

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Gary W. Bastian, Commissioner,  
Department of Labor and Industry,  
State of Minnesota,

**ORDER**

Complainant,

v.

Fagen, Inc.,

Respondent.

By a written motion filed on March 13, 1996, the Respondent moved to dismiss this matter for failure to file a complaint in a timely manner. The Complainant filed a Memorandum in Opposition to the Motion to Dismiss on March 27, 1996. The Respondent filed a Reply Memorandum on April 8, 1996.

Christopher S. Hayhoe, Esq., of the firm of Felhaber Larson Fenlon & Vogt, 4200 First Bank Place, 601 Second Avenue South, Minneapolis, Minnesota 55402-4302, represented the Respondent, Fagen, Inc. Julie A. Leppink, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103, represented the Complainant.

Based upon the written submissions, and upon all of the filings in this matter, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED that the Motion to Dismiss is DENIED.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 1996.

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GEORGE A. BECK  
Administrative Law Judge

**MEMORANDUM**

The Respondent has moved for an order dismissing this matter on the grounds that the Complainant's Complaint was not filed within the 90-day timeline set out in Minn. Stat. § 182.661, subd. 6. This case involves an inspection of the employer's workplace on July 31, 1995, which was followed by the issuance of citations and penalties to the Respondent on September 11, 1995. The Respondent then filed a Notice of Contest with the Department on September 28, 1995. That was followed by an informal conference between the parties on October 26, 1995, and a second conference on November 14, 1995, which was attended by counsel for the Respondent. Under Minn. Stat. § 182.661, subd. 6, the Complainant was required to serve a complaint upon the Respondent by approximately December 27, 1995. This was not done. Counsel for the Respondent then called the Complainant's attorney on February 20, 1996, and advised her that the Respondent had not yet received a complaint. Complainant's attorney stated that if so, it was an administrative oversight which would be corrected. The Complainant then served a complaint upon the Respondent which was dated February 21, 1996. The Respondent then filed an answer on March 8, 1996.

Under Minn. Rule 5215.2500, the Administrative Law Judge may exercise discretion in permitting a late filing of a complaint or answer. The filing of late complaints and late answers have been permitted in Minnesota OSHA cases and in federal OSHA cases. *Commissioner v. Richard Knutson, Inc.*, OAH Docket No. 4-1901-8136-2 (decided August 27, 1993); *Commissioner v. Northwest Airlines, Inc.*, OAH Docket No. 1-1901-9142-2 (decided October 17, 1994); *Howard Electric Company*, 11 OSH Cas. (BNA) 1091 (Rev. Comm. 1992), 1983-84 OSH Dec. (CCH) para. 26,362. The factors generally considered in whether or not dismissal is appropriate are the reasons advanced for the late filing and the prejudice to the party moving for dismissal caused by the late filing.

The reason advanced by the Complainant for a late filing of the Complaint is miscommunication between the Department and the Attorney General's office as to whether or not a complaint had been filed. As the Respondent observes, Complainant essentially admits that an administrative foul-up caused its failure to serve the Complaint in a timely fashion. The Respondent argues this does not amount to excusable neglect. The explanation advanced by the Complainant is not a positive factor for it in arriving at a decision. However, the Complaint was filed only two months late. Additionally, the Administrative Law Judge is obligated to consider the factor of prejudice to the Respondent.

The Respondent argues that it was prejudiced in two respects. First, the deadline for citation by the OSH Division of another employer at the worksite has passed. The Respondent argues that another employer was in fact responsible for the fatality which occurred at the worksite and should have been issued a citation. However, it is within the Division's discretion to decide which employer or employers to cite for a worksite violation. There is no requirement that a citation be issued and the decision not to issue one against another employer does not have an adverse affect on the Respondent's case. Secondly, the Respondent argues that employees working on the project in question have now dispersed and are working on other projects.

However, even if the Complainant had filed its complaint prior to the statutory deadline, the project would have been long since finished and the workers dispersed. In other words, the filing of the Complaint two months late did not impact the present location of the employees who were at the worksite in July of 1995.

The Respondent has not suggested that any crucial witness is unavailable to testify in this matter. The hearing date in this case has not yet been set and no discovery has been conducted. It appears that at no time did the Division or counsel for the Division indicate to the Respondent that there might not be a hearing in this case. Under these circumstances, with the failure of the Respondent to show prejudice, the filing of a complaint two months late does not justify a dismissal. *Keefe v. Cargill, Inc.*, 393 N.W.2d 425, 426 (Minn. Ct. App. 1986). Rather, this matter should be determined on the merits.

G.A.B.