

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

STEPHEN M. RHIM,

Affected Employee,

v.

OSHRC DOCKET NO. 17-0307

R. ALEXANDER ACOSTA¹, Secretary of
Labor

Respondent.

Marla Haley, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, IL
For Respondent

Stephen M. Rhim, Indianapolis, IN
For Affected Employee

Before: Administrative Law Judge Patrick B. Augustine

AMENDED DECISION AND ORDER OF DISMISSAL
LETTER OF CONTEST OF AFFECTED EMPLOYEE

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act). The Occupational Safety and Health Administration (OSHA) conducted an inspection of an U. S. Postal Service facility located at 7451 Tempelhof Dr., Ste.

¹ R. Alexander Acosta, on the Court's own motion, is substituted for Edward C. Hugler. When this case was commenced Secretary Acosta had not been confirmed by the U.S. Senate and sworn into office. As of the date of this *Decision and Order*, Secretary Acosta has been sworn in as the U. S. Secretary of Labor and therefore is the proper party.

A, in Indianapolis, Indiana (Inspection).² As a result of the Inspection, OSHA issued a Citation and Notification of Penalty (Citation) to the U. S. Postal Service on January 23, 2017, alleging one serious violation of the Act with a penalty of \$6,791.00. The U. S. Postal Service contested the Citation by filing a *Notice of Contest*. The case in which the U. S. Postal Service filed its *Notice of Contest* was docketed with the Commission and assigned OSHRC Docket Number 17-0352.³

On January 31, 2017, the Affected Employee filed a letter to contest the abatement date (Letter of Contest)⁴ set forth in the Citation asserting that the abatement date afforded the U. S. Postal Service too much time to take corrective action and alleged that the U. S. Postal Service should have corrected any violations that were potentially discovered during the Inspection on September 21, 2016.⁵ The Affected Employee's *Letter of Contest* was assigned a separate docket number, OSHRC Docket Number 17-0307 – which is the matter before the Court. This case was designated to proceed under the conventional proceeding rules of the Commission. *See* 29 C.F.R. § 2200.

² The inspection was assigned Number 1179577.

³ OSHRC Docket Number 17-0352 has also been assigned to the Court but is not subject to, or impacted, by this Decision and Order.

⁴ Pursuant to 29 C.F.R. §§ 2200.7(l) and 20, the Affected Employee was to serve the U. S. Postal Service with a copy of his *Letter of Contest* so the U. S. Postal Service could be advised of his contest and protect its rights under 29 C.F.R. § 2200.20(b) by deciding whether or not to elect party status. In addition, service on the U. S. Postal Service is required under 29 C.F.R. § 2200.7(l) so that the U.S. Postal Service could post the *Letter of Contest* as required. There was no proof that the Affected Employee served the U.S. Postal Service with his *Letter of Contest*. Also, under 29 C.F.R. § 2200.7(k), the Affected Employee was required to serve the authorized employee representative (i.e. the union representing postal service employees under a collective bargaining agreement) so that the union could decide whether to elect party status and proceed to prosecute the *Letter of Contest*. If the union elected party status, then affected employees may not separately elect party status. 29 C.F.R. § 2200.22(b). Accordingly, if the union elected party status after it had been properly notified of the filing of the *Letter of Contest*, the Affected Employee would not have standing to pursue his *Letter of Contest*. There is no proof the Affected Employee served his *Letter of Contest* on the union as required under 29 C.F.R. § 2200.7(k). These procedural deficiencies could result in a dismissal of the Affected Employee's *Letter of Contest*; however, the Court elects to dispose of this case through an evaluation of the substantive issues in this case.

⁵ The sole issue present in this case is whether the established abatement date in the Citation is reasonable.

Under 29 C.F.R. § 2200.38(a), Respondent in this action was required to file a “statement of reasons” (Statement) which supports the established abatement date. Respondent filed its *Statement* on February 14, 2017, serving the Affected Employee with a copy of the *Statement*. In the *Statement*, the Secretary asserted the abatement period and date set forth in the Citation was reasonable. In the Citation, the Secretary alleged that the U. S. Postal Service violated 29 CFR § 1910.178(l)(1)(ii). That section provides employers shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in paragraph (l). Specifically, OSHA alleged that untrained clerks and their supervisors operated power driven hand jacks (PHJs) to move Gaylord boxes and APC rolling containers. The clerks and their supervisors are allowed to move boxes and containers by rolling them, without the use of the PHJs. However, the use of the PHJ to move the boxes and materials is classified as operation of a powered vehicle by OSHA. The Citation issued provided the U. S. Postal Service until February 16, 2017 to abate the violation. The abatement date established in the Citation was less than a month away from the Citation issuance date. The Secretary deemed this date to be reasonable since 29 CFR § 1910.178(l)(ii) sets forth extensive requirements for training and verification of training in order to allow employees to operate powered equipment. To comply with these requirements, the U. S. Postal Service had to potentially train up to 125 employees. In addition to the number of employees involved, abatement would also require coordination of training for employees working multiple shifts. For these reasons, the Secretary argued in his *Statement* the proposed abatement date was appropriate.

Under 29 C.F.R. § 2200.38(b), the Affected Employee was to file a response to the *Statement* not later than ten days after the receipt of the *Statement* by the Affected Employee. The Affected Employee failed to comply with this Commission Rule.

On April 6, 2017 the Court issued an *Order* (April 6 Order), pursuant to 29 CFR § 2200.39, directing the Secretary and U. S. Postal Service to submit a brief which addressed whether abatement had been completed, the date abatement was completed, provide documentation that the abatement had been completed and the Secretary had accepted the abatement. The *April 6 Order* was also served on the Affected Party.

The Secretary filed its brief in response to the *April 6 Order* with exhibits on April 14, 2017 (Secretary's brief). The United States Postal Service filed its brief with exhibits on April 13, 2017 (USPS brief). The Secretary's brief and USPS brief shall be collectively referred to as the "Briefs." The Parties certified the Affected Employee was served with copies of the Briefs. On April 20, 2017, the Court issued an Order (April 20 Order) to the Affected Employee to file any response to the Briefs he wished the Court to consider by May 1, 2017. The Affected Employee did not file any response.

On April 3, 2017, the U. S. Postal Service advised the Secretary that it had completed abatement and forwarded documentation showing it trained a number of individuals. *See* Exhibit C to the Secretary's brief. After receiving the documentation, OSHA had additional questions about training of four individuals who were not mentioned in the abatement documentation. On April 11, 2017 and April 14, 2017, the U. S. Postal Service confirmed the following additional abatement had occurred with regard to its employees, including the four individuals noted by OSHA: (i) employees without documentation training were prohibited from using any powered

industrial trucks at the Indianapolis MPA (USPS Annex facility): (ii) the four individuals (whom OSHA had inquired about) are prohibited from operating industrial trucks until training is received and documented; and (iii) clerks are prohibited from using the powered industrial trucks. See Exhibit D attached to the Secretary's brief. Upon review of these documents, the description of the abatement and the certification of abatement, the Secretary deemed the abatement to be complete and satisfactory. The Secretary accepted the U. S. Postal Service's certification of abatement thereby concluding the issue of abatement.

The Secretary and U. S. Postal Service notified the Court on April 20, 2017 (April 20 Order), that they had reached a settlement of the underlying case, OSHRC 17-0352. The Court provided thirty (30) days to submit an executed settlement agreement. The Affected Employee was served with a copy of the April 20 Order. Thus, with the underlying case being settled, there remains no issue in that case which bears on the issue in this case.

Jurisdiction

The Commission has jurisdiction over this action pursuant to section 10(c) of the Act due to the filing of a *Letter of Contest* by the Affected Employee. 29 USC § 659(c). In addition, the U. S. Postal Service is an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5) See *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). All indications in the record establish the Affected Employee is an employee of the U. S. Postal Service.

Analysis

A. Affected Employee's Letter of Contest was Tolloed by the United States Postal Service Filing its Notice of Contest.

When the U. S. Postal Service filed its *Notice of Contest*, the Court assumed jurisdiction for setting the appropriate abatement date. The filing of the *Notice of Contest* by the U. S. Postal Service served to toll the abatement compliance date requirement until there is a final Order of the Commission. *Reich v. Manganas*, 70 F.3d 434 (6th Cir. 1995). See section 10(b) of the Act. See also *Secretary v. Matthews and Fritts, Inc.*, 2 BNA OSHC 1149 (No. 3998, 1974). Abatement is tolled pending a final decision of the Commission so employers will not be required to abate conditions that may not be in violation of the Act. If a contested citation is affirmed by the Commission, the period of time for abatement begins to run from the date of the final order of the Commission. In that instance, the burden of proving the reasonableness of the proposed abatement period is on the Secretary. *Druth Packaging Co.*, 8 BNA OSHC 1999 (No. 77-3266, 1980).

Therefore, the *Letter of Contest* filed by the Affected Employee contesting the abatement date was premature since there was no final order of the Commission finding the U.S. Postal Service had violated the Act; therefore requiring the U.S. Postal Service to abate the violation. The Court acted prudently in not deciding the issue of the reasonableness of the abatement date as contested by the Affected Employee until a final order had been rendered in OSHRC Docket 17-0352.

B. Affected Employee's Letter of Contest is Rendered Moot by Achievement of Abatement.

The Secretary has the "exclusive prosecutorial discretion" to issue a citation after he determines that a hazardous or unsafe condition exists at a workplace and establish an abatement date. *Mobil Oil Corp.*, 713 F.2d 918 (2d Cir. 1983). The Secretary does not concede this discretion to an affected employee who contests the reasonableness of the time established in the

citation for abatement to be achieved. As noted in *Boise Cascade Corp.*, Congress did not intend employees to “constitute a separate and distinct enforcement authority under the Act.” 14 BNA OSHC 1993, 1995 (No. 89-3087, 1993). Accordingly, the Secretary has the sole authority to determine if citations have been properly abated. Affected parties do not have the right to question the underlying evidence of abatement that the Secretary relies on in making that determination. *See Heinz Pet Prods.*, No. 98-0558, 1998 WL 651120 (O.S.H.R.C.A.L.J. Sept. 18, 1998))(rejecting Union’s assertion that it was entitled to review underlying materials upon which the Secretary had based his assessment that all conditions were abated); *Calvin L. Sisson*, 17 BNA OSHC. 1528 (No. 95-1041, 1995)(dismissing employee objections as moot because employee cannot contest whether conditions have been adequately abated). In OSHRC Docket No. 17-0352, the U. S. Postal Service has provided documentation to the Secretary supporting its abatement of the hazardous or unsafe working condition. The Secretary has determined, based upon the information which it received, that the abatement is satisfactory and accepted the certification of abatement filed by the U. S. Postal Service. Such action by the Secretary in accepting the abatement as satisfactory – which is within his sole prosecutorial discretion – renders the issue of the reasonableness of the abatement date moot.⁶

C. No Actual Controversy Remains Vesting the Court with Subject Matter Jurisdiction.

The Court has determined that it lacks subject matter jurisdiction over the Affected Employee’s *Letter of Contest* since abatement has been completed and has been accepted by the Secretary as satisfactory. *St. John’s United Church of Christ v. City of Chicago*, 507 F.3d 616, 626 (7th Cir. 2007)(“When the issues presented are no longer live or the parties lack a legally

⁶ This action was therefore mooted even before the Secretary of Labor and the U. S. Postal Service notified the Court that a settlement had been reached in OSHRC Docket 17-0352.

cognizable interest in the outcome, the case is (or the claims are) moot and must be dismissed for lack of jurisdiction”)(internal quotes omitted) The Court can determine at any time that it lacks subject matter jurisdiction and dismiss the action. Fed.R.Civ.P. 12(h)(3).

In order to invoke this Court’s jurisdiction, the Affected Employee must demonstrate that he possesses a legally cognizable interest in the outcome of this action. *See Camreta v. Greene*, 563 U.S. 697,701 (2011)(quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009)). This requirement ensures that the Court confines itself to a limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved.

A corollary to this case-or-controversy requirement is that an “actual controversy must be extant at all stages of review, not merely at the time the complainant is filed.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (quoting *Preiser v. Newkirk*, 422 U.S. 395 (1975)). If an intervening circumstance deprives the plaintiff of a personal stake in the outcome at any point during litigation, the action can no longer proceed and must be dismissed as moot. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990)(internal quotation marks omitted).

Courts have consistently adhered to this principle in a variety of labor disputes, in addition to OSHA. In *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523 (2013), the Supreme Court reviewed a Fair Labor Standards Act action brought by an employee on behalf of herself and “other employees similarly situated” for various alleged violations. During the pendency of the case, the district court determined that the employee’s claims had been fully satisfied and that the employee’s case was, therefore, rendered moot. 133 S.Ct. at 1526.

Likewise, in OSHA cases where abatement was at issue, courts have dismissed employee objections as moot because employees cannot contest whether conditions have been adequately

abated as they have no personal stake in the case. *See L.H. Sowles Co.*, No. 2770, 1973 WL 4278, at *9 (O.S.H.R.C.A.L.J. Dec 5, 1973) (consolidated).

Since the issue of the reasonableness of the date of abatement has been rendered moot by its satisfactory completion and acceptance by the Secretary, the Court has been divested of subject matter jurisdiction to adjudicate this case since there is no remaining dispute the Affected Employee has standing to pursue. The Affected Employee has no standing under established legal precedent to prosecute the public interest in providing for a safe workplace as under the Act such standing is solely vested in the Secretary of Labor. The Secretary of Labor has discharged his duty by accepting the abatement as satisfactory. *See Mobil Oil Corp.*, 713 F.2d at 927 (the public rights created by the Act are protected by the Secretary).

ORDER

Accordingly, with respect to the above-referenced docket, the Affected Employee's *Letter of Contest* is hereby VACATED and this case is hereby dismissed with prejudice for lack of subject matter jurisdiction.

SO ORDERED.

DATE: June 7, 2017
Denver, Colorado

Patrick B. Augustine
Patrick B. Augustine
Judge, OSHRC