

STATE OF VERMONT
VERMONT OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Commissioner of the Vermont)
Department of Labor,)
Complainant,)
v.)
Myers Container Service)
Corporation,)
Respondent.)

Docket Number 952

Received

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VOSHA Review Board

**HEARING OFFICER'S DECISION AND ORDER REGARDING RESPONDENT'S
MOTION TO DISMISS CITATIONS**

This matter involves two citations issued to Respondent on February 22, 2013, one for failure to maintain records of employee safety training, the other for failure to report fatalities or serious injuries on the required forms. Following the Respondent's timely notice of contest, VOSHA delays in processing of the case resulted in Respondent's January 16, 2014, motion to dismiss the citations. Thereafter, the Complainant filed her response, and Respondent submitted a reply. A hearing on Respondent's motion was held on Friday, March 7, 2014, at Montpelier, Vermont. The Respondent was represented by WILLIAM B. TOWLE, Esq., and the Complainant was represented by DIRK ANDERSON, Esq. The hearing officer was MICHAEL R. ZIMMERMAN. Testimony on behalf of the Respondent was given by JEFF MYERS, and on behalf of the Complainant by JOHN STEPHEN MONAHAN, Esq.

The issues involved in the motion are as follows: (1) Whether the citations were issued more than six months after the inspection, in violation of 21 VSA § 225(d)¹; (2) Whether the citations were issued with reasonable promptness, as required by 21 VSA § 225(a); and (3) Whether the Complainant violated 21 VSA § 226(c) by failing to immediately forward the notice of contest to the VOSHA Review Board.

Facts

Myers Container Service Corporation (hereinafter referred to as "the company") is a trash hauling company. Its President, JEFF MYERS (hereinafter referred to as "MYERS"), has owned the company for 14 years.

On August 23, 2012, one of the company's employees, JERRY FISHER, fell off the back of one of the company's trucks. At the moment it occurred, the truck's driver happened to look

¹ While this issue was not expressed in Respondent's motion, there was reference to it in the notice of contest, and in the course of the hearing, testimony on that subject was given.

back and saw FISHER's arms go limp, resulting in the fall. FISHER died that day or the next. No autopsy was performed on his body, with the result that no one knows the cause of death.

The accident resulted in investigations by the police, the Department of Motors Vehicles (which inspected the truck), and by the company's insurer. Those agencies all gave the company a clean bill of health.

The day after the accident, i.e., August 24, 2012, Mr. CALLAN, a VOSHA inspector, came to the company's place of business. At the conclusion of his visit, he told MYERS that the company was "all set." MYERS never saw or heard from CALLAN again until he returned, in February 2013, to serve the citations. Because the authorities had cleared the truck of blame, and because of CALLAN's comment, and the fact that he had heard nothing more from VOSHA that Fall, MYERS was certain, in his own mind, that nothing more would come of the tragic accident. Accordingly, MYERS did not thereafter make any effort to investigate the accident because of his confidence that the matter was resolved.

The Vermont Department of Labor has 3 or 4 divisions, one of which carries the title Workers' Compensation and Safety Division. VOSHA is part of that division. VOSHA is headed by a Program Director. Under him is a Supervisor, an Administrative Assistant, and 3 Inspectors. In September of 2012, the Supervisor resigned and the Administrative Assistant retired. Then, starting in October of 2012, the Program Director went out on an extended medical leave of absence, which lasted until March of 2013. With the absence of 3 key people, other, less knowledgeable and experienced (in VOSHA) employees had to be drafted to fill in, as best they could.

By late Fall 2012 or early Winter 2013, JOHN STEPHEN MONAHAN (hereinafter referred to as MONAHAN), the Director of the Workers' Compensation and Safety Division, had to fill in for the Program Director and Supervisor of VOSHA. In the course of doing so, he reviewed CALLAN's proposed citations, but felt more work was needed, and he instructed CALLAN to meet with a more experienced inspector. At some point near the end of six months from the inspection,² MONAHAN consulted with OSHA representatives, who confirmed his understanding that it is possible for a citation to be issued within the six month period, yet over 180 days. Accordingly, the citations³ were issued on February 22, 2013, which was 183 days, inclusive, from the date of the inspection (August 24, 2012), but 2 days shy of six months.

CALLAN went to the company's office a day or two after the issuance of the citations in order to serve them. When he arrived, he encountered Mr. WOBBY, who was then representing the company. WOBBY refused to accept the citations on grounds that they had been issued more than 180 days after the inspection. Both CALLAN and WOBBY then telephoned MONAHAN, who instructed CALLAN to leave the citations at the company's office.

² The fact that MONAHAN called OSHA to inquire about the expiration of 6 months from the date of inspection (see 21 VSA § 225(d)) suggests that the citation's description of the date(s) of the inspection (8/24/12-2/13/13) was not accurate.

³ As indicated above, one citation alleged that the company had failed to document safety training, and the other that the company had failed to log employee injuries on the proper forms.

Understandably, MYERS was surprised by the citation, having been cleared of fault by the insurer, the police, and the DMV, and by CALLAN's comment ("you're all set"), all buttressed by the passage of very close to 6 months without any indications to the contrary.

Within 6 days following service of the citations, the company filed its notice of contest with Complainant. Under the terms of 21 VSA § 226(c), once that occurs, the Commissioner must "immediately"⁴ advise the review board of the fact that the notice of contest has been filed so that the Board can give the employer a hearing. That was not done in this case. It was not until December 18, 2013, that the Complainant informed the Board of the notice of contest. The delay amounted to 293 days, inclusive, or 9 months and 18 days.

After the company had filed its timely notice of contest, it heard nothing back from anyone at VOSHA for that long period. During most of 2013, therefore, hearing nothing more, MYERS thought the matter was finished, so he made no effort to further investigate the accident or to preserve any documents.

With respect to the VOSHA office during the period after the company had filed its notice of contest, MONAHAN had directed staff (by means of sticky notes placed on files) to take steps to notify the Review Board and to contact the company in order to schedule an informal conference to explore settlement. His instructions were not followed, and it was not until OSHA officials noticed that the notice of contest had not been sent to the Board that the Board was advised (on December 18, 2013) of the filing of the notice of contest.

All told, the two delays – 183 days between the inspection and issuance of the citation, and 293 days between the notice of contest and forwarding it to the Board – in this case totaled 476 days from the date of the inspection until the Board was notified of the notice of contest.

Opinion

In approaching this case, one is at rather a disadvantage, inasmuch as there is such a dearth of Vermont cases dealing with VOSHA issues. There are, however, a number of Federal cases dealing with the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678, and because Vermont's law is patterned after the Federal law, it is helpful to look for guidance (though not binding) in applying Vermont's law. Green Mountain Power Corp. v. Commissioner of Labor and Industry, 136 Vt. 15, 24-25 (1978).

Issuance of citations (21 V.S.A. § 225(d)):

With respect to the question of whether or not the Commissioner violated the statute of limitations governing the issuance of citations, the essential question is whether the 183 day period from the inspection (i.e., August 24, 2012) to the date of issuance (i.e., February 22, 2013) exceeded the allowable 6 months for the issuance of a citation. Under the interpretation of the Federal analog of our statute (i.e., 29 U.S.C. § 659(c)) passed on to MONAHAN by OSHA officials, 6 months means 6 months, not 180 days, leading to the conclusion that the allowable

⁴ Board rule 2200.31(a) puts a gloss on the meaning of "immediately" by requiring the Commissioner to send the original notice of contest to the Board within 7 days of receipt.

time for issuance of a citation expired on February 24, 2013, even though the number of elapsed days would have been 185. Given the fact that there seem to be no Federal cases holding the other way, and because “(c)onstruction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong,” Committee to Save the Bishop’s House v. Medical Center Hospital of Vermont, 137 Vt. 142, 150-151 (1979), the conclusion must be that the Commissioner did not violate the statute of limitations governing the issuance of citations here inasmuch as they were issued within the 6 month limitation.

Issuance of citations (21 V.S.A. § 225(a)) and Forwarding of Notice of Contest to Board (21 V.S.A. § 226(c)):

These two delays are considered together because, unlike the absolute bar under 21 V.S.A. § 225(d), they would be considered as procedural violations that do not automatically bar further action on citations. Under Federal decisions considering the Federal analogs, appellate courts and the OSHA Review Commission hold that unless an employer can demonstrate that it was prejudiced by the delay, relief is not in order. *See* Havens Steel Company v. Occupational Safety and Health Review Commission, 738 F.2d 397 (10th Cir. 1984), Todd Shipyards Corporation v. Secretary of Labor, 566 F.2d 1327 (9th Cir. 1977), Stripe-A-Zone, Inc., 82 OSAHRC 31/E13, 10 BNA OSHC 1694, 1982 CCH OSHD ¶ 26,069 (No. 79-2380, 1982). Applying that test here, MYERS has not shown that the company was prejudiced by the delays in issuance of the citations or in notifying the Board of the filing of the notice of contest.

However, that approach (requiring a respondent to show prejudice) is not the only one when procedural violations are present. Another approach is the following:

“In order to give proper effect to the ‘reasonable promptness’ language in section 9(a), the Commission should not, in my view, limit itself to examining only whether the employer was prejudiced by the Secretary’s delay in issuing citations. The Commission should also give relief to an employer in situations where the delay is patently unreasonable, unnecessary, and unjustified. Consistent with the statutory language that citations be issued promptly, I conclude that a citation should not be allowed to stand when unreasonable and unjustified delays unnecessarily postpone the citation – and subsequent proceedings before the Commission – for alleged violations of the Act.” Stripe-A-Zone, Inc., *supra* (Chairman Rowland’s concurring Opinion).⁵

Inasmuch as the first approach, discussed above is not binding on the Board or its Hearing Officer, and under the circumstances of this case (two procedural delays totaling 476 days, and two “paperwork” citations), this second approach is the proper one to take. Accordingly, because the delays here were unreasonable, unnecessary, and unjustified, it is concluded that the Respondent’s motion to dismiss the citations should be granted.

⁵ See also Chairman Buckley’s reasoning expressed in footnote 3 of Secretary of Labor v. Rust Engineering Company, OSHRC Docket Number 79-2090 (1984).

Order

The motion to dismiss the citations issued to Myers Container Service Corporation is granted. Accordingly, the citations should be, and hereby are, DISMISSED.

Dated this 25th day of March, 2014, at Barre, Vermont.



MICHAEL R. ZIMMERMAN
Hearing Officer