Some personal identifiers have been redacted for privacy purposes

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Paul Simkus, Affected Employee Petitioner, v. Secretary of Labor, Respondent, IBT Local Union 781, Authorized Employee Representative, United Airlines, Inc., Party.	OSHRC Docket No. 15-1756 Petition for Modification of Abatement Period Per 29 C.F.R. § 2200.38 EXPEDITED PROCEEDING PER 29 C.F.R. § 2200.103

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION TO DISMISS EMPLOYEE'S PETITION FOR MODIFICATION OF ABATEMENT PERIOD

I. Background

On about March 23, 2015 and May 23, 2015, United Airlines, Inc. (United) employee, Paul Simkus (Mr. Simkus or Petitioner), filed complaints with the Occupational Safety & Health Administration (OSHA) against United for alleged violations of asbestos abatement during renovation or remodeling of classrooms 8101, 8103, 8104, and 8105 (and other places) in United's Training Center located at 1200 East Algonquin Road, Elk Grove, Illinois (United's Training Center). (Simkus October 12, 2015 Petition to OSHA, p. 1). Mr. Simkus worked at that facility for more than ten years as a facilities and maintenance mechanic.[1] (Tr. 6, 23; Resp.

[1] Mr. Simkus was "certified under the EPA and the Asbestos Hazard Emergency Response Act (hereinafter "AHERA") to respond to asbestos release episodes and perform most asbestos removal work" and was "qualified to

to Dismissal motion, p. 23). During the November 3, 2015 conference, Mr. Simkus stated that he knew "every pipe in that building every elbow has concrete cement asbestos on it, every elbow, every turn and the asbestos spray on was throughout the campus." (Tr. 24). He has worked in these classrooms. (Tr. 6, 11). He was last in classrooms 8103 and 8104 in about 2009. (Tr. 12). [Redacted] (Tr. 11; AD Loftus Decl. ¶ 10). Mr. Simkus is concerned that there is asbestos above the newly installed ceiling that has never been properly sealed to which employees have for years been, and continue to be, exposed. (Tr. 5-6).

OSHA conducted Inspection No. 1049817 of United's Training Center between March 30, 2015 and September 21, 2015. OSHA's North Area Office Director Angeline Loftus (AD Loftus) issued two citations consisting of three items to United on September 28, 2015 as result of its inspection. The first citation included two items, both Serious. Item 1 was for a failure to keep necessary records concerning the presence, location, and quantity of asbestos-containing material or presumed asbestos-containing material for classrooms 8101, 8103, 8104, and 8105 of the subject facility.[2] Item 2 was for a failure to clean up spills and sudden releases of material

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act as the asbestos project/contractor supervisor." His duties included knowing the location of all the asbestos contained materials and presumed asbestos containing materials at United's Training Center. (Resp. to Dismissal motion, p. 23).

[2] Citation 1, Item 1, states:

> Type of Violation: **Serious**
>
> 29 CFR 1910.1001(j)(2)(ii): Installed Asbestos Containing Material. Building and facility owners did not maintain records of all information required to be provided pursuant to this section and/or otherwise known to the building owner concerning the presence, location and quantity of ACM and PACM in the building/facility.
>
> a) United Airlines Inc. - The employer did not ensure that records of all information concerning the presence, location and quantity of ACM and PACM in the building/facility for classrooms 8101, 8103, 8104 and 8105 were maintained.
>
> In accordance with 29 CFR 1903.19(d), abatement certification is required for this violation (using the CERTIFICATION OF CORRECTIVE ACTION WORK.SHEET), and in addition, documentation demonstrating that abatement complete must be included with your certification. This document may include, bet is not limited to, evidence of the purchase or repair of the equipment photographic or video evidence of abatement, or other written records.
>
> Date by Which Violation Must be Abated: 11/16/2015
> Proposed Penalty: $7000.00

containing asbestos in classrooms 8103 and 8104 as soon as possible.[3] Citation 1, Item 2, did not identify when the alleged spills and sudden releases of material containing asbestos occurred. OSHA also cited United for failure to maintain certain training records at Citation 2, Item 1.

The Citation and Notification of Penalties required United to abate the cited conditions by November 16, 2015. (AD Loftus Decl., App. B, ¶ 2). The Citation and Notification of Penalties also included a "Notice to Employees" that stated:

> The law gives *an employee* or his/her representative the opportunity to object to any abatement date set for a violation if he/she believes the date to be unreasonable. The contest must be mailed to the U.S. Department of Labor Area Office at the address shown above and postmarked within 15 working days (excluding weekends and Federal holidays) of the receipt by the employer of this Citation and Notification of Penalty. (emphasis added).

(Citation and Notification of Penalties, p. 3).

Mr. Simkus alleges that the two citations relate to the two complaints that he had made to OSHA. (Simkus October 12, 2015 Petition, pp. 1-2).

OSHA held an informal conference with United on October 8, 2015 wherein United

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[3] Citation 1, Item 2, states

Type of Violation: **Serious**

29 CFR 1910.1001(k)(2): All spills and sudden releases of material containing asbestos were not cleaned up as soon as possible.

a) United Airlines Inc. - Releases of material containing asbestos in classrooms 8103 and 8104 were not cleaned as soon as possible.

In accordance with 29 CFR 1903.19(d), abatement certification is required for this violation (using the CERTIFICATION OF CORRECTIVE ACTION WORKSHEET), and in addition, documentation demonstrating that abatement complete must be included with your certification. This document may include, bet is not limited to, evidence of the purchase or repair of the equipment photographic or video evidence of abatement, or other written records.

Date by Which Violation Must be Abated: 11/16/2015
Proposed Penalty: $7000.00

provided OSHA with verification that all of the cited conditions had been abated.[4] (AD Loftus Decl. ¶¶ 6-8). United acknowledged that the records related to asbestos removal in the training classrooms identified in the first citation were missing, and that the records could not be reconstructed. (AD Loftus Decl. ¶ 4). United provided additional evidence that it had initiated a comprehensive asbestos survey for all buildings at the subject facility. (AD Loftus Decl. ¶ 6). United further indicated at the informal conference that classrooms 8103 and 8104 were subject to renovation in October, 2014. (AD Loftus Decl. ¶ 7). The contractor for the October, 2014 renovation, according to United, stated that it removed fiberglass insulation from those classrooms. (AD Loftus Decl. ¶ 7). United further stated that the classrooms were closed in May, 2015 in response to employee concerns, and that it hired a second contractor to find and remove any asbestos-containing debris, which the second contractor did in May, 2015, roughly two months after OSHA opened its inspection. (AD Loftus Decl. ¶ 7). Finally, United provided verification that all but two maintenance employees received training, that those employees would be trained, and that it now has a system to track training requirements for maintenance employees. (AD Loftus Decl. ¶ 8).

OSHA considered these measures adequate abatement for all of the subject citations and items. (AD Loftus Decl. ¶¶ 6-8).

On October 15, 2015, AD Loftus received a facsimile from Mr. Simkus, with a petition dated October 12, 2015, with a subject line "Notice of Request to Contest and Participate."[5] (Petition or Pet.) (AD Loftus Decl. ¶ 9). In his October 12, 2015 Petition, Mr. Simkus "contest[ed]" the proceedings and OSHA's investigative findings "in its entirety." He further

[4] Mr. Simkus alleges that OSHA did not allow him to participate in the October 8, 2015 conference. (Simkus October 12, 2015 Petition, p. 4).
[5] In the Petition's "Re" line, Mr. Simkus referred to Inspection No. 1049817, and his two earlier complaints to OSHA by number.

stated that he contested "OSHA's the [sic] investigative findings and abatement plan designed by OSHA, it is **completely inaccurate**, insufficient and highly unreasonable." (emphasis in bold in the original; underlined emphasis added). He also contested[ed] "OSHA's decision to deny my right to participate in the follow up conference held between OSHA and United Airlines on October 8, 2015 at 1:30 pm." His Petition also identified a number of other protestations and allegations related to OSHA's investigation.[6]

By letter dated October 19, 2015, the International Brotherhood of Teamsters and its Local Union 781 informed the Occupational Safety and Health Review Commission (Commission) that they wished to elect party status in the matter pertaining to OSHA Inspection No. 1049817. They are the authorized bargaining agent for United's employees and the Authorized Employee Representative (AER). This letter was received by the Commission on October 22, 2015.

On October 20, 2015, United submitted its Notice of Contest to the Citations and Notifications of Penalty for the violations alleged by OSHA to have occurred at United's Training Center. United's Notice of Contest stated: "Respondent contests each and every alleged citation, item, classification, proposed penalty, abatement date and proposed method of

[6] On about October 19, 2015, Mr. Simkus submitted to OSHA a "Notice of Contest to all Citations and Proposed Penalties." The Notice's "Re" line also referred to Inspection No. 1049817, and his two earlier complaints to OSHA by number. Mr. Simkus requested "to invoke party status." He stated that he is "currently an employee who filed two complaints against my employer (United Airlines) for knowingly committing violations that represent very serious health hazards in the workplace as alleged in the two complaints already filed." Mr. Simkus repeated the matters he had contested in his October 12, 2015 petition and "contest[ed]" the proceedings and OSHA's investigative findings "in its entirety." He further stated that he contested "OSHA's the [sic] investigative findings and abatement plan designed by OSHA, it is **completely inaccurate**, insufficient and highly unreasonable." (emphasis in bold in the original; underlined emphasis added). He also contested[ed] "OSHA's decision to deny my right to participate in the follow up conference held between OSHA and United Airlines on October 8, 2015 at 1:30 pm." Mr. Simkus also identified a number of other protestations and allegations related to OSHA's investigation. In his Response to the Secretary's Motion to Dismiss, Mr. Simkus characterized his October 19, 2015 notice as an "Amended Petition and Notice of Contest" and as an "Amended Notice of Contest and Petition to OSHA's proposed abatement plan and dates for citation 1, item 1, citation 1, item 2 and citation 2, item 1." (Resp. to Dismissal motion, pp. 13-14).

abatement." OSHA received United's Notice of Contest on October 20, 2015. (AD Loftus Decl. ¶ 11).

On October 21, 2015, AD Loftus forwarded Mr. Simkus' October 12, 2015 Petition to the Commission. (AD Loftus Decl. ¶ 9). Mr. Simkus' October 12, 2015 Petition was received by the Commission on October 21, 2015.

On October 22, 2015, the Commission docketed Mr. Simkus' October 12, 2015 Petition as *Paul Simkus, Affected Employee, v. Secretary of Labor*, Respondent, Docket No. 15-1756.

On October 22, 2015, AD Loftus timely filed OSHA's statement of reasons the abatement period was not unreasonable with the Commission. *See* Commission Rule 38(a); 29 C.F.R. § 2200.38(a). AD Loftus indicated "on October 8, 2015, the employer [United] provided OSHA with written abatement documentation for each violation." (AD Loftus Decl. ¶ 12).

By Order dated October 27, 2015, Chief Judge Covette Rooney granted the AER's request for party status in OSHRC Docket No. 15-1756.

By Order dated October 29, 2015, the Court set a Pre-Hearing Scheduling Conference to be conducted on November 3, 2015. The Order stated:

> The Occupational Safety and Health Act of 1970 granted employees the substantive right to challenge the reasonableness of the "period of time fixed in the citation for the abatement of the violation." *See* 29 U.S.C. § 659(c).
>
> Since Mr. Simkus' NOC contested the OSHA proceedings in their entirety, the Court will at the present time, for purposes of scheduling a pre-hearing scheduling conference, treat his NOC as a petition for the modification of the November 16, 2015 abatement date (Petition).

The Order further stated:

> At that time, the parties shall be prepared to stipulate that a settlement has been reached, or, in the alternative, shall be prepared to commit to a specific schedule in preparation for and the conduct of the hearing in this matters, including, but not limited to,

specific dates for the following:

1. Hearing date(s).
2. Identification of expert witnesses and submission of their written reports.
2a. Completion of depositions of experts.
3. Close of all other discovery.
4. Submission of motions seeking amendment(s) of the pleadings.
5. Submission of all dispositive and partially dispositive motions and motions *in limine*.
6. Submission of pre-hearing position statements which shall include:
    a. A brief narrative statement of the unresolved factual and legal issues.
    b. A list and brief description of all documents and other exhibits to be offered in evidence.
    c. An estimate of the time needed by each party to present its case.

The Order also stated that "[i]n the event a hearing is required, the parties will ascertain whether they are available for a hearing in this matter commencing November 18, 2015, November 23, 2015, December 10, 2015, and/or December 17, 2015."[7]

On October 30, 2015, Petitioner timely filed his response to OSHA's Statement of Reasons (Response to OSHA's Statement of Reasons). *See* Commission Rule 38(b); 29 C.F.R. § 2200.38(b). Mr. Simkus reiterated that he was "a current employee of United Airlines." (*Id*., p. 1). He objected "to the proposed abatement plan and abatement period designed by OSHA it is unreasonable because the abatement plan was based on false information that was procured through fraud which will continue to cause United Airlines employees and others to be exposed to airborne asbestos." (emphasis added) (*Id*.). He stated that he objected "to the abatement plan and abatement dates in its entirety" for a myriad of reasons outlined in the Petitioner's Response to OSHA's Statement of Reasons. (emphasis added). He asserted that he contested OSHA's proposed abatement date, abatement plan, …." (emphasis added). He again requested to invoke "Party Status." He also identified numerous grievances he had against

[7] By Order dated October 30, 2015, the parties were also directed to "ascertain by the time of the November 3, 2015 pre-hearing scheduling conference whether they are available for a hearing in this matter commencing 9:00 a.m., C.S.T., November 5, 2015, in Chicago, Illinois in the event a hearing is required."

OSHA, its inspection, the citations, and United. (*Id.*, pp. 1-7).

By letter to the Chief Judge and the Court dated November 2, 2015, United elected party status in Docket No. 15-1756.

The court held a recorded pre-hearing conference call on November 3, 2015 during which all four parties participated. During the call, Petitioner stated that he has not worked in classrooms 8103 and 8104 since about 2009. (Tr. 12). He further asserted that his concern was "not so much" that the November 16, 2015 abatement "date is too short or too long" a time for abatement, his concern is that the abatement date is unreasonable because it is "ineffective" since "people are still being exposed to asbestos as we speak." (Tr. 3, 6). Mr. Simkus stated that he was proceeding *pro se* in this matter. (Tr. 2, 18, 32). During the conference, the Secretary's counsel stated his belief that the spills and sudden releases of material containing asbestos alleged in Citation 1, Item 2, occurred in October, 2014.[8] (Tr. 13). The Secretary also stated that OSHA had received a certification from United that indicated that the citations had been abated as of October 8, 2015. (Tr. 6-7). Citing to *UAW (Ford Motor Co.) v. OSHRC*, 557 F.2d 607 (7th Cir. 1977) and *Secretary of Labor v. Pan American World Airways*, *Inc.*, No. 83-0249, 1984 WL 34860 (O.S.H.R.C.A.L.J. January 6, 1984), the Secretary's counsel asserted that an employee "may only contest the abatement period". (Tr. 9). The Secretary further stated that the time for abatement "is moot … because the conditions, practices and circumstances have been abated." (Tr. 17). The Secretary also stated that any assertion by Mr. Simkus that the November 16, 2015 abatement period is unreasonable because the hazard has not been abated "would be outside of the scope or the rules and controlling precedent." (Tr. 22). United's counsel stated that she disagreed with the majority of Mr. Simkus'

[8] In his Motion to Dismiss, the Secretary asserts that "[t]he alleged [citation] violations likely occurred between October 2014 and March 2015." (Motion to Dismiss, pp. 4-5).

statements. (Tr. 10, 21). Citing to 29 U.S.C. § 659(b),[9] she also stated that United's notice of contest of the citations stayed "abatement pending a final order of the commission on the merits of the case." (Tr. 10).

During the November 3, 2015 conference, the Court stated that it was not going to set a hearing date; and instead was giving the Secretary the opportunity to file by November 6, 2015 his Motion to Dismiss for the various reasons addressed by the Secretary and United during the conference. (Tr. 25).

On November 6, 2015, Respondent, Thomas E. Perez, Secretary of Labor, U.S. Department of Labor (Respondent or Secretary), filed his Motion to Dismiss Employee's Petition for Modification of Abatement Period (Motion to Dismiss). The Secretary requests that the court dismiss Petitioner's petition for modification of abatement period for three reasons. First, the Secretary asserts that the Petitioner's petition for modification of abatement period should be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure (FRCP) because Petitioner lacks standing to file such a petition pursuant to Commission Rule 38, 29 C.F.R. § 2200.38(a). Second, the Secretary contends that even if the court were to find that Petitioner has standing, his petition should alternatively be dismissed under FRCP 12(b)(6) because Petitioner fails to state a claim upon which relief can be granted. The Secretary asserts that the Occupational Safety and Health Act of 1970 (the OSH Act), 29 U.S.C. §§ 651 *et seq*., and Commission Rule 38(a) provide an extremely narrow and specific basis for employee contests by expressly limiting such contests to the length of an abatement period in an issued citation. To the extent that Petitioner makes any claims, assertions, or accusations outside of this

[9] 29 U.S.C. § 659(b) states, in part:

> If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties, ….). 29 U.S.C. § 659(b).

limited scope, the Secretary asserts he is not entitled to relief as there are no available remedies under the applicable Commission rules. Lastly, the Secretary asserts that any potential claim or contest related to the abatement period of the subject citations is moot because the employer has already abated the cited conditions to OSHA's satisfaction.

On November 24, 2015, the Commission received United's Notice of Contest of the citations. On that date the Commission docketed the matter as *Secretary of Labor, Complainant, v. United Airlines, Inc., Respondent*, in Docket No. 15-2019. The case was assigned to this Court the very next day.[10]

On about December 1, 2015, Petitioner filed his Response and Opposition to Respondent's Motion to Dismiss Employee's Petition For Modification of Abatement Plan and Request for A Hearing (Resp. to Dismissal motion). Mr. Simkus stated he "completely disagrees" with the Secretary's contentions that he lacks standing to contest the abatement period, does not qualify as an "affected employee", and the proposed abatement plan makes his petition "moot." (Resp. to Dismissal motion, pp. 1, 12). He stated that section 10(c) of the OSH Act gives an employee "a right, whenever he believes that the period of time provided in a citation for abatement of a violation is unreasonably long, to challenge the citation on that ground." (Resp. to Dismissal motion, pp. 21-22). Mr. Simkus asserts that he is an "affected employee" because "he was asked to file the complaints with OSHA on behalf of other United Airlines employees who worked at United's former World Headquarters (1200 East Algonquin Road)" and speaks for other United employees who have been and continue to be exposed to asbestos who qualify as "affected employees." (Resp. to Dismissal motion, pp. 5-6, 27-28). [Redacted]

[10] By Order dated November 30, 2015, the Secretary and United were directed to be prepared to address, during a pre-hearing scheduling conference to be conducted by the Court on December 21, 2015, whether or not Docket No. 15-2019 should be consolidated with Docket No. 15-1756 for discovery and/or trial purposes.

(Resp. to Dismissal motion, pp. 27-28). Citing to *UAW (Ford Motor Co.) v. OSHRC,* 557 F.2d at 610, he acknowledged that "[e]mployees are prohibited from instituting a commission action on any matter other than the reasonableness of the abatement period."[11] (Resp. to Dismissal motion, pp. 19-20).

II. Discussion

A. Petitioner has standing to file his notice of contest since he is an "affected employee".

Dismissal under FRCP 12(b)(1) for lack of subject matter jurisdiction is appropriate where a party lacks standing to bring a particular claim. *See Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443-44 (7th Cir. 2009) (affirming trial court's dismissal for lack of standing). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or particular issues." *Id.,* at 443 (citation omitted).

Commission Rule 20(a), 29 C.F.R. § 2200.20(a), states that an affected employee "may elect party status concerning any matter in which the Act confers a right to participate." When allowing an employer charged with the responsibility of abating the violation to elect party status, Commission Rule 20(b), 29 C.F.R. § 2200.20(b), refers to a notice of contest filed by an "employee". Commission Rule 38(a), 29 C.F.R. § 2200.38(a), provides that an "affected employee" may file a "notice of contest with respect to the abatement period." An "affected employee" is defined in the Commission rules as "an employee of a cited employer who is

[11] Mr. Simkus argues that does not similarly confine employee/union participation as "parties" in the hearings initiated by the employer to contest a citation. Whether or not that is so is not pertinent to this proceeding, docket no. 15-1756, since this case was initiated by an employee, Mr. Simkus, and not by United.

exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices or operations." [12] 29 C.F.R. § 2200.1(e).

The Secretary contends that Mr. Simkus lacks standing to file his notice of contest with respect to the abatement period because he has not worked in the classrooms at the site since 2009 and has not had access to the alleged violative conditions that likely occurred between October, 2014 and March, 2015; after Mr. Simkus potentially had access to the conditions.

The Secretary's contention is without merit. The Court finds that Petitioner has standing to file his notice of contest with respect to the abatement period since he is an "employee" and an "affected employee" under the Commission Rules. That Mr. Simkus is an "employee" is not in dispute. [Redacted] Nonetheless, he remains a United employee. [Redacted][13]

[12] As the Secretary noted in his Motion to Dismiss, these two Commission rules are inconsistent as to whether a Petitioner must be an "employee" or an "affected employee" in order to bring an employee contest with respect to the reasonableness of the period for abatement. *Compare* 29 C.F.R. § 2200.20(b) *with* 29 C.F.R. § 2200.38; *see also* 29 U.S.C. § 659(c) and the Citation and Notification of Penalty, p. 3. Any inconsistency is not dispositive here since the Court finds Mr. Simkus is both a United employee and an "affected employee" under the OSHA Act for the purpose of filing this action.

[13] [Redacted]

Considering matters presented in the pleadings and viewing facts in the light most favorable to Mr. Simkus for the purpose of ruling upon the Secretary's Motion to Dismiss, the Court finds Mr. Simkus to be both a United employee and an "affected employee" eligible to file a petition on about October 12, 2015 under the OSH Act challenging the reasonableness of the abatement periods specified in the citations.

B. Petitioner's Notice of Contest is not subject to dismissal to the extent it contests the reasonableness of the period of abatement set forth in the citations at issue, but his other claims are dismissed.

The sponsor of the original bill in the Senate that enacted the OSH Act believed that workers could provide unique expertise that would help eliminate workplace hazards.[14] The Commission has also recognized that "employees … may have significant information to offer regarding the alleged violations and the most appropriate form of relief." *Mobil Oil Corporation*, 10 BNA OSHC 1905, 1911 (No. 77-4386, 1982). Going further, the Commission has stated "[i]n fact, the party status conferred by the Act is an apparent recognition that the government

[14] During the floor debate on the OSH Act, Senator Harrison Williams, Jr., sponsor of the original bill, stated: "no one knows better than the working man what the conditions [in his plant] are, where the failures are [and] where the hazards are…." 116 Cong. Rec. 37,340 (1970).

might not always adequately protect the public interest." (*Id*., at 1917). Seeking to make use of employees' expertise and self-interest, Congress gave workers a meaningful role in the enforcement process. The OSH Act permits workers to request inspections[15] and to have an employee representative accompany OSHA inspectors around their plants where they could point out potential hazards.[16] The OSH Act also allows workers to seek a writ of mandamus to compel the Secretary of Labor to close down a plant that poses an imminent risk of "death or serious physical harm," if the Secretary of Labor "arbitrarily or capriciously" fails to seek a court injunction.[17] Section 10(c) of the OSH Act, 29 U.S.C. § 659(c), also provides that an employee may file "a notice with the Secretary alleging that the period of time fixed in the citation for the abatement is unreasonable." Consistent with section 10(c) of the OSH Act and Commission Rule 38(a), 29 C.F.R. §§ 2200.38(a), the Seventh Circuit Court of Appeals has held that "the Commission may review only the reasonableness of the period of time fixed in the citation for the abatement of the violation" in an employee-initiated contest. *UAW (Ford Motor Co.) v. OSHRC*, 557 F.2d at 609; *see also OCAW v. OSHRC (Am. Cyanamid Co.)*, 671 F.2d 643, 647 (D.C. Cir. 1982) ("Employees are prohibited from instituting a commission action on any matter other than the reasonableness of the abatement period.") (citing *UAW (Ford Motor Co.) v. OSHRC*, 557 F.2d at 610).

In *UAW (Ford Motor Co.)*, the Union filed a notice of contest asserting that the time period for Ford's submission of its abatement plan set forth in a citation not contested by Ford was unreasonably long. Ford Motor Co. later elected party status, claiming the abatement period was too short. The Secretary chose not to participate as a party. The Commission referred the matter to an Administrative Law Judge for evidentiary hearings. Judge George W. Otto held his

[15] 29 U.S.C. § 657(f)(1).
[16] 29 U.S.C. § 657(e).
[17] 29 U.S.C. § 662(a),(d).

hearing before the abatement date and issued his decision after it had past. The Commission later held that although "the sufficiency of the abatement plan could not be directly contested by the Union" because the OSH Act limits employee contests to the reasonableness of the period of time which is fixed in the citation for abatement, "evidence could be adduced [at the hearing] to show the employer's abatement plan does not include all presently available feasible abatement methods or controls since such specific methods and controls and their implementation time are determinative of reasonable abatement time." (*Id*., at 609). The judge concluded that the time period for abatement was unreasonably short and that it was necessary to remand to the Secretary to fix a reasonable time for the abatement. The Commission agreed with Judge Otto that the time period for abatement was unreasonably short, but faulted the judge for not prescribing a reasonable abatement time himself on the basis of the evidence before him. *Automobile Workers, Local 588 (Ford Motor Co.)*, 4 BNA OSHC 1243 (No. 2786, 1976). The Commission gave Ford two years from the date its order became final to implement feasible administrative or engineering controls to comply with the noise regulation. (*Id*., at 1244-45).

The 7th Circuit Court of Appeals agreed with the Commission that Section 10(c) of the OSH Act permitted the Commission to only review the reasonableness of the period of time fixed in the citation for the abatement of a violation. (*UAW (Ford Motor Co.) v. OSHRC*, 557 F.2d at 609-10). In doing so, the 7th Circuit Court of Appeals agreed with the Commission and Judge Otto that they could consider the abatement plan and "questions respecting the means available to abate a violation in determining the reasonableness of the abatement period." (*Id*., at 610). The 7th Circuit Court of Appeals stated that it "need not decide whether the Commission could reject an abatement plan which contains no true abatement date at all …." (*Id*.).

Judge Jerome C. Ditore's decision in *Secretary of Labor v. Pan American World Airways*, *Inc.*, No. 83-0249, 1984 WL 34860 (O.S.H.R.C.A.L.J. January 6, 1984), cited by the

Secretary during the November 3, 2015 conference, is distinguishable from the case at hand. There, the Union objected to a settlement agreement solely contending that the abatement plan and methods would not eliminate the hazardous and unsafe working conditions. The Union did not object to the reasonableness of the abatement period. In *Pan American World Airways*, *Inc.,* the Court found that it had no jurisdiction to entertain the Union's objection where the settlement agreement called for an immediate abatement of the hazardous condition. (*Id.*). The Commission affirmed Judge Ditore's decision holding an Authorized Employee Representative may not object to a method of abatement prescribed in a settlement agreement. The Union may object only to the reasonableness of the abatement period specified by the agreement. *Pan American World Airways*, *Inc.,* 11 BNA OSHC 2003, 2004 (No. 83-249, 1984).

Given the plain language of the OSH Act and the controlling precedent, all of the claims and allegations Petitioner made in his Petition that are outside the scope of the OSH Act and the Commission rules for employee contests pertaining to the reasonableness of the abatement date are subject to dismissal. All of these claims, including Mr. Simkus' contest of: 1) any alleged OSHA decision to exclude Mr. Simkus from the October 8, 2015 conference, 2) these proceedings in general, 3) OSHA's investigative findings, 4) the way OSHA conducted its inspection and investigation, and 5) the proposed abatement plan, must be dismissed because they do not constitute claims under the OSH Act and Commission rules for which the Commission can grant relief in an employee-initiated contest of the reasonableness of the abatement period.[18] The Court has no jurisdiction to hear such claims in this matter. These claims, as identified and enumerated here, are dismissed with prejudice. Petitioner's contest of the reasonableness of the period of abatement for the three items in the citations remains.

[18] The Commission also lacks jurisdiction to adjudicate any alleged violations of criminal statutes.

C. Petitioner's Notice of Contest contesting the reasonableness of the period of abatement is not moot.

The Secretary also asserts that Petitioner's contest is now moot because OSHA considers the violative conditions to have been adequately abated at least four days *prior* to Mr. Simkus' October 12, 2015 Petition. Consequently, the Secretary argues there is no relief that the Court may grant with regard to any contest of the abatement period and the Petition must be dismissed for failure to state a claim upon which relief may be granted. *See* Rule 12(b)(6), FRCP.

Pleadings before the Commission include statements of reasons and contestants' responses filed under 29 C.F.R. § 2200.38. *See* 29 C.F.R. § 2200.1(n). Pleadings closed on October 30, 2015. A Motion for Judgment on the Pleadings asserting a Rule 12(b)(6) defense may be made after pleadings have closed. Rule 12(c)(h)(2), FRCP. Accordingly, the Court treats the Secretary's Motion to Dismiss for failure to state a claim upon which relief may be granted as a Motion for Judgment on the Pleadings. Judgement on the pleadings is proper when the pleadings show that there is no material issue in dispute and one party is entitled to judgment as a matter of law. Such is not the case here as an issue regarding the reasonableness of the abatement periods remains in dispute. The Court considers matters presented in the pleadings and views facts in the light most favorable to the nonmoving party. Accordingly, the Court assumes the facts as alleged by Mr. Simkus to be true for the purposes of ruling on the Secretary's Motion to Dismiss. *National Fidelity Life Ins. Co. v. Karaganis*, 811 F.2d 357, 358-59 (7th Cir. 1987).

Mr. Simkus has alleged that the proposed abatement plan and abatement dates prescribed in the citations are unreasonable because as of October 12, 2015 they will continue to cause United Airlines employees, including himself, to be exposed to airborne asbestos. The

Secretary alleges in his pleadings that the hazards have all been abated.[19] Mr. Simkus' alleges that the hazards have not been abated.[20] United has contested the underlying Citation items, their classification, proposed penalty, abatement date and proposed method of abatement.[21] As stated by United during the November 3, 2015 conference, an employer's timely notice of contest tolls a citation's abatement requirement until such time as there is a final order of the Commission.[22] Abatement is tolled so that employers will not be required to abate conditions that may not be in violation of the OSH Act. Here, eight days after Mr. Simkus filed his notice of contest, United filed its notice contesting everything.[23] Consequently, United no longer has to meet the November 16, 2015 abatement date. There will be nothing for United to abate and no abatement date to satisfy in the event United is not found to be in violation of the underlying citations. If found in violation of the citations, any obligation for United to abate the hazardous conditions will be extended to a date at or beyond the date there is a final order by the Commission.

Although United's contest tolled the abatement dates set forth in the citations, it did not cause Mr. Simkus' Petition, to the extent it alleged the abatement dates in the citations to be unreasonable, to become moot and subject to dismissal for failure to state a claim upon which relief can be granted. Mr. Simkus retains his right under the OSH Act to participate as a party in his employee-initiated action challenging the reasonableness of whatever abatement date, if any, eventually arises concerning these citations. Court adjudication of Mr. Simkus' employee-

[19] There is no settlement agreement between the Secretary and United that resolves any issues between the two concerning the underlying citations, abatement date and proposed method of abatement. They remain matters in dispute between the Secretary and United; as well as Mr. Simkus.
[20] *See* Mark A. Rothstein, Occupational Safety and Health Law, 577, Thomson Reuters, 2015 ed. (1978) (A "never" abated hazard is too long and constitutes an unreasonable abatement date under section 10(c)).
[21] The Court takes judicial notice of United's Notice of Contest in Docket No. 15-2019. *See Ennenga v. Starns,* 677 F.3d 766, 773-74 (7th Cir. 2012) (the Court could take judicial notice of facts contained in the public record).
[22] *Automobile Workers, Local 588 (Ford Motor Co.)*, 4 BNA OSHC at 1244-45.
[23] In an employer-contested case, the burden of proving the reasonableness of the proposed abatement dates is on the Secretary.

initiated action will, however, have to await disposition of United's separate contest of the underlying citations.[24] The Court will not hold a hearing on the merits of Mr. Simkus' employee-initiated action challenging the reasonableness of the period of abatement before it holds a hearing on the merits of United's contest of the underlying citations. Whether or not Mr. Simkus' employee-initiated action (Docket No. 15-1756) and United's contest of the citations (Docket No. 15-2019) should be consolidated for discovery and trial purposes remains a possibility. *See* 29 C.F.R. § 2200.9.

III. Order

WHEREFORE IT IS ORDERED that the Secretary's Motion to Dismiss is GRANTED, IN PART, and DENIED, IN PART, WITH PREJUDICE, to the extent indicated herein; and

IT IS FURTHER ORDERED that the parties to this action shall meet and confer and advise the Court by December 21, 2015 on whether or not this matter, Docket No. 15-1756, and United's contest, Docket No. 15-2019, should be consolidated for discovery and trial purposes.

SO ORDERED.

/s/

The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: December 3, 2015
Washington, D.C.

[24] This order does not take into account any status Mr. Simkus might eventually have in Docket No. 15-2019 or the effect of any settlement agreement that may be reached between the Secretary and United concerning these citations. Such eventualities are speculative and not before the Court.