



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, S.W.  
Atlanta, Georgia 30303-3104

Secretary of Labor,  
Complainant

v.

Wildcat Renovation, LLC,  
Respondent.

OSHRC Docket No.: **21-0387**

### **ORDER DENYING MOTION FOR SANCTIONS**

Before the court is Respondent's motion for sanctions. Respondent asks the court to draw an adverse inference against the Secretary regarding certain statements, and to exclude a proposed exhibit related to the statements, on the ground the Secretary failed to preserve the statements. The Secretary contends Respondent is not entitled to sanctions because it has failed to show misconduct on the part of the Secretary or prejudice to Respondent. For the reasons that follow, Respondent's motion is **DENIED**.

### **BACKGROUND**

This matter arose following a fatal accident at Respondent's worksite in September of 2020. The Fort Lauderdale Area Office of the Occupational Safety and Health Administration (OSHA) conducted an investigation of that accident. As a result of the investigation, the Secretary issued Respondent a Citation and Notification of Penalty under the Occupational Safety and Health Act (the Act) on March 21, 2021. Respondent timely contested the citation, bringing the matter before the Commission.

The Citation indicates OSHA initiated its investigation in September of 2020. The investigation was initially assigned to Compliance Safety and Health Officer (CSHO) Chad Schulenberg. CSHO Schulenberg was accompanied by trainee Karen Alvarez. Prior to completing the investigation CSHO Schulenberg left the agency, and the matter was reassigned to CSHO Reginald Benson. The Secretary contends upon being reassigned the matter, CSHO Benson discovered CSHO Schulenberg had not preserved his working file (Secretary's Response at p. 2). The parties both presume within that working file were written interview statements

CSHO Schulenberg had taken of two employees of Respondent at the outset of his investigation. These statements are the subject of Respondent's motion.

Upon being reassigned the matter, CSHO Benson contacted counsel for Respondent. According to an email sent on January 22, 2021, from CSHO Benson to Respondent's counsel, circumstances required he start the investigation "from the beginning." (Exhibit 1 of Secretary's Response) CSHO Benson also requested copies of the interview statements from Respondent's counsel. This request implied the Secretary had lost his copies of the statements, and Respondent was aware of the loss.

In addition to CSHO Schulenberg, present during the initial interviews were Trainee Alvarez and Respondent's counsel. Trainee Alvarez made a drawing during the interviews depicting the process by which the deceased employee had conducted the demolition operation at issue. The Secretary produced the drawing to Respondent during discovery. Respondent seeks to have this drawing excluded.

## **DISCUSSION**

### **Procedural Deficiencies of Respondent's Motion**

As the Secretary points out, Respondent's motion is procedurally deficient. Commission Rule 40(d) requires a party to confer with other parties prior to filing any motion. In the motion, the party must state the efforts undertaken and whether any other party opposes or does not oppose the motion. Respondent's motion fails to comply with any of these obligations. However, the court declines to deny the motion based upon these procedural deficiencies because the motion lacks merit. The court admonishes the parties to carefully review the Commission's procedural rules to ensure compliance in the future.

### **Request for Sanctions**

Respondent's request for sanctions is based on the Secretary's alleged spoliation of evidence. Respondent asks the court first to draw an adverse inference that the two employees' first statements would be supportive of its claim the deceased employee acted contrary to specific instructions. Second, it asks the court to exclude the drawing made by Trainee Alvarez. Respondent has failed to establish it is entitled to either sanction on the basis of spoliation.

The law in the 11<sup>th</sup> Circuit<sup>1</sup> regarding sanctions for spoliation is well-settled.

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<sup>1</sup> Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its

Spoliation sanctions – and in particular adverse inferences – cannot be imposed for negligently losing or destroying evidence. Indeed, ‘an adverse inference is drawn from a party’s failure to preserve evidence only when the absence of that evidence is predicated on bad faith.’ *Bashir v. Amtrack*, 119 F.3d 929, 931 (11<sup>th</sup> Cir. 1997). And bad faith ‘in the context of spoliation, generally means destruction for the purpose of hiding adverse evidence.’ *Guzman v. Jones*, 804 F.3d 707, 713 (5<sup>th</sup> Cir. 2015). This consideration is key in evaluating bad faith because the party’s reason for destroying evidence is what justifies sanction (or a lack thereof). ‘Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case.’ *Vick v. Tex. Emp’t Comm’n*, 514 F.2d 734, 737 (5<sup>th</sup> Cir. 1975)(citation omitted).

*Tesoriero v. Carnival Corp.*, 965 F3d 1170, 1184 (11<sup>th</sup> Cir. 2020).

Respondent has not proven, or even alleged, bad faith on the part of the Secretary. The undisputed evidence establishes CSHO Schulenberg’s interview statements were lost or destroyed prior to the Secretary reassigning the matter to CSHO Benson. CSHO Benson conducted his investigation “from the beginning.” Based upon CSHO Benson’s investigation, the Secretary issued the Citation. The timing of these events suggests the loss of CSHO Benson’s interview statements was the result of negligence. Respondent has presented no evidence to support an inference the Secretary intentionally destroyed CSHO Schulenberg’s interview statements because they contained adverse information. Respondent has failed to establish bad faith on the part of the Secretary.

Even if Respondent could establish bad faith destruction of the statements, the Eleventh Circuit directs other factors must also be considered before imposing sanctions. The court must consider whether the party seeking sanctions has been prejudiced and whether that prejudice can be cured; the practical importance of the evidence; and the potential for abuse if sanctions are not imposed. *Id. citing ML Healthcare Servs., LLC v. Publix Super Mkts, Inc.*, 881 F.3d 1293, 1307 (11<sup>th</sup> Cir. 2018). Respondent contends the Secretary’s case is predicated on the employees’ first statements supporting the Secretary’s theory of the case and being inconsistent with the employees’ second statements. The loss of the first statements prevents Respondent, it contends,

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principal office. 29 U.S.C. § 660(b). This case arose in Florida, which is in the 11<sup>th</sup> Circuit. “[I]n general, ‘[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has ... applied the precedent of that circuit in deciding the case—even though it may differ from the Commission’s precedent.’” *Dana Container, Inc.*, No. 09-1184, 2015 WL 7459426, at n. 10 (OSHR November 19, 2015), *aff’d*, 847 F.3d 495 (7<sup>th</sup> Cir. 2017) (citation omitted).

from rebutting this position. Respondent's argument is unavailing. Respondent may rebut the Secretary's contention through the testimony of the two employees. If, as Respondent contends, the second statements taken by CSHO Benson and the anticipated trial testimony of the two employees support its defense, the only evidence to the contrary is the recollection of Trainee Alvarez.<sup>2</sup> Respondent will have ample opportunity to cross-examine Trainee Alvarez as to the accuracy of that recollection.

Having failed to establish bad faith on the part of the Secretary in the loss of the interview statements or any prejudice resulting from that loss, Respondent is not entitled to the sanctions it seeks.

For the foregoing reasons, Respondent's motion for sanctions is **DENIED**.

**SO ORDERED.**

/s/  
**First Judge Heather A. Joys**  
Atlanta, GA

Date: **August 17, 2022**

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<sup>2</sup> Respondent suggests in its motion CSHO Benson has also provided a sworn statement averring the two employees testified inconsistently in the two statements. CSHO Benson was not present during the first interviews and would have no first-hand knowledge whether the two statements are consistent.