States District Court for the Central District of Illinois. (Petition to Enforce Administrative Subpoena *Duces Tecum* Issued by the Occupational Safety and Health Administration, Ex. DD). Mr. Ishu sent the *Petition to Enforce* to Mr. Yoder's home address via regular and certified mail. (Ex. CC). As with the original subpoena, both the regular and certified mailings were returned as "Refused". (Ex. CC). Eventually, Complainant

2. Any references to exhibits are to those contained in Complainant's *Response* and will be referred to simply as Ex. AA, BB, etc., as Respondent did not submit any exhibits in support of its *Motion*.

3. Complainant notes that Mr. Yoder is familiar with the process of an OSHA inspection. Specifically, Complainant had cited Paul Yoder, doing business as Lincoln Land Builders, for failing to provide fall protection at a site directly adjacent to the worksite at issue. Those citations became final orders of the Commission on April 8, 2013.

personally served Mr. Yoder's wife by leaving a copy of the *Petition* at his home address.[4]

Mr. Yoder persisted in his recalcitrant behavior and failed to respond to the *Petition to Enforce*. Accordingly, Complainant filed a *Motion for a Rule to Show Cause*, requesting the District Court to order Mr. Yoder to show cause why he should not comply with the subpoena issued on July 9, 2013. (Ex. EE). The court granted the *Motion* and issued an *Order to Show Cause* on December 4, 2013. (*Id.*). The United States Marshals Service made multiple attempts to serve the *Order to Show Cause* and was rebuffed by Leanne Yoder, who stated that she did not know when Mr. Yoder would be at the residence. (Process Receipt and Return of Service, Ex. GG). On December 27, 2013, Mr. Ishu mailed a copy of the *Order to Show Cause* to Mr. Yoder's home address via regular and certified mail. (Ex. CC). Unsurprisingly, the mailings were returned as "Refused" by "L.K.Y.". (*Id.*).

After the refusal of service, the District Court held a show cause hearing on January 10, 2014. Yet again, Mr. Yoder failed to appear. In response, Complainant moved to find Mr. Yoder in contempt, and the Court issued a body attachment for Mr. Yoder. On Feburary 11, 2014, the U.S. Marshal arrested Mr. Yoder and took him into custody. During a status hearing with the District Court, Mr. Yoder requested time to procure the services of an attorney for the purposes of Complainant's contempt motion. On March 3, 2014, Jason Hortenstein entered an appearance on behalf of Mr. Yoder.

Mr. Yoder submitted to a deposition on March 20, 2014. (Administrative Deposition Transcript of Paul Yoder, Ex. HH). During the course of that deposition, Complainant learned that Mr. Yoder had created a new company, named Clearview Construction, LLC, which employed the workers found at the worksite. As indicated in footnote 1, *supra*, Complainant

4. Complainant cites to its Exhibit DD, which it identifies as the "October 21, 2013 Affidavit of Service". No such document is present in the exhibit. That said, Exhibit EE, which contains Magistrate Judge Bernthal's *Order to Show Cause*, indicates that Respondent was served with the *Petition to Enforce*. The Court accepts the magistrate's finding as sufficient for determining that Respondent was served with the petition.

also learned that the address of the worksite was 1280 Independence Court, *not* 1285 Independence Court. Accordingly, Complainant issued two new subpoenas on March 25, 2014—one directed to Clearview Construction, LLC and one to Paul Yoder, individually. (Ex. II). In response to the new subpoenas, Respondent provided Complainant with approximately 40 documents. Satisfied with the information he received, Complainant withdrew his *Motion to Enforce*. (Ex. KK). Subsequently, Complainant issued the *Citation* to Respondent on May 25, 2014.

Discussion

Though not specifically stated, Respondent seeks to dismiss the *Complaint* by seeking judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Rule 12(c) permits a party to move for judgment after the parties have filed a complaint and answer. Fed. R. Civ. P 12(c). Similar to 12(b) motions, a 12(c) motion will only be granted if "it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim . . . ." *Craigs, Inc. v. General Elec. Capital Corp.*, 12 F.3d 686, 688 (7th Cir. 1993). In that regard, facts are to be viewed in the light most favorable to the non-moving party. *GATX Leasing Corp. v. Nat'l Union Fire Ins. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995). If matters outside the pleadings are introduced by Respondent, the motion pursuant to Rule 12(c) should be converted to a Rule 56 motion for summary judgment. *See Dempsey v. Atchison, Topeka and Santa Fe Ry. Co.*, 16 F.3d 832, 836–36 (7th Cir. 1994).[5]

Without taking into consideration any of the foregoing, the pleadings themselves seem to support Respondent's assertion that Complainant failed to issue the *Citation* within the 6-month period required by Section 9(c) of the Act. The alleged violations were observed by AD Bielema

5. Although Complainant introduced information external to the pleadings, this does not, of itself, convert the motion to one for summary judgment; as such matters were introduced to counter the allegations contained in Respondent's 12(c) motion, not in support of it. *See Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449 at n.5 (7th Cir. 1998).

on June 28, 2013, and the *Citation* was not issued until May 29, 2014, nearly a year later. As noted above, however, the pleadings themselves do not illustrate the entire story of this case.

Complainant contends that, due to the actions of Respondent, the Court should equitably toll the statute of limitations from the time that the subpoenas were issued until such time that Respondent, and Mr. Yoder, complied with the subpoenas. In support of this contention, Complainant cites to a number of cases in the EEOC and Labor Relations contexts, wherein statutes of limitation were equitably tolled due to delays caused by the action (or inaction) of the responding party. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990); *E.E.O.C. v. O'Grady*, 857 F.2d 383 (7th Cir. 1988); *Hodgson v. Int'l Printing Pressmen & Assistants' Union*, 440 F.2d 113, (6th Cir. 1971), *cert. denied*, 404 U.S. 828 (1971).

"Statutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabelli v. SEC*, 133 S. Ct. 1216, 1221, 185 L.Ed.2d 297 (2013) (internal citation omitted). The Court has deemed them so vital to the administration of justice that, in some instances "even wrongdoers are entitled to assume that their sins may be forgotten." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985). However, the Court has also noted that "the cases in which 'a statute of limitations may be suspended by causes not mentioned in the statute itself . . . are very limited in character, and are to be admitted with great caution; otherwise the court would make law instead of administering it.'" *Gabelli*, 133 S. Ct. at 1224.

In *Gabelli*, the Supreme Court held that the discovery rule was not applicable to the SEC's five-year statute of limitations, because the purpose of the discovery rule is to ensure that an injured party receives, or at least has an opportunity to receive, recompense. *Id.* at 1223. Administrative enforcement actions, such as the one at issue in *Gabelli*, are designed to punish

infractions of the law. *Id.* Because the Court could not find textual, historical, or even equitable reasons to apply the discovery rule to the SEC's statute of limitations, it declined to do so. *Id.* at 1224. Notwithstanding its conclusion in *Gabelli*, the Court left open the possibility that there might be equitable reasons for extending the statute of limitations in an administrative enforcement proceeding. *Id.*

The Commission has previously dealt with such a possibility. In *Yelvington Welding Service*, the Commission tolled the statute of limitations found in Section 9(c) because the employer failed to report a fatal accident to OSHA within 48 hours, as required by 29 C.F.R. § 1904.8.[6] *Yelvington Welding Svc.*, 6 BNA OSHC 2013 (No. 15958, 1978). In fact, it was not until the State of Florida reported the injury to OSHA—approximately 10 months after the violation occurred—that OSHA became aware of the violation. *Id.* In light of the employer's failure to comply with the Act's reporting requirements, the Commission held that:

> An employer should not be permitted to avoid responsibility for exposing employees to hazardous work conditions by breaching the obligation to report a fatality caused by the hazardous conditions. *To hold otherwise would reward an employer for violation [sic] of the Act in that by failing to report he would escape the attention of the agency designated to enforce the statute*. We do not believe that the establishment of a six month limitation on actions by the Secretary requires such an anomalous result.

Yelvington, 6 BNA OHSC 2013 (emphasis added).

In this case, though Respondent was not under an obligation to report an injury or fatality—nobody was hurt—this Court finds that Respondent had a duty to comply with the requests of Complainant during the course of his inspection. *See* 29 U.S.C. §§ 657(a)–(c). Section 8(a) of the Act authorizes Complainant to enter a worksite of an employer covered by the Act to "inspect and investigate . . . any such place of employment and all pertinent conditions . . .

6. It is important to note that the lion's share of the Commission's discussion did not focus on Section 1904.8, which it dealt with summarily. Rather, the Commission focused on an additional citation pursuant to 5(a)(1). This distinction is important because it was the employer's failure to comply with 1904.8 that prevented OSHA from timely issuing a citation.

and to question privately any such employer owner, operator, agent or employee." *Id.* § 657(a). Section 8(b) allows district courts to exercise jurisdiction to compel recalcitrant employers to produce evidence and testimony relating to the matter under investigation. *Id.* § 657(b). Finally, Section 8(c) requires each employer to "make, keep, and preserve, and make available to the Secretary or the Secretary of Health and Human Services, such records regarding his activities relating to this Act as the Secretary . . . may prescribe by regulation as necessary or appropriate for the enforcement of this Act . . . ." *Id.* § 657(c)(1). Among those records Respondent is required to "make, keep, preserve, and make available" are any "other records which are directly related to the purpose of the inspection." *See* 29 C.F.R. § 1903.3(a). In other words, Section 8 of the Act is a two-way street: Complainant is authorized to perform inspections within "reasonable" limits, and Respondent has a correlative obligation to facilitate the inspection by providing access to the worksite as well as "records which are directly related to the purpose of the inspection." *Id.*; *see also* 29 U.S.C. §§ 657(a)–(c).

Just as the Commission found that the employer in *Yelvington* should not be allowed to benefit from its failure to comply with its obligations under the Act, this Court finds that Respondent should not be rewarded for its attempts to avoid Complainant's legitimate requests for information. First, after being cited under a different company name at the same worksite, Mr. Yoder changed the name of his company. Second, Complainant went through the proper channels to perform an inspection and was rebuffed at each turn. Failing that, Complainant, pursuant to Section 8(b), sought through administrative subpoena to obtain "records directly related to the purpose of the inspection" only to be ignored or to have its attempts at service refused. Even the United States District Court for the Central District of Illinois could not compel Mr. Yoder to comply until such time as the court ordered him arrested for his repeated failure to comply with its orders.

The typical concerns associated with a statute of limitations are not present in this case—the claims of Complainant have not been allowed to slumber. In fact, Complainant made every attempt available to him in order to comply with its obligations under the Act. Respondent's actions, on the other hand, illustrate a calculated attempt to avoid responsibility for its actions through subterfuge, manipulation, and avoidance. If the Court were to grant Respondent's motion, it would, in effect, legitimize such behavior and open the proverbial flood gates to future acts of a similar nature. The statute of limitations is designed to place a check on Complainant from pursuing stale enforcement claims; it is not an opportunity for employers to "game" the system, as it were.

The Supreme Court noted that "the cases in which 'a statute of limitations may be suspended by causes not mentioned in the statute itself . . . are very limited in character, and are to be admitted with great caution . . . .'" *Gabelli*, 133 S. Ct. at 1224. Although the statute of limitations in the Act is silent as to the issue of tolling, the facts of this case are certainly unique in character and limited in scope. Based on this unique set of facts, the only reasonable and equitable conclusion is that the statute of limitations shall be tolled. Accordingly, the Court finds that the *Citation and Notification of Penalty* was timely issued. Respondent's *Motion* is DENIED.

SO ORDERED.

Date: February 25, 2015

s/ Patrick B. Augustine

Denver, Colorado

Patrick B. Augustine
Judge, OSHRC