

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF
LABOR AND INDUSTRIAL
RELATIONS,

Complainant,

and

PETROCHEM INSULATION, INC.,

Respondent.

CASE NO. OSH 2013-6

Inspection No. 316266949

Issuance Date: November 26, 2012

ORDER NO. 513

ORDER GRANTING DIRECTOR
OF LABOR'S MOTION TO
DISMISS APPEAL

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I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

On April 10, 2013, the Hawaii Labor Relations Board (Board) received a "Notice of Contest" involving Respondent PETROCHEM INSULATION, INC. (Respondent), from the Hawaii Occupational Safety and Health Division (HIOSH) of the Department of Labor and Industrial Relations, State of Hawaii. Attached to the Notice of Contest was a letter from Respondent's representative, dated February 7, 2013, and bearing a date/time stamp that indicates the letter was received by HIOSH on February 8, 2013. The February 7, 2013, letter contested the citations resulting from HIOSH Inspection No. 316266949. The letter further stated, "[t]he Company has just learned that this matter was not contested by its employee, who the Company believes consciously did not disclose receipt of the citation and effectively concealed its receipt from the Company."

Pursuant to the initial/settlement conference held in this matter on July 8, 2013, the Board notified the parties that the deadline to file a motion was July 23, 2013; the deadline to respond to a motion was August 6, 2013; the deadline to reply to a response was August 13, 2013; and the motions hearing was to be held on August 23, 2013.

On July 22, 2013, Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Complainant or Director) filed Director of Labor's Motion to Dismiss Appeal (Motion to Dismiss), asserting Respondent failed to file a timely notice of contest. The Affidavit of Clayton Chun (Chun) attached to the Motion to Dismiss, the exhibits attached thereto, and the records and files in this case indicate the following: that as a result of an inspection conducted by a HIOSH inspector on September 11, 2012, at Respondent's workplace located at 91-220 Kalaeloa Blvd., Kapolei, Hawaii, 96707, a Citation and Notification of Penalty (Citation) was issued against Respondent on November 26, 2012, with an aggregate penalty of \$412.50 proposed; the Citation was sent by certified mail on November 26, 2012, to Respondent's address as listed in the inspection report; that Alice Dalomba (Dalomba) accepted the Citation on November 30, 2012, for Respondent; that a check for \$412.50 was issued from Respondent's office located at 110 Corporate Place, Vallejo, California, 94590, dated December 13, 2012, signed by Ken Norris (Norris) and Stephen Louis (Louis), and received by HIOSH on December 20, 2012. Also on December 20, 2012, HIOSH received an Abatement Certification describing the corrective action taken by Respondent with respect to the violation.

The affidavit of Mr. Chun indicates Mr. Chun reviewed Respondent's website and learned the address from which the check was issued is Respondent's corporate headquarters, that Mr. Louis is Respondent's corporate vice president of finance, and Mr. Norris is its manager.

On August 6, 2013, Respondent filed its Opposition to Director of Labor's Motion to Dismiss Appeal (Opposition). In its Opposition, Respondent asserts the following: that after the Citation was received by Ms. Dalomba at Respondent's Hawaii facility, the facility's safety compliance officer, Troy Carringa (Carringa) asked the facility's Operations Manager, Rafael Mendoza (Mendoza), to allow him to handle the Citation; that Mr. Carringa assured Mr. Mendoza that he would "take care of it"; and that prior to receiving the Citation, Mr. Carringa assured his supervisor, Ryan Blood, that he would keep him abreast of the results of the inspection. Respondents further assert that Mr. Carringa failed to report the Citation in accordance with its clear policies; that Mr. Carringa intended to adversely affect Respondent's reputation and safety record by concealing receipt of the citation from his supervisors; and that Mr. Carringa ceased actively working for Respondent in December of 2012 and resigned shortly thereafter to work for a competitor. Respondent also asserts that the check issued to HIOSH was

signed by two of Respondent's executives, but that the executives, who are based in California, were not aware that the check was intended to satisfy a HIOSH citation; that Mr. Carringa surreptitiously acquired a check request form and submitted it to Respondent's corporate office without alerting his supervisor at Respondent's Hawaii facility, as required by company policy; and that Mr. Carringa filed the Abatement Certification with HIOSH, effectively concealing the existence of the Citation from Respondent. Respondent asserts that it was unaware a citation had been issued until February of 2013, and Respondent promptly filed its Notice of Contest on February 7, 2013, after discovering the existence of the citation.

On August 23, 2013, the Board heard oral arguments from the parties, with Respondent's representatives Ronald W. Taylor and Lillian L. Reynolds appearing via telephone, and Deputy Attorney General Herbert B.K. Lau appearing on behalf of the Director. The Director argued in his Motion to Dismiss and at hearing that the Board lacks jurisdiction over Respondent's appeal because the Notice of Contest was untimely, and cited to Hawaii case law for the holding that the time limit for the taking of an appeal established by statute is mandatory, and that the filing of a tardy notice of appeal is a jurisdictional defect which can neither be waived by the parties nor disregarded by the courts. In its Opposition and at hearing, Respondent argued that timeliness is not a jurisdictional defect and that Hawaii Revised Statutes (HRS) § 396-11(g) requires that the Board "shall afford an opportunity for a de novo hearing on any notice of contest," and cited to Third Circuit cases involving federal Occupational Safety and Health law, which mirrors the Hawaii HIOSH laws, for the holding that timeliness is not a jurisdictional defect, because uncontested citations cannot become final orders of a commission if that commission never had jurisdiction. Respondent also argued that there is no prejudice to the Director if the tardy Notice of Contest is permitted, while Respondent would suffer severe prejudice if it is not permitted; and, that Hawaii Rules of Civil Procedure (HRCP) Rule 60 permits relief from judgment or order due to mistake, inadvertence, excusable neglect, newly discovered evidence, and fraud.

II. CONCLUSIONS OF LAW, DISCUSSION AND ORDER

In considering a motion to dismiss, the Board's consideration is strictly limited to the allegations of the complaint, or in this case, the Notice of Contest, which are deemed to be true. See County of Kauai v. Baptiste, 115 Hawaii 15, 24, 165 P.3d 916, 925 (2007) (citing In re Estate of Rogers, 103 Hawaii 275, 280-81, 82 P.3d 1190, 1195-96

(2003), *reconsideration denied*, 115 Hawaii 231, 116 P.3d 991. Additionally, when considering a motion to dismiss, the Board may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Yamane v. Pohlson, 111 Hawaii 74, 81, 137 P.3d 980, 9987 (2006) (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).

The Board's jurisdiction over appeals from HIOSH citations is governed by HRS § 396-11, which provides in relevant part:

- (a) 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.

Further, Hawaii Administrative Rules (HAR) § 12-51-19, implementing HRS § 396-11, provides in relevant part:

Any employer to whom a citation and notice of proposed penalty has been issued may petition the director for review of the citation and notice pursuant to the rules of the appeals board within twenty days of the receipt by the employer of the notice of proposed penalty . . . This petition shall be an original, and shall be served on the director 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.

The Hawaii Supreme Court has held that the right of appeal is purely statutory, and therefore the right of appeal is limited as provided by the legislature and compliance with the method and procedure prescribed by it is mandatory. In re tax appeal of Lower Mapunapuna Tenants Assn., 73 Haw. 63, 69, 828 P.2d 263, 266 (1992).

In Si-Nor, Inc. v. Director, Dept. of Labor and Indus. Relations, 120 Hawaii 135, 145, 202 P.3d 596, 606 (2009), the Hawaii Intermediate Court of Appeals cited with

approval the following quote from Love v. College Level Assessment Services, Inc., 928 S.W.2d 36, 38 (Tenn. 1996):

[T]he timely perfecting of an appeal is no mere technical formality: it is in fact a mandatory requirement, and if it is not complied with, the court has no jurisdiction over the case.

The Court in Si-Nor held that, to comply with HRA § 12-51-19, a notice of contest filed in person must be an original that is received by the Director within twenty days of the employer's receipt of the citation and notice of proposed penalty, and that an original notice of contest filed by mail does not need to be received by a certain date, but must **be served on the Director and postmarked within twenty days of the employer's receipt of the citation and notice of proposed penalty.** 120 Hawaii at 146, 202 P.3d at 607 (emphasis added). See also, Kissell v. Labor and Industrial Relations Appeals Board, 57 Haw. 37, 549 P.2d 470 91976) (the word "shall" is generally regarded as mandatory and the statutory time for perfecting appeals is generally mandatory).

Respondent's apparent assertion that HRS§ 396-11(g) requires that the Board "shall afford an opportunity for a de novo hearing on any notice of contest" including untimely notices, is not supported by Hawaii law and further, would conflict with the provisions of HRS § 396-11(a) which requires a written notice of contest to be filed within 20 days of the receipt of the citation by the employer. Similarly, application of HRCPP Rule 60 would conflict with the Hawaii court's holdings regarding perfecting an appeal.

Finally, HRS § 396-11(a)'s provision that "[a]ny citation, proposed penalty, or order of the director shall be final and conclusive against the employer" does not appear to divest the Director of jurisdiction to issue a citation merely because the Board lacks jurisdiction over an untimely appeal.

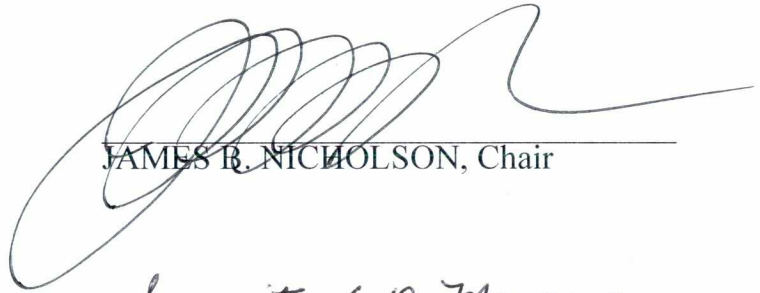
The Board therefore finds that the appeal in this matter was untimely, and the Board lacks jurisdiction.

ORDER

For the reasons discussed above, the Board hereby grants the Director of Labor's Motion to Dismiss Appeal, filed on July 22, 2013.

DATED: Honolulu, Hawaii, August 28, 2013.

HAWAII LABOR RELATIONS BOARD



JAMES R. NICHOLSON, Chair



SESNITA A.D. MOEPONO, Member



ROCK B. LEY, Member

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