



STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

EFiled: Jan 27 2016 03:57PM HAST
Transaction ID 58487088
Case No. OSH 2015-30

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

vs.

CERTIFIED CONSTRUCTION, INC.,

Respondent.

CASE NO. OSH 2015-30

ORDER NO. 748

ORDER GRANTING IN PART AND
DENYING IN PART RESPONDENT'S
MOTION TO RESET DEADLINES;
SECOND AMENDED PRETRIAL ORDER

ORDER GRANTING IN PART AND DENYING
IN PART RESPONDENT'S MOTION TO RESET
DEADLINES; SECOND AMENDED PRETRIAL ORDER

On January 4, 2016, Counsel for Respondent CERTIFIED CONSTRUCTION, INC. (Respondent) filed a Motion to Reset Deadlines (Motion) in the above-captioned matter at the Hawaii Labor Relations Board (Board). Respondent argued that on December 21, 2015 (the discovery cutoff deadline in this case) Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Complainant or Director) filed with the Board numerous investigative file photographs through the Board's File and ServeXpress efilng system. Respondent further argued that "Responent [sic] also filed with the Board a Video clip Explanation and three videos from Respondent's investigative file. The three videos were mailed on by Complainant to Respondent on December 23, 2015 (date of postmark) but not received until December 29, 2015." Respondent's counsel asserted that she was prevented from reviewing the complete (investigative) file, which was to have been provided to Respondent's counsel prior to the filing deadline for the initial/settlement conference. Finally, Respondent argued that it anticipated taking the HIOSH inspector's oral deposition between February 4, 2016 and February 9, 2016, if the Board granted 1) an extension of the Discovery Deadline to February 9, 2016, 2) an extension of the deadline for the parties to exchange exhibit lists to February 22, 2016, and 3) an extension of the deadline to file and exchange exhibits to February 25, 2016. Alternatively, Respondent requested the Board strike from the record all investigative report(s) filed with the Board on December 21, 2015.

On January 8, 2016, Complainant filed Director's Objection to Respondent's Motion to Reset Discovery Deadlines, Declaration of Herbert Lau; Exhibits 1-4. Director objected to resetting the discovery cutoff deadline, on the basis that Respondent had ample opportunity to conduct discovery, and Respondent's motion to reset discovery deadlines was filed after the December 21, 2015 discovery deadline had passed. The Director did not object to the continuance of the exchange of exhibit list deadline and the deadline to file and exchange copies of proposed

exhibits, in conformity with the current trial date of February 29, 2016, as these dates customarily occur one week and one day before trial respectively.

The parties did not request a hearing on the Motion, and the Board considers this to be a non-hearing Motion.

Based upon the record, the Board makes the following findings of fact, conclusions of law, and order granting in part and denying in part Respondent's January 4, 2016 Motion.

FINDINGS OF FACT

If it be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

1. On July 24, 2015, the Director, through the Hawaii Occupational Safety and Health Division (HIOSH), issued a Citation and Notification of Penalty to Respondent for fall protection and other safety violations. HIOSH characterized six of the violations as "Serious", one of the violations as "Other-than-Serious", one as "Repeat-Serious" and imposed a Penalty of \$46,800.00.
2. By letter dated August 10, 2015, Respondent filed a Contest with the Director and HIOSH which was received on August 11, 2015 (Contest).
3. On September 11, 2015, the Director filed the Contest with the Board.
4. On September 14, 2015, the Board issued a Notice of Initial/Settlement Conference (Notice), which directed the Respondent to provide Complainant with a copy of any investigative report forthwith.
5. On September 17, 2015, the Director sent Respondent's counsel the investigative file received from HIOSH.
6. On October 5, 2015, the Board held an initial conference in this matter attended by Complainant's counsel Herbert Lau, Deputy Attorney General and Respondent's counsel, Stacy Miller, Esq. Following the initial conference, by Order No. 700, Pretrial Order dated October 6, 2015, the Board established discovery deadlines and scheduled the trial date of January 19, 2016. The Pretrial Order states that all discovery must be completed by the discovery cutoff date of December 21, 2015.
7. On November 23, 2015, the Director received Respondent's First Request for Admissions, for which the thirtieth day and final day to provide a response was December 23, 2015, two days after discovery cutoff.
8. On November 24, 2015, the Director received Respondent's First Request for Production of Documents, requesting HIOSH files within thirty days of receipt of the request, which was December 24, 2015, three days after the discovery cutoff deadline.
9. On November 24, 2015 also, the Director received an email from Respondent's counsel requesting to arrange a date for the HIOSH inspector's oral deposition. By return email on November 24, 2015, Complainant's counsel advised

Respondent's counsel that the inspector would be taking one day of vacation on December 7, 2015.

10. No notice of oral deposition of the HIOSH investigator was filed by Respondent.
11. On December 3, 2015, by Stipulation to Continue Trial Date and Order, Order No. 724, the parties stipulated and the Board ordered that trial in this matter was to be reset for a date after the second week of February 2016. The discovery deadlines remained unchanged.
12. During the week of December 14, 2015, Director's counsel received from the HIOSH inspector additional photographs and video the investigator took of Respondent's work site that were not attached to the investigative report and of which Director's counsel was previously unaware.
13. On December 17, 2015, the Board issued Order No. 734, First Amended Pretrial Order, continuing the trial to February 29, 2016. All other deadlines contained in Pretrial Order, Order No. 700, remained unchanged.
14. Respondent did not move the Board to continue the discovery cutoff deadline prior to the December 21, 2015 deadline.
15. On December 21, 2015, the discovery cutoff date, the Director filed with the Board, through File and ServeXpress, the efilings system, the photographs, a video clipboard explanation and three videos from the investigator's file received the week of December 14, 2015. The same photographs and video were entered into a compact disc and sent to Respondent's counsel on December 23, 2015, as a part of the Director's response to the request for production of documents.
16. On December 23, 2015, Director filed a Certificate of Service certifying that a copy of the Director's Response to Respondent's First Request for Admissions was served on Respondent through its counsel on that date.
17. On December 23, 2015 also, the Director filed a Certificate of Service certifying that a copy of the Director's Response to Respondent's First Request for Production of Documents was served on Respondent through its counsel on that date.
18. On January 4, 2016, Respondent filed its Motion to Reset Deadlines in this matter. No affidavit, declaration or exhibit(s) accompany Respondent's motion.

CONCLUSIONS OF LAW

If it be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

1. The Board has jurisdiction over the instant Contest pursuant to Hawaii Revised Statutes §§ 396-3, 396-11 and 396-11.5.
2. Pursuant to the Hawaii Rules of Civil Procedure (HRCPP), Rule 33(b)(3), the party upon whom interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories.

3. Pursuant to HRCP Rule 34(b), the party upon whom the request for production of documents is served shall serve a written response within 30 days after the service of the request.
4. In the instant case, Respondent's discovery requests were served upon Complainant less than 30 days prior to the discovery cutoff date of December 21, 2015, and Complainant complied with both the December 21, 2015 discovery cutoff deadline, when Complainant timely efiled with the Board photographs and video received from the HIOSH investigator, and with Respondent's discovery requests on December 23, 2015, when Complainant produced said photographs and video within the thirty day period allowed. Respondent has offered no reason why its discovery requests were not timely made. The Board denies Respondent's request to strike from the records all items filed by Complainant at the Board on December 21, 2015.
5. The Board also concludes, however, that in this instance as Complainant had access to the photos and video from the investigator the week of December 14, 2014, one week before discovery cutoff and months after the investigative report was produced, and Complainant did not then immediately produce those visual records to Respondent, fairness and due process dictate that discovery cutoff be extended for a period to allow Respondent to conduct discovery, including, the taking of the HIOSH investigator's oral deposition. In reaching this conclusion, the Board notes for the record that to date Respondent has not noticed the HIOSH investigator's deposition. All further discovery must be completed within the new discovery cutoff period.
6. Finally, the Board grants the mutual request of the parties to continue 1) the deadline for the parties to exchange exhibit lists and 2) the deadline to file and exchange copies of proposed exhibits in conformity with the trial date of February 29, 2016.

ORDER

Based upon the foregoing, the Board denies Respondent's request to strike from the record the visual documentation filed by Complainant at the Board on December 21, 2015, and pursuant to the Second Amended Pretrial Order as stated below, hereby orders that discovery cutoff be extended to allow Respondent time to review the records produced by Complainant in December 2015 and to allow the taking of the HIOSH investigator's oral deposition. As provided in the Second Pretrial Order also, the exhibit list and filing and exchange of proposed exhibits deadlines are extended accordingly.

SECOND AMENDED PRETRIAL ORDER

Pursuant to Hawaii Revised Statutes §§ 396-3, 396-11 and 396-11.5 the Board sets the following continued deadlines:

Discovery Cutoff Date.
Deadline for Parties to Exchange Exhibit List.

February 9, 2016
February 22, 2016

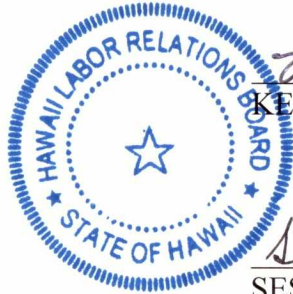
Deadline to file & Exchange Copies of Proposed Exhibits.

February 25, 2016

The Pretrial Order No. 700 filed October 6, 2015 in the above-captioned matter is amended accordingly. The Board previously continued the trial (scheduled on January 19, 2015) to February 29, 2016 at 9:00 a.m., and that date is unchanged.

DATED: Honolulu, Hawaii, January 27, 2016.

HAWAII LABOR RELATIONS BOARD




KERRY M. KOMATSUBARA, Chair


SESNITA A.D. MOEPONO, Member


ROCK B. LEY, Member

NOTICE TO EMPLOYER

You are required to post a copy of this Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted at least five working days prior to the trial date. Further, you are required to furnish a copy of this Order to a duly recognized representative of the employees, if any, at least five working days prior to the trial date.

c: Stacy N.H. Miller, Esq.
Herbert B.K. Lau, Deputy Attorney General

