

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

Secretary of Labor,

Complainant,

v.

Mulch ‘N More, Incorporated,

Respondent.

OSHRC DOCKET NO. 17-1900

**DECISION AND ORDER GRANTING COMPLAINANT’S AMENDED MOTION FOR
SUMMARY JUDGMENT**

I. BACKGROUND

This is a proceeding brought before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (the Act).

Nicholas Henault, an employee of Respondent’s, was operating a chain saw at Respondent’s job site located at 34 Terrace Drive, East Greenwich, Rhode Island, 02818 (Job Site) on June 23, 2017 when he sustained a laceration near his knee. The on-site supervisor contacted Respondent’s president and owner, Michael Baird, and informed him that Mr. Henault had been injured at the job site. Mr. Baird directed a salesman in the vicinity to travel to the job site and take the injured employee to the hospital. The salesman took Mr. Henault to the hospital, where he received medical treatment including stiches and an immobilizing wrap. Mr. Baird knew that Mr. Henault was sent home from work the following day in connection with his on-the-job injury. Respondent neither logged the injury on the OSHA 300 Form nor prepared an OSHA 301 Form within seven days as required.

After being notified of Mr. Henault's injury, the Occupational Safety and Health Administration (OSHA) conducted an investigation of the matter between July 12, 2017 and September 28, 2017. Following its investigation, OSHA issued a single-item Citation to Respondent alleging a Willful violation of 29 C.F.R. § 1904.29(b)(3), which requires that each recordable injury must be recorded on the OSHA 300 Form and 301 Incident Report within seven calendar days of receiving information that a recordable injury has occurred. According to OSHA, there was and is no legitimate excuse for Respondent's failure to timely log the June 23, 2017 chain saw injury within seven days as required. The OSHA proposed penalty is \$13,942.

Respondent filed a notice of contest.

On January 11, 2018, the Secretary filed his complaint. Respondent filed its answer on February 22, 2018.

On September 10, 2018, Complainant filed his Motion for Summary Judgement.

On September 12, 2018, Complainant filed his Amended Motion for Summary Judgement (ASJM).¹ Complainant states that the ASJM was filed to correct two instances where the word "unemployment" was used instead of the term "worker's compensation" on pages 14

¹ The Secretary submitted the following exhibits in support of his ASJM:

Exhibit 1, the declaration of Thomas Braile, the Compliance, Safety, and Health Officer (CHSO) who conducted the underlying Inspection, and the exhibits thereto, which include:

Exhibit A (Corporate Entity Summary);
Exhibit B (Respondent's 2016 OSHA Form 300 and Form 300A);
Exhibit C (Respondent's 2017 OSHA Form 300 as provided at the opening conference);
Exhibit D (excerpt from Mr. Henault's June 23, 2017 medical records); and
Exhibit E (ED Provider Notes)

Exhibit 2, the Secretary's Interrogatories and Document Requests to Respondent;

Exhibit 3, Respondent's Answers to Interrogatories; and

Exhibit 4, Respondent's Responses to Document Requests.

and 19. No other changes were made. Complainant asks the Court to grant his summary judgment motion, affirm the cited item and uphold the proposed penalty.

Using the date the ASJM was served, Respondent's response was due to be filed with the Court by September 26, 2018. Respondent has not filed a response to the ASJM.

Discovery has been completed. A trial is scheduled to commence on October 3, 2018.

II. UNDISPUTED MATERIAL FACTS²

1. At all relevant times in regard to the underlying Inspection and litigation of this matter (Relevant Times), Respondent has been a corporation organized under Rhode Island law. (Complaint & Answer, ¶ II; Exs 1, ¶ 5, A).

2. At all Relevant Times, Respondent maintained an office and place of business at 17A Reservoir Road, Rhode Island. (Complaint & Answer, ¶ II; Exs. 1, ¶ 5, A).

3. At all Relevant Times, Michael Baird was the president and owner of Respondent. (Exs. 1, ¶¶5-6, A, B).

4. At all Relevant Times, Respondent's business included the provision of landscaping services, which sometimes included tree-trimming. (Complaint & Answer, ¶ 2; Exs. 1, ¶ 5, A).

5. Respondent's employees sometimes used chain saws when trimming trees. (Ex. 1, ¶ 7).

6. As of June 23, 2017, Nicholas Henault was an employee of Respondent's. (Ex. 1, ¶ 4).

² Respondent has failed to properly address Complainant's assertion of facts contained within his ASJM as required by Rule 56(c), Fed. R. Civ. P. Consequently, the Court may, and does here now, consider the facts asserted in the Secretary's ASJM to be undisputed for the purposes of the ASJM.

7. Mr. Baird saw Mr. Henault on the morning of June 23, 2017 and did not observe Mr. Henault to be injured at that time. (Ex. 1, ¶ 12(a)(i)).

8. Later in the day on June 23, 2017, Stephen Lichtenberg, a supervisor for Respondent, traveled with Mr. Henault to Respondent's job site. (Ex. 1, ¶ 7). Mr. Lichtenberg did not observe Mr. Henault to be injured at that time. (*Id.*)

9. Mr. Lichtenberg observed Mr. Henault operating a chain saw at the Job Site on June 23, 2017. (*Id.*)

10. Mr. Henault sustained an injury (specifically, a laceration in the vicinity of his knee) while he was operating a chain saw at the Job Site on June 23, 2017 (the "Injury"). (Ex. 1, ¶¶ 7-8).

11. Soon after the Injury occurred, Mr. Lichtenberg became aware of it and notified Mr. Baird that Mr. Henault had been hurt at the Job Site. (Ex. 1, ¶¶ 6(b), 7, 12(a)(ii)).

12. Shortly after being notified of the Injury on June 23, 2017, Mr. Baird asked Kevin Richotte, a salesman in the vicinity, to go to the Job Site and take Mr. Henault to the hospital. (Ex. 1, ¶¶ 6(b)-(c), 7, 12(a)(iii)).

13. As directed, Mr. Richotte went to the Job Site on June 23, 2017. (Ex. 1, ¶¶ 6(b)-(c),

7). By the time he arrived there, a rag or t-shirt had been wrapped around Mr. Henault's wound. (Ex. 1, ¶ 6(c)). Mr. Richotte took Mr. Henault from the Job Site to Kent County Hospital. (*Id.*)

14. The medical treatment that Mr. Henault received on June 23, 2017 included stitches, an immobilizing wrap, and instructions to rest. (*Id.*, ¶ 8).

15. Although Mr. Henault sought to return to work the next day (June 24, 2017), Respondent sent him home for medical reasons in connection with the Injury from the day before. (*Id.*, ¶ 10).

16. Mr. Baird knew on June 24, 2017 that Mr. Henault had been sent home from work that day for medical reasons in connection with the Injury he had suffered the previous day. (*Id.*)

17. Mr. Baird stated that Mr. Henault was sent home on June 24, 2017 because he could not do much, or words to that effect. (*Id.*)

18. After being notified of the above Injury, the Providence Area OSHA Office assigned Compliance, Safety, and Health Officer Thomas Braille (the CSHO) to conduct an inspection. (*Id.*, ¶¶ 3-4).

19. As part of the Inspection, the CHSO conducted an opening conference with Respondent on July 12, 2017, at which Mr. Baird, Trish McGowen (the office manager), and Albert Medici, Esq. (counsel for Respondent) were present. (*Id.*, ¶ 6).

a. Among other things, Mr. Baird admitted during the opening conference that an on-site foreman at the Job Site on June 23, 2017, Stephen Lichtenberg, had informed him that same day that an employee had been hurt while operating a chain saw at the Job Site. Mr. Baird further admitted that he directed Kevin Richotte, a salesman who happened to be working in the vicinity, to go to the Job Site and take the injured employee to the hospital for treatment. (*Id.*, ¶ 6(b)).

b. During the opening conference, the CSHO requested Respondent's 2016 OSHA 300 and 300A Forms (sometimes referred to as the OSHA logs), as well as the 2017 OSHA 300 Form. (*Id.*, ¶ 6(d)). Respondent provided copies as requested. (*Id.*; Exs. B, C).

c. Respondent's 2016 OSHA Form 300 included the following instructions

to Respondent:

You must record information about every . . . work-related injury . . . that involves loss of consciousness, restricted work activity or job transfer, days away from work, or medical treatment beyond first aid. . . . You must complete an Injury and Illness Report (OSHA Form 301) or equivalent form for each injury . . . recorded on this form. If you're not sure whether a case is recordable, call your local OSHA office for help.

(Ex. B).

d. Respondent's 2016 OSHA Form 300 listed eight work-related injuries incurred by its employees during 2016, including a strike to a knee by wood coming off a splitter, a contusion to a knee when a log rolled, a twisted knee incurred while loading a dumpster, a leg strained while pulling down a truck hatch, a leg strained while pushing a tree stump, and a hand laceration. (Ex. B). According to the 2016 OSHA Form 300, each such injury resulted in only a single day of work being missed. (*Id.*)

e. Mr. Baird signed Respondent's 2016 Form 300A in January 2017, thereby certifying that he had reviewed Respondent's 2016 OSHA Form 300, and that each entry was "true, accurate, and complete." (Ex. B).

f. The 2017 OSHA Form 300 that Respondent provided to the CHSO on July 12, 2017 during the opening conference did not list Mr. Henault's June 23, 2017 Injury, nor did Respondent list any work-related injury as having occurred on or near that date. (Ex. C). The only work-related injury that Respondent had recorded on the 2017 OSHA 300 Form was dated June 6, 2017 and concerned an entirely different employee who fractured a finger. (*Id.*)

g. At one point during the opening conference, the CHSO asked if the June 23, 2017 Injury at the Job Site had been logged on Respondent's OSHA 300 log, if Respondent

had prepared an OSHA 301, and if Respondent had submitted a first report of injury to the State of Rhode Island. (Ex. 1, ¶ 6(e)).

h. Ms. McGowen stated that it was part of her usual duties to complete such tasks and that, if she is told an injury is work-related, she usually logs it right away. (*Id.*, ¶ 6(e)(i)). She further stated that she did not log the June 23, 2017 Injury at the Job Site because she was never told by Respondent that it was work-related. (*Id.*)

20. The CHSO conducted a closing conference with Mr. Baird by telephone on September 28, 2017. (*Id.*, ¶ 12). During this conference, Mr. Baird made several statements including the following, he stated that: (1) he saw Mr. Henault on the morning of June 23, 2017, and Mr. Henault did not appear injured at that time; (2) his foreman called him later in the day from the Job Site to report that Mr. Henault had injured himself with a chain saw; (3) he sent Mr. Richotte to the Job Site to help Mr. Henault; (4) because Mr. Henault had told the hospital the June 23, 2017 Injury occurred at home, he (Mr. Baird) told Ms. McGowen that she did not have to report anything, to include on Respondent's OSHA 300 Log; and (5) the Injury was no longer his "problem," or words to that effect. (Ex. 1, ¶¶ 12(a)). He also stated: "Who cares about reporting it; this guy did this to himself and he wasn't wearing chaps. I have five different agencies in my office every week investigating something; I can't keep track of what everyone wants, and I don't do the reporting. Look, I'm 50 years old and I'm done paying fines," or words to that effect. (Ex. 1, ¶ 12(a)(6)).

21. Mr. Baird ended the closing conference by hanging up on the CHSO. (*Id.*, ¶ 12(c)).

22. Respondent was cited by OSHA on previous occasions, including the following:

- 8/23/2016 (OTS, 1910.95(c)(1) & (g)(1)) for not protecting employees from noise exposures;
- 5/4/2016 (Willful, 5(a)(1)) for exposing employees to struck-by hazards while cutting down trees;
- 4/26/2016 (OTS, Serious, Repeat, 1910.37(a)(2), 1910.253(b)(2)(iv), 1910.253(b)(4)(iii), 1910.212(a)(1) & 1910.133(a)(1)) for exposing employees to a large unguarded saw, failing to provide the necessary PPE and for improper storage of compressed gas cylinders; and
- 12/3/2013 (Serious & OTS, 1910.67(c)(2)(V), 1910.67(c)(3), 1910.133(a)(1), 1910.332(b)(1), 1910.335(a)(1)(I), & 1904.29(b)(1)) for exposing employees to fall hazards, electrical hazards, failure to provide the necessary PPE and fall protection training, and failure to enter all data on the company OSHA Log.

(Ex. 1, ¶ 13).

23. On October 12, 2017, OSHA issued Respondent Citation 1, Item 1 alleging a Willful violation as follows:

<p><u>Citation 1 Item 1</u> Type of Violation: Willful</p> <p>29 CFR 1904.29(b)(3): Each recordable injury or illness was not recorded on the OSHA 300 Log and 301 Incident Report within seven calendar days of receiving information that a recordable injury or illness has occurred:</p> <p>(a) Worksite - 34 Terrace Drive, East Greenwich RI, 02818</p> <p>On or about 6/23/2017, the employer was notified of a work related injury to one of his employees, which resulted in medical treatment beyond first aid, and did not record the incident on the company OSHA 300 Log and OSHA 301 Incident Report within seven days.</p>
--

(Ex. 1, ¶ 14).

24. OSHA proposed a penalty of \$13,942 regarding Citation 1, Item 1, which was calculated pursuant to the Field Operations Manual as follows:

- a. Gravity based penalty: \$18,107
- b. Multiplier: 1
- c. Size reduction based on Respondent having between 26 and 100 employees: 30%
- d. History increase based on past citations: 10%
- e. Good faith: 0 %

f. Quick Fix: 0 %
(Ex. 1, ¶ 15).

25. The Court finds that the cited standard applies to the June 23, 2017 injury sustained by Mr. Henault and Respondent, including the president and owner specifically, knew that Mr. Henault's work-related injury had to be recorded on the applicable OSHA forms; but willfully failed to comply.

26. The Court further finds that Respondent violated 29 C.F.R. § 1904.29(b)(3) and such Violation was committed voluntarily by Respondent with intentional disregard and demonstrated plain indifference to the Act.

27. The Court further finds that that the proposed fine for the cited violation is appropriate considering the assessment factors, including good faith or lack thereof as here, size, history, and gravity.

28. The Court further finds that there is no genuine dispute of any material fact and that Respondent has no affirmative defenses to the cited standard.

III. DISCUSSION

Motions for summary judgment before the Commission are covered by Fed. R. Civ. P. 56. 29 C.F.R. § 2200.61. Summary judgment is granted only where there is no dispute as to material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2128 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001), *Trico Technologies Corp.*, 17 BNA OSHC 1497, 1500-01 (No. 91-0110, 1996), *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2159 n.2 (No. 87-214, 1989) (Consol.).

The initial burden is on the party seeking summary judgment to point to evidence that demonstrates the absence of a genuine issue of material fact. *See Warrior Tombigbee Transp.*

Co., Inc. v. M/V Nan Fung, 695 F.2d 1294, 1296 (11th Cir. 1983) (“The party seeking summary judgment bears the exacting burden of demonstrating that there is no dispute as to any material fact in the case.”). When determining whether there is a genuine factual dispute, courts resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. “[C]ourts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. (citation omitted) All reasonable doubts about the facts should be resolved in favor of the non-movant. (citation omitted) A trial court must not decide any factual issues it finds in the records; if factual issues are present, the court must deny the motion and proceed to trial.” *Id.*

The moving party carries its burden of proof by the submission of depositions, affidavits, interrogatory answers, admissions, or other exhibits in the record. If the moving party carries its burden, the opposing party must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact. *Brown v. Eli Lilly & Co.*, 654 F.3d 347, 358 (2d Cir. 2011), *Bacchus Ind., Inc. v. Arvin Ind., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991).

Respondent has failed to properly address Complainant’s assertion of facts contained within his ASJM as required by Rule 56(c), Fed. R. Civ. P.³ As stated earlier, the Court may, and does here now, consider the facts asserted in the Secretary’s ASJM to be undisputed for the purposes of the ASJM.⁴

³ See Fed. R. Civ. P., 56(e) Failing to Properly Support or Address Fact.

If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may:

... 2) consider the fact undisputed for purposes of the motion;

3) grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it; ...

⁴ See *Nat’l Forge Co.*, No. 77-4067, 1978 WL 6599 (O.S.H.R.C.A.L.J., March 16, 1978) (Summary Judgment appropriate where Complainant filed no response to the Motion for Summary Judgment).

The Court may deem the contest of a cited violation abandoned when a party moves for summary judgment and the opposing party fails to address the assertions and argument of the moving party. *See Ferraresso v. Town of Granby*, 646 F. Supp 2d 296, 305 (D. Conn., 2009).

Based on the evidence before it, the Court finds that it cannot reasonably find in favor of the Respondent on the issues of whether the cited standard was violated or regarding the proposed penalty. Respondent has abandoned whatever disputes or defenses it had to the citation. Accordingly, the Court finds Complainant is entitled to summary motion as to Citation 1, Item 1.

The Court is satisfied that Complainant has shown the absence of any genuine issues of material fact, a requirement of prevailing in a motion for summary judgment. *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1080 (3d Cir. 1996).

IV. CONCLUSION

The Court finds Complainant is entitled to summary motion as to Citation 1, Item 1.

V. ORDER

WHEREFORE IT IS ORDERED THAT Complainant's Amended Motion for Summary Judgment is GRANTED;

IT IS FURTHER ORDERED THAT Citation 1, Item 1, is affirmed as a Willful violation of 29 C.F.R. § 1904.29(b)(3), with a penalty of \$13,942 assessed by the Court; and

IT IS FURTHER ORDERED THAT the hearing scheduled to commence on October 3, 2018 is CANCELLED.

SO ORDERED.

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

Dated: October 9, 2018
Washington, D.C.