



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 09-0516

MDLG, INC. dba PHENIX LUMBER CO.,

Respondent.

APPEARANCES:

Edmund C. Baird, Attorney; Michael P. Doyle, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; Carol A. De Deo, Deputy Solicitor of Labor for National Operations; U.S. Department of Labor, Washington, DC
For the Complainant

J. Burruss Riis, Esq.; Katie L. Hammett, Esq.; Hand Arendall, L.L.C., Mobile, AL
For the Respondent

DIRECTION FOR REVIEW AND REMAND ORDER

Before: ROGERS, Chairman; THOMPSON, Commissioner.

BY THE COMMISSION:

On March 6, 2009, the Occupational Safety and Health Administration issued a citation in this case to MDLG, Inc. dba Phenix Lumber Co. alleging a violation under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. In an order dated July 27, 2009, Administrative Law Judge Patrick B. Augustine denied the Secretary's motion for leave to file a complaint past the end of the filing period and vacated the citation. The Commission docketed the judge's dismissal order on August 17, 2009, and the Secretary filed a Petition for Discretionary Review seeking reinstatement.

On September 10, 2009, the Secretary filed with the Commission the parties' Joint Notice of Settlement, which states that this matter has been settled. The Secretary also indicates that the

parties will submit a proposed settlement agreement to the judge for approval. Under these circumstances, we direct this case for review, vacate the judge's dismissal order, and remand the case for further proceedings consistent with this decision.

SO ORDERED.

/s/ _____
Thomasina V. Rogers
Chairman

/s/ _____
Horace A. Thompson III
Commissioner

Dated: September 15, 2009



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
721 19th Street, Room 407
Denver, Colorado 80202

Phone: (303) 844-3409

Fax: (303) 844-3759

SECRETARY OF LABOR,
Complainant,

v.

MDLG, INC. dba PHENIX LUMBER CO.,
Respondent.

OSHRC DOCKETS
NOS.: 09-0516

ORDER

Procedural History

The four above-listed cases were consolidated on June 24, 2009 for the purposes of conducting a Mandatory Settlement Conference. On July 9, 2009, the Secretary filed *Complainant's Motion for Leave to File Complaint Instanter* in Docket Nos. 09-0514 & 09-0516 and *Complainant's Motion to Amend Complaint to Substitute Corrected Exhibits* in Docket Nos. 09-0513 & 09-0910 (collectively, the "Motions"). On July 16, 2009, Respondent, MDLG, Inc. dba Phenix Lumber Co. ("MDLG"), timely filed *Respondent's Opposition to Complainant's Motions for Leave to File Complaint Instanter and Substitute Corrected Exhibits* ("Response"). On July 17, 2009, the court conducted a Pretrial Conference with the parties during which these Motions were discussed. Both parties asked the court to rule on the Motions prior to the Mandatory Settlement Conference. During the Pretrial Conference, the parties were offered an opportunity to present oral argument on the issues raised in the Motions and Response. Both parties declined.

Jurisdiction

The court has jurisdiction to rule on the Motions, even though these cases have been referred for Mandatory Settlement, as the resolution of these Motions will facilitate the proceedings.

Commission Rule 120(b). 29 C.F.R. 2200.120(b) and (c).

Principles of Law

1. A party is generally allowed to amend its complaint before a responsive pleading has been filed. *F.R.C.P. 15(a)(1)(A)*.
2. When analyzing an untimely filing in a proceeding, the Commission has recognized several relevant factors to consider in determining the appropriateness of sanctions, with prejudice to the opposing party and/or contumacious conduct by the untimely party being the most relevant. *See Duquesne Light Company*, 8 BNA OSHC 1218, 1980 CCH OSHD ¶24,384 (Nos. 78-5034, 5112, 5303, 1980); *Choice Electric Corporation*, 14 BNA OSHC 1899, 1990 CCH OSHD ¶29,141 (No. 88-1393, 1990). *See also* 29 C.F.R. §2200.101.

Analysis and Findings of Fact

I.

Complainant's Motion to Amend Complaint to Substitute Corrected Exhibits in Docket Nos. 09-0513 & 09-0910

As a result of OSHA Inspection No. 312283062, the Secretary issued two sets of alleged violations: (1) a *Citation and Notification of Penalty* based on violations discovered during the inspection, and (2) a *Notification of Failure to Abate Alleged Violations* based on citations issued during a previous inspection (No. 310509575). MDLG contested both sets of alleged violations and penalties by letter to the Mobile, Alabama Area OSHA Office on March 30, 2009.

On April 16, 2009, the Secretary timely filed a *Motion to Extend Time* for filing her Complaint in both dockets until May 15, 2009. The Secretary's Motion for Extension of Time was never ruled upon. However, such motions are liberally granted. Although the Secretary's motion was not ruled

upon, she filed her Complaint on May 14, 2009, one day earlier than the requested extension date. The Secretary filed a single Complaint, referencing both sets of alleged violations. The two related cases were assigned Commission Docket Nos. 09-0513 & 09-0910.

The Secretary now moves to amend her Complaint in those two cases by substituting a new, comprehensive copy of the *Citation and Notification of Penalty* and *Notification of Failure to Abate Alleged Violation* as Exhibits A & B. Apparently, when the Secretary filed her May 14, 2009 Complaint in Docket Nos. 09-0513 & 09-0910, only a portion of the alleged violations were attached as an exhibit. Upon review of the record, the violations alleged in the Secretary's proposed amended Exhibits A & B appear to be the exact same violations and penalties which were contested by MDLG. No new factual allegations are being made and no new penalties are being proposed from those which had already been identified and contained in the Citations. Furthermore, MDLG has not yet filed an answer to the Secretary's Complaint in Docket Nos. 09-0513 & 09-0910. A party is generally allowed to amend its complaint before a responsive pleading has been filed. *F.R.C.P. 15(a)(1)(A)*. Accordingly, *Complainant's Motion to Amend Complaint to Substitute Corrected Exhibits* is GRANTED.

II.

Complainant's Motion for Leave to File Complaint Instanter in Dockets 09-0514 & 09-0516

As a result of OSHA Inspection No. 312283054, OSHA issued two additional sets of alleged violations in this matter: (1) a *Citation and Notification of Penalty* based on alleged violations discovered during the inspection, and (2) a *Notification of Failure to Abate Alleged Violations* based on citations issued during a previous inspection (No. 310510847). As with the two dockets discussed above, MDLG contested these alleged violations and penalties on March 30, 2009. See Ex. A attached to Respondent's Opposition. The Commission assigned the two sets of violations alleged as a result of OSHA Inspection No. 312283054 to Docket Nos. 09-0514 & 09-0516.

Pursuant to Commission Rule 34, 29 C.F.R. §2200.34, the Secretary's Complaints in these two dockets were due on April 17, 2009.¹ Unlike Commission Docket Nos. 09-0513 & 09-0910, the Secretary failed to file her complaints on time and failed to request an extension of time to file her Complaints. It was not until July 9, 2009, through the pending Motions, that the Secretary formally addressed Commission Docket Nos. 09-0514 or 09-0516. The only explanation offered by the Secretary for her late filing is "clerical error" in that the Solicitor's Office did not receive "relevant information" on the two sets of alleged violations issued as a result of OSHA Inspection 312283054 until June 22, 2009. No explanation was provided regarding the continued delay in filing the Complaints in these two dockets between June 22, 2009 and July 9, 2009. Overall, the record establishes that the Secretary was **83** days late in filing her Complaints in OSHRC Dockets Nos. 09-0514 & 0516.

When analyzing an untimely filing in an OSHRC proceeding, the Commission has recognized several relevant factors to consider in determining the appropriateness of sanctions, with prejudice to the opposing party and/or contumacious conduct by the untimely party being the most relevant. See Duquesne Light Company, supra; Choice Electric Corporation, supra. See also 29 C.F.R. §2200.101.

MDLG argues that "the Secretary's misrepresentations to the Court,² extreme tardiness in filing, [and] evasive explanation of 'clerical' error combine to demonstrate a pattern and practice that amounts to contumacious conduct." *Response, p.2.* MDLG further argues that it would be prejudiced by such a late filing of the Complaints because (1) if MDLG had been 83 days late in filing its notices of contest, such tardiness would not have been excused based on a general claim of "clerical error," (2)

1 The Secretary submits in her motion that her complaints were due April 16, 2009. However, Commission Rule 34 allows no more than 20 days from OSHA's receipt of a Notice of Contest to file a complaint. Since the 20 days concluded on Sunday, April 19, 2009, the Secretary was required to file her complaint by Friday, April 17, 2009.

2 Respondent attached two affidavits in support of its position that the Secretary misrepresented, in her *Motion to Extend Time* to file complaints in OSHRC Dockets No. 09-0513 & 09-0910, that the motion was uncontested. Since such motions are liberally granted when timely filed, that issue will not be addressed herein.

allowing such a late filing will unfairly increase the number of alleged violations at issue in this case, and (3) allowing such a late filing will unfairly increase the litigated penalty total by \$68,100.00. *Id.*

Upon review of the record, no evidence has been offered to support a finding of contumacious conduct by the Secretary in failing to file a timely complaint in Docket Nos. 09-0514 & 09-0516. The court is in agreement with MDLG that if its notice of contest had been 83 days out of time with no explanation beyond “clerical error,” it is unlikely that such contest would have been accepted. Missing a deadline to file a complaint by 83 days with no substantive explanation is not reasonable.

The court notes that the Commission’s Executive Secretary issued a letter to the Parties on June 19, 2009, advising them of the docketing of all four cases at issue here. In my opinion, the letter should have created a heightened awareness on the part of the Secretary that she had failed, at that point, to file a complaint in two of the four dockets at issue. Despite this heightened awareness, the Secretary unexplainably chose to wait an additional 20 days to file her Complaints in Docket Nos. 09-514 & 09-0516, increasing her tardiness from 63 days to 83 days.

The Court finds that waiting more than 2 ½ months beyond the deadline proscribed by Commission Rule 34 resulted in a substantial delay which prejudiced MDLG, who had no reasonable expectation after the passing of such time that the Secretary intended to pursue the violations or penalties alleged as a result of OSHA Inspection No. 312283054. *Pitt-Des Moines, Inc.*, 16 BNA OSHC 1429, 1993 CCH OSHD ¶30,225 (No. 90-1349, 1993). *Complainant’s Motion for Leave to File Complaint Instantly* in Docket Nos. 09-0514 & 09-0516 is DENIED.

Conclusions of Law

The Secretary’s amended Complaint in Docket Nos. 09-0513 and 09-0910 will be allowed as no responsive pleading has been filed by MDLG. MDLG will not be prejudiced by the amendment.

The Secretary’s request to file her Complaints in Docket Nos. 09-0514 and 09-0516 more than 80 days beyond the deadline proscribed by Commission Rule 34 will not be granted. The court finds

waiting 83 days beyond the deadline resulted in a substantial delay which prejudiced MDLG, who had no reasonable expectation after the passing of such time that the Secretary intended to pursue the violations or penalties alleged as a result of OSHA Inspection No. 312283054.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. The Secretary's timely filed *Motion to Extend Time to File* her Complaints until May 15, 2009 in Dockets No. 09-0513 & 09-0910 is hereby GRANTED;
2. *Complainant's Motion to Amend Complaint to Substitute Corrected Exhibits* in Dockets No. 09-0513 & 09-0910 is hereby GRANTED;
3. *Complainant's Motion for Leave to File Complaint Instanter* in Dockets No. 09-0514 & 09-0516 is hereby DENIED. The violations alleged as a result of OSHA Inspection No. 312283054 are hereby VACATED.
4. MDLG shall not be required to file an Answer in Docket Nos. 09-0513 and 09-0910 until the completion of the Mandatory Settlement proceedings at which time an order will be issued setting forth the date of such filing.

SO ORDERED.

Patrick B. Augustine
Judge, OSHRC

Dated: July 27, 2009