

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket No. 12-2052
	)	
Yenkin-Majestic Paint Corporation, dba OPC	)	
Polymers,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

**ORDER DENYING RESPONDENT’S MOTION TO DISMISS BUT AWARDING  
LESSER SANCTIONS AGAINST COMPLAINANT**

I. FACTS

On September 14, 2012, the U.S. Occupational Safety and Health Administration (OSHA) issued a 20 item serious citation, one item other-than-serious citation, and Notification of Penalty to Respondent.<sup>1</sup> The serious citations generally concern alleged violations of standards relating to process safety management of highly hazardous chemicals; *e.g.* Citation 1, Item 1, alleges a serious violation of 29 C.F.R. § 1910.119(d)(2)(i)(C).<sup>2</sup> The purpose provision of 29 C.F.R. § 1910.119, Process safety management of highly hazardous chemicals, states:

*Purpose.* This section contains requirements for preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable or explosive chemicals. These releases may result in toxic, fire or explosive hazards.

The citations proposed penalties amounting to \$138,600.<sup>3</sup> Thereafter, Respondent submitted its notice of contest. On October 31, 2012, the Secretary moved for an extension of

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<sup>1</sup> The citations identify the inspection dates as “3/22/2012 – 07/19/2012.”

<sup>2</sup> Citation 1, Item 1 alleges that Respondent’s process safety information did not include the maximum intended inventory for the K3 kettle unit system located at 1920 Leonard Avenue, Columbus, Ohio.

<sup>3</sup> Due to the amount at issue exceeding \$100,000, this case is considered a significant case where the mandatory

time to file the Complaint in order to “review the investigation and to prepare a complaint conforming to the requirements of 29 C.F.R. § 2200.34.” On November 8, 2012, the matter was designated for Mandatory Settlement Proceedings before another judge. On November 14, 2012, that judge issued an order granting the Secretary’s motion for an extension of time, and set the new deadline for filing the Complaint on or before December 17, 2012.<sup>4</sup> On November 27, 2012, the Secretary provided Respondent with the OSHA investigation file, with privileged material redacted. Having not settled, on September 6, 2013, the matter was reassigned to the undersigned for disposition by trial.<sup>5</sup> By Notice of Pre-Hearing Scheduling Conference and Order dated September 11, 2013, the Court stated that “[i]f not yet filed, the Secretary shall file his complaint within 20 days of receipt of this Order ....”

A pre-hearing scheduling conference was conducted on November 1, 2013 by telephone. During the conference call, the Court noted that no complaint had yet been filed and the Secretary stated his intention to file his complaint by November 4, 2013.

On November 4, 2013, the Secretary filed his complaint

On November 22, 2013, Respondent filed its Motion to Dismiss, along with an Answer in the alternative. Respondent seeks the dismissal of the Secretary’s Complaint and all accompanying penalties on the basis that the Secretary filed his complaint nearly 11 months late. Respondent asserts that it has been substantially prejudiced by the delay because its: 1) ability to adequately defend itself has been harmed through employees’ faded memories and recollections;

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settlement procedures set forth in 29 C.F.R. § 2200.120 (b) are applicable.

<sup>4</sup> The order stated:

The fact that settlement discussions or negotiations are ongoing does not relieve the parties of the obligation to file timely pleadings as otherwise required by the Rules of Procedure of the Occupational Safety and Health Review Commission, 29 C.F.R. §§ 2200.1-211 (2005). *Wes Jones & Sons, Inc.*, 13 BNA OSHC 1277 (No. 86-1095, 1987).

<sup>5</sup> The Reassignment Order stated that all pleadings were to be filed with the undersigned.

e.g. Mr. John Malaby, Respondent's Safety Manager, ended his employment on April 29, 2013 and Mr. Bernardo Jurado-Blanco, Operations Manager – OPC Polymers, ended his employment on July 12, 2013,<sup>6</sup> 2) ability to have a timely resolution of abatement issues has been seriously inhibited, and 3) costs have substantially increased.<sup>7</sup> Respondent further asserts that the Secretary's delay constitutes contumacious conduct.

On November 22, 2013, Complainant filed his Brief in Opposition to Respondent's Motion to Dismiss (Opposition). Complainant asserts that the Motion to Dismiss should be denied because there was no prejudice to Respondent and his late filing of the complaint was not the result of contumacious conduct.<sup>8</sup>

The matter is scheduled for trial commencing June 17, 2014.

## II. DISCUSSION

29 C.F.R. § 2200.34(a) states that in employer contests "[t]he Secretary shall file a complaint with the Commission no later than 20 days after receipt of the notice of contest."<sup>9</sup> The 20-day time requirement is not a statute of limitations, but only a procedural rule of pleading.<sup>10</sup> See *Pukall Lumber Co.*, 2 BNA OSHC 1675, 1677 (No. 10136, 1975). An employer must show real prejudice to warrant a dismissal of a proposed penalty for the Secretary's violation of a procedural rule. *Id.* The Commission has not insisted on literal compliance with

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<sup>6</sup> Respondent alleges that these two former employees were directly involved with the matters at issue.

<sup>7</sup> Respondent does not identify these costs and to what extent they have increased.

<sup>8</sup> The Court sustains Respondent's objection to the Court considering exhibits C and D to the Secretary's Opposition and these two exhibits will not be considered by the Court. See 29 C.F.R. § 2200.120(d)(3), Fed. R. Evid. 408.

<sup>9</sup> Complaints are not required in cases designated as simplified proceedings pursuant to 29 C.F.R. § 2200.200(b)(1). The Court also takes judicial notice that the pleading requirements are sometimes suspended at the parties' request during mandatory settlement proceedings to allow the parties to focus on settlement discussions.

<sup>10</sup> The current requirement to file the complaint in 20 days has not always been so before the Commission. In 1986, the Commission allowed a complaint that was a hybrid of fact and notice pleading to be filed in 30 days. See Occupational Safety and Health Review Commission, 51 Fed. Reg. 32,006 (September 8, 1986) (codified at 29 C.F.R. Part 2200) ("the Commission does not believe that in the usual contested case it should take long to draft a complaint. The elements of violations are generally set out clearly in the standards themselves and the Secretary's

its procedural rules in the absence of prejudice to the parties. *See Rollins Outdoor Advertising, Inc.*, 5 BNA OSHC 1041, 1042 (No. 12528, 1977) (Secretary's filing of complaint 14 days late excused due to a severe but temporary shortage of secretarial help at the Department of Labor and employer's case was not prejudiced).<sup>11</sup> Prejudice in the context of the late filing of a complaint is procedural and would stem "from such factors as loss of evidence and unavailability of witnesses that would diminish a respondent's defense on the merits." *Pukall Lumber Co.*, 2 BNA OSHC at 1678.

One of the key purposes of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.* (Act), is to assure safe and healthful working conditions. The dismissal of a significant case based solely upon the Secretary's failure to comply with a procedural rule pertaining to the timing of the filing of the complaint would undermine the Act's purpose. *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 833 (5<sup>th</sup> Cir. 1975). "From its earliest cases, the Commission has emphasized that contested matters should be adjudicated on their merits rather than on pleading technicalities." *Pukall Lumber Co.*, 2 BNA OSHC at 1677. There are also public interests that call for cases brought under the Act to be decided on their merits to deter future violations of the Act. *Pittsburgh Forgings Co.*, 10 BNA OSHC 1512, 1514 (No. 78-1361, 1982). These public interests are also balanced with "a substantial public interest in orderly procedure." *Id.* *See also Duquesne Light Co.*, 8 BNA OSHC 1218, (No. 78-5303, 1980) (Commission held that because vacation of a citation is an extreme sanction that frustrates the

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attorneys will be expected to draw upon the OSHA investigative file to supply any needed factual bases.")

<sup>11</sup> *But see MDLG, Inc. dba Phenix Lumber Co.*, No. 09-0514, 2009 WL 3030766 (O.S.H.R.C.A.L.J. July 27, 2009) (ALJ finds Secretary's wait of more than 2 ½ month beyond deadline to file complaint prejudiced the company because it had no reasonable expectation that the Secretary intended to pursue the citations). *MDLG, Inc.* is distinguishable from the instant case because here the parties engaged in mandatory settlement proceedings from November, 2012 through September, 2013 and Respondent had no reason to believe that the Secretary had ever abandoned this case.

remedial purpose of the Act, it should generally not be imposed unless prejudice or contumacious conduct is found.) The sanction of a citation dismissal must be tied to a showing of prejudice, particularly where the hazards, as alleged here, are of considerable magnitude and employee exposure would not be not limited to minor injuries. *See Jensen Constr. Co. of Ok., Inc. v. OSAHRC and Marshall*, 7 BNA OSHC 1283, 1284 (No. 77-1459, 1979).

The Court finds that Respondent has not made a specific showing that it suffered real prejudice due to the Secretary's delay in filing his complaint. Although Respondent asserts that two employees, Messrs. Malaby and Jurado-Blanco, left the company between April 29, 2013 and July 12, 2013, it has not asserted or demonstrated that either of these two former employees are no longer available to provide testimony or evidence relating to its defense of this action.

§ 9(a) of the Act states in relevant part that “[e]ach citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated.” The Commission has held that the “purpose of the particularity requirement is to put the cited employer on notice as to the nature of the violation.” *Pukall Lumber Co.*, 2 BNA OSHC at 1677, fn 9; *Gannett Corp.*, 4 BNA OSHC 1383, 1384 (No. 6352, 1976). Whether fair notice has been provided does not depend only on the citation's language but may also be determined from other factors, such as the circumstances surrounding the inspection or the employer's familiarity with his own business. *Id; Accord, Meadows Indus., Inc.*, 7 BNA OSHC 1710, 1711 (No. 76-1463, 1709). The Commission has also held that § 9(a) does not require a citation to state the elements of a cause of action; and, even a citation that facially lacks sufficient particularity need not be declared void as a matter of law if the purposes of the particularity requirement may be met during the

pleading, discovery, hearing and decisional phases of the litigation.<sup>12</sup> *Del Monte Corp.*, 4 BNA OSHC 2035, 2037 (No. 11-865, 1977). Here, Respondent had access to OSHA investigative file early-on in the mandatory settlement process. The Court finds that the Secretary's citations, along with OSHA's investigative file, have put Respondent on timely notice by no later than November 27, 2012 as to the nature of the violations as required by § 9(a) of the Act.

When any party fails to plead, the Court may declare the offending party in default on the motion of a party. Thereafter, the Court, in its discretion, may enter a decision against the defaulting party or strike any pleading not filed in accordance with the Commission rules. *See* 29 C.F.R. § 2200.101(a). The Court has "broad discretion" concerning the consequences to be suffered in the event of a failure to timely file a complaint. *Jensen Constr. Co. of Ok., Inc. v. OSAHRC and Marshall*, 7 BNA OSHC at 1284.

Under these circumstances, the Court finds that Respondent has not demonstrated that its ability to adequately defend itself has been harmed through employees' faded memories and recollections to the extent that the citations must be dismissed.<sup>13</sup> Additionally, the Court finds that Respondent has not demonstrated that its ability to have a timely resolution of abatement

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<sup>12</sup> *See* Rules and Regulations, Occupational Safety and Health Review Commission, 57 Fed. Reg. 41,676 (September 11, 1992) ("Commission has eliminated fact pleading and instituted notice pleading at the complaint and answer stage."). The Commission had previously stated that notice pleadings filed before 1986 were of "limited value" and "typically add nothing to the citation and the notice of contest. In the usual case, the Secretary files a standardized complaint that merely incorporates the citation by reference and adds an allegation of commerce coverage." *See* Rules and Regulations, Occupational Safety and Health Review Commission, 51 Fed. Reg. 23,186 (June 25, 1986).

<sup>13</sup> Although not dismissing the complaint, the Court does not in any way condone the Secretary filing his complaint nearly eleven months late. *See Pittsburgh Forging Co.*, 10 BNA OSHC at 1513 (Secretary admonished for late filing of a more definite statement by about 11 days due to inadvertence and a heavy workload). The Court admonishes the Secretary that future failures to comply with Commission rules or judge's orders will not be tolerated. Some form of sanction, less than dismissal, is appropriate to deter the Secretary from ignoring a Commission pleading rule for so long, and to ameliorate any possible prejudice sustained by Respondent through the departure of Messrs. Malaby and Jurado-Blanco from Respondent's employment in 2013. *See Rollins Outdoor Advertising, Inc.*, 5 BNA OSHC at 1043 (Commissioner Moran, dissenting - Permitting the Secretary to file his complaint 14 days late may lead to expectation that the Secretary may treat Commission rules with disdain.). *See also* 29 C.F.R. § 2200.101(a), Failure to obey rules, Sanctions.

issues has been seriously inhibited. Lastly, the Court finds that Respondent has not demonstrated that its costs have substantially increased due to the Secretary's failure to file his complaint until November 4, 2013.<sup>14</sup>

The Court further finds that the Secretary's actions here do not amount to contumacious conduct. In its Opposition, the Secretary's counsel stated that he had mistakenly believed as of November 1, 2013 that the Complaint had been filed. The Secretary's counsel stated that he realized that the Complaint in the case file was unsigned and undated after reviewing the case file after that call.<sup>15</sup> He then filed the Complaint on November 4, 2013. Counsel's pleading-related oversight, under these circumstances, does not indicate intentional disrespect towards the Court and is not an indication of bad faith to the extent that dismissal of the citations is warranted. *See Newport News Shipbuilding & Drydock Co.*, 9 BNA OSHC 1085, 1090 (No. 76-171, 1980).<sup>16</sup>

### III. ORDER

WHEREFORE IT IS ORDERED that Respondent's Motion to Dismiss is DENIED, and IT IS FURTHER ORDERED that, as a sanction for filing his complaint nearly 11 months late, the Secretary shall bear the costs and expenses associated with the taking of any deposition, videotaped or otherwise at Respondent's discretion, by Respondent [or the Secretary] of Messrs. Malaby and Jurado-Blanco; including the cost of any Deposition reporter and videographer, preparation of deposition transcripts, and deponents' witness fees and travel expenses; but excluding Respondent's related attorneys' fees and expenses.<sup>17</sup>

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<sup>14</sup> Respondent does not identify these costs and to what extent they have increased.

<sup>15</sup> The Secretary's counsel also previously failed to insure that it had complied with the Court's September 11, 2013 order that directed the Secretary to file its complaint within 20 days of receipt of the order.

<sup>16</sup> *Cf. Chao v. Roy's Const., Inc.*, 517 F.3d 180 (3d Cir. 2008) (Citation vacated where OSHA refused to file the complaint because the notice of contest was untimely.).

<sup>17</sup> At its discretion, Respondent shall also be able to introduce these two depositions into the evidentiary record at trial for all purposes.

**SO ORDERED.**

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

Date: December 17, 2013  
Washington, D.C.