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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of,
DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,
Complainant,

vs.

HAWAIIAN DREDGING AND
CONSTRUCTION COMPANY,
Respondent.

CASE NO. OSAB 96-040
(OSHC No. C4756)
(Report No. 120610043)

FILED
DEPT. OF LABOR
INDUSTRIAL RELATIONS

97 JUN 25 08:37

DECISION AND ORDER

This Occupational Safety and Health case is before the Board on a Notice of Contest submitted by HAWAIIAN DREDGING AND CONSTRUCTION COMPANY ("Respondent"), to contest a Citation and Notification of Penalty issued to it by the Director of Labor and Industrial Relations, via the Division of Occupational Safety and Health ("Complainant").

On September 5, 1996, Complainant file a motion to dismiss Respondent's Notice of Contest for untimeliness.

For the reasons stated below, we grant Complainant's motion to dismiss Respondent's Notice of Contest.

FINDINGS OF FACT

1. On May 21, 1996, Complainant issued a Citation and Notification of Penalty against Respondent for a violation of an Occupational Safety and Health Standard.

2. The Citation and Notification of Penalty was received by Respondent on May 23, 1996.



3. An informal conference between Complainant and Respondent was held on June 12, 1996, twenty days after Respondent's receipt of the Citation and Notification of Penalty.

4. At the conclusion of the informal conference, Respondent indicated that it would file an appeal of the Citation and Notification of Penalty to the Labor Appeals Board.

5. On June 12, 1996, which was the last day of the appeal period, Respondent transmitted to Complainant a facsimile of its written Notice of Contest for filing. The facsimile transmission of the Notice of Contest was received by Complainant on June 12, 1996.

6. Respondent also mailed Complainant an original written Notice of Contest that was postmarked on June 13, 1996, and received by Complainant on June 14, 1996.

7. There is no dispute that the original written Notice of Contest was untimely filed. The dispute is whether the Notice of Contest by facsimile transmission constituted a timely and proper appeal of the Citation and Notification of Penalty.

CONCLUSIONS OF LAW

Hawaii Revised Statutes ("HRS") §396-11(a) specifies the time period to contest citations and penalties for violations of Occupational Safety and Health Standards. It states as follows:

Any citation, proposed penalty, or order of the director shall be final and conclusive against the employer unless the employer

files with the director a written notice of contest of the citation, the abatement period stated in the citation, the proposed penalty, or order within twenty days after receipt of the citation, proposed penalty, or order.

Administrative Rule §12-51-19 provides the manner and procedure in which a Notice of Contest may be filed:

Each notice of contest shall specify whether it is regarding the citation, the proposed penalty, or both. This petition shall be an original, and shall be served on the director. A copy of the petition shall be forwarded to the appeals board and must be postmarked, or if not mailed, received by the director within twenty calendar days of the receipt by the employer of the citation and notice of proposed penalty.

Respondent contends that its filing of a Notice of Appeal by facsimile transmission on the last day of the appeal period constituted a timely and effective appeal and that Complainant should be estopped from arguing that facsimile filings are not allowed under the statute and the rules, because it had justifiably relied on a representation from one of Complainant's employees that facsimile filings of Notices of Contest are acceptable.

Complainant argues, however, that the filing requirements for notices of contest must be strictly construed. Complainant cited to Kissell v. Labor and Industrial Relations Appeals Board, 57 Haw. 37 (1976), in which the Hawaii Supreme Court declared that the time for filing an administrative appeal in a workers' compensation case is mandatory. Complainant also

referred this Board to Ko'olau Agric. Co. v. Comm'n of Water Resource Management, 76 Haw. 37 (1994), wherein the Hawaii Supreme Court held that an untimely appeal "is a jurisdictional defect which can neither be waived by the parties nor disregarded by the court in the exercise of judicial discretion[.]"

Since an untimely appeal deprives us of jurisdiction to review a case, we agree with Complainant that the requirements for filing an appeal must be strictly construed. Principles of estoppel or waiver are not material to the determination of whether jurisdiction exists and will not be considered. See, Pratsch v. Pratsch, 548 N.W. 2d 852, 854 (Wis. App. 1996) (appeal dismissed for untimeliness where rules did not specifically permit the filing of a notice of appeal via facsimile transmission.)

In this case, neither HRS §396-11, nor administrative rule §12-51-19 allows for filing of Notices of Contest by facsimile transmission. Rule 12-51-19 specifically requires that an "original" Notice of Contest be submitted for filing with the Director.

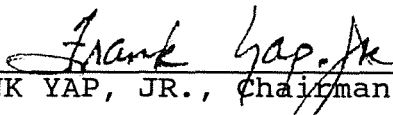
Accordingly, we conclude that the facsimile filing of Respondent's Notice of Contest on the last day of the appeal period was not a properly filed Notice of Contest. There being no timely filing of an original Notice of Contest, we have no jurisdiction to review this case.

ORDER


Respondent's Notice of Contest is hereby dismissed for
untimeliness.

JUN 25 1997

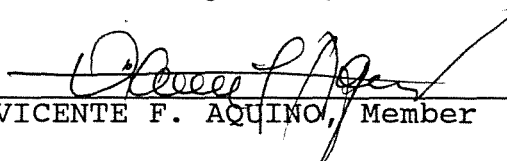
Dated: Honolulu, Hawaii, _____.



FRANK YAP, JR., Chairman



CAROL K. YAMAMOTO, Member



VICENTE F. AQUINO, Member

Frances E.H. Lum, Esq., for
Complainant

Gary M. Yokoyama, Esq., and
Carina Y. Enhada, Esq., for
Respondent

NOTICE TO EMPLOYER:

You are required to post a copy of this Decision and
Order at or near where citations under the Hawaii
Occupational Safety and Health Law are posted.
Further, you are required to furnish a copy of this
Decision and Order to a duly recognized representative
of the employees.

I do hereby certify that the foregoing
is a full, true and correct copy of
the original on file in this office.