STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE No. 49D13-2106-PL-018812

SALINI IMPREGLIO/S.A. HEALY JOINT VENTURE and THE LANE CONSTRUCTION CORPORATION,	)
Petitioners,	)
v.	)
INDIANA DEPARTMENT OF LABOR and the INDIANA OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION,	)
Respondents.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW & FINAL ORDER

This cause came before the Court on Petitioners' Verified Petition for Judicial Review of Agency Actions of the Indiana Department of Labor ("IDOL") and Indiana Occupational Safety & Health Administration ("IOSHA") (the "Petition"). The Petition, filed June 3, 2021, seeks to set aside Safety Orders and penalties issued by IDOL on March 25, 2021 (the "Safety Orders") Notably, IDOL refusal to certify the Petitioners' administrative appeal, dated May 4, 2021, to the Indiana Board of Safety Review. On January 24, 2024, the Court conducted a hearing to hear argument on the Petition. Having considered the agency record, the parties' written submissions, and oral argument, the Court GRANTS the Petition and sets aside the Safety Orders.

I. Findings of Fact.[1]

1. On March 25, 2021, IDOL issued the Safety Orders to the Lane Construction Corporation ("Lane"). (Sept. 15, 2021 Mot., Ex. B, pp. 1-11.) The Safety Orders cite alleged

[1] Any conclusion of law that should be considered a factual finding is incorporated by reference as a finding of fact, and any finding of fact that should be considered a legal conclusion is incorporated by reference as a conclusion of law.

safety violations by Lane that occurred at the jobsite located at 705 Glasgow Avenue, Fort Wayne, Indiana (the "Jobsite"). (*Id.*) Neither IDOL nor IOSHA served the Safety Orders on Lane at the Jobsite. (*Id.* at 1-11, 14-15.) Rather, IDOL mailed the Safety Orders to Lane's corporate headquarters located at 90 Fieldstone Court, Cheshire in Connecticut. (*Id.*)

2. IDOL mailed the Safety Orders to Lane's Connecticut office during the COVID-19 pandemic while Connecticut was encouraging office employees to "work from home when possible."[2] Similarly, almost all IOSHA employees worked from home during this time due to the COVID-19 pandemic. (AR 7729-7730, 7736, Osborne Dep., pp. 85:17-86:7, 112:8-12.)

3. Indiana Code § 22-8-1.1-25.1(c) directs the agency to serve Safety Orders on the employer at the jobsite, unless the employer requests that the Safety Orders be sent to an alternate address.

4. To document the selection of an alternate service address and the designated recipient of the alternate service, IOSHA has created an Employer Name and Address Verification Form (the "Form"). (*Id.* at 20; AR 7734, Osborne Dep., pp. 104-105.) The Form is to be completed and signed by the employer's "most upper management person" at the jobsite, which was Lance Waddell for Lane. (AR 7713, 7733, Osborne Dep., p. 20:9-11, 100:10-13.) Here, however, Richard Twine appears to have signed the Form. The evidence in the record establishes that Twine did not have authority to sign the Form. (AR 7713, 7733, Osborne Dep., p. 20:9-11, 100:10-13.) Moreover, the Form contains a dedicated box where the employer is to identify to whom Safety Orders should be sent at the alternate address. Although this box is required to be completed when any such orders are sent to an alternate address, the box was left

[2] https://www.cbia.com/news/economy/state-releases-new-covid-19-business-operating-guidelines/;https://www.cbia.com/news/economy/lamont-eases-some-covid-19-restrictions/; https://portal.ct.gov/-/media/Office-of-the-Governor/News/20200526-Governors-Reopen-Report.pdf?la=en

blank. (Sept. 15, 2021 Mot., Ex. B, p. 20; AR 7734, Osborne Dep., p. 104:15-16.) After the box are lines where an employer representative can identify a person, his title, and other information. (*Id.*) The person identified here is J.R. Glascock "Director/Corp. Safety." (*Id.*)

5. IOSHA mailed the Safety Orders to "The Lane Construction Corporation," but not to the attention of J.R. Glascock or any specific employee or officer of Lane. (*Id.* at pp. 13-15.) The Safety Orders were delivered to Lane's Connecticut office on March 29, 2021, and received by "Carlos." (*Id.*) At first, the Safety Orders were routed to Lane's payroll department, which received them on March 30, 2021. (Pet., Ex. A, p. 1.) Next, the Safety Orders were forwarded to Lane's legal department, which did not receive them until April 28, 2021. (*Id.*) IOSHA never delivered a copy of the Safety Orders to the Jobsite, nor did IOSHA contact Lane regarding the Safety Orders. (Sept. 15, 2021 Mot., Ex. B, pp. 1-11, 14-15; AR 7734-36, Osborne Dep., pp.105:24-10, 112:23-113:16.)

6. One of the Safety Orders cited Lane for a willful violation of 29 C.F.R. § 1926.800(r)(6)(ii) and imposed a $50,000.00 penalty. (*Id.* at p. 9.) Respondents claim that Lane's mantrips violated 29 C.F.R. § 1926.800(r)(6)(ii) because they lacked doors enclosing their ingress and egress points. (AR 7578; AR 7739, Osborne Dep., pp. 44:12-17, 125:10-126:2; *see also* AR 7584.) IOSHA's interpretation of section 1926.800(r)(6)(ii) was reached only days before IDOL issued the willful violation safety order. (AR 7854.)

7. Lane filed a petition for administrative review on April 29, 2021. (Sept. 15, 2021 Mot., Ex. B, p. 12.) On May 4, 2021, IDOL refused to certify the petition for administrative review to the Indiana Board of Safety Review (the "Safety Board"). (*Id.* at p. 13.)

8. On June 3, 2021, Petitioners filed the instant Petition. The parties disagreed on the scope of the agency record. (Sept. 15, 2021 Mot., pp. 2-3.) IDOL's general counsel swore under

penalties for perjury that the agency record was 21 pages, but this was not the full record. (*Id.* at Ex. B, p. 21.) On December 17, 2021, the Court granted Petitioners' Motion to Supplement and Compel Agency Record and ordered Respondents to provide Petitioners with a supplemented agency record by January 18, 2022.

9. Respondents disobeyed the December 17, 2021, Order and failed to produce a single document by that date. (Jan. 31, 2022, Mot.; Feb. 15, 2022, Resp., pp. 2-3, 5.) Over a year later, on August 25, 2023, Respondents completed their production of what they claimed to be the complete record. (Sept. 8, 2023, Mot.; Nov. 27, 2023, Br., Ex. F.)

10. Respondents failed to submit certain documents they claimed were privileged to the Court for *in camera* review, a violation of the Court's September 30, 2022, Order. (*Id.*, Ex. E, p. 2) To this day, the Respondents have not submitted a certain document they claim is privileged for *in camera* review. (*Id.*, Ex. G, Nov. 13, 2023 email.) Petitioners raised this issue in their briefs and at the January 24, 2024, hearing, but Respondents never submitted this entire document to the Court.

11. Respondents made numerous misrepresentations to the Court and Petitioners' counsel. (Nov. 27, 2023, Br., pp. 17-20; Jan. 10, 2024, Reply, pp. 6-10.) In response to Petitioners' motion for sanctions, Respondents told the Court on three separate occasions that they would produce all documents responsive to the order and remedy their noncompliance by February 18, 2022. (Feb. 15, 2022, Resp., pp. 3, 5, 7.) But it was not until August 25, 2023, that Respondents completed their production of what they claim is responsive to the December 17, 2021, Order. (Sept. 8, 2023, Mot.; Nov. 27, 2023, Br., Ex. F.) Their production came only after Petitioners repeatedly requested Respondents produce more responsive documents. (Nov. 27, 2023, Br., Exs. A, C-F.) Moreover, it was clear during the March 15, 2022, hearing on

Petitioners' motion for sanctions that Respondents had not produced all of the documents responsive to the December 17, 2021, Order.

12. Similarly, in an April 21, 2022, Notice, Respondents informed the Court that they had complied with the December 17, 2021, Order, having produced about 4,300 pages of documents. However, this was false, as Respondents later admitted, and the agency record now contains over 7,000 pages. (*Id.*, Ex. C, May 13, 2022, ltr., pp. 4-6; Ex. F, July 21, 2023, email, Aug. 25, 2023 & Nov. 13, 2023, filings.)

13. Further, in their response to Petitioners' brief in support of petition for judicial review, Respondents told the Court that Petitioners failed to file the "original, certified agency record." (Resp., pp. 8, 23-25.) This was false, but Respondents waited until the beginning of the January 24, 2024, hearing to inform the Court of this fact. (Sept. 15, 2021 Mot., pp. 2-3, Ex. B.)

14. Also, Respondents told Petitioners they could not locate and produce Jeremy Swick's (the initial IOSHA inspector investigating Lane) Microsoft Teams messages. (Nov. 27, 2023, Br., Ex. C, May 13, 2022, ltr., p. 6.) But this was false, and Respondents ultimately produced these messages after repeated requests from Petitioners. (*Id.*, Ex. F.)

15. Lastly, Respondents spoiled evidence. In a July 13, 2021, email, an IOSHA employee called the Lane inspection file "a bit of a mess," stated that several pictures described in the narrative were missing, and asked for those pictures to be uploaded. (AR 915.) Jeremy Galloway, who was IOSHA's construction supervisor and ultimately became the construction director, responded by stating that the photos would be uploaded "within the next couple of days." (*Id.*; AR 7724, Osborne Dep., pp. 63:25-64:4.) In an internal message dated July 23, 2021, an IOSHA employee said, "Jeremy [Galloway] had me take that sentence out" when discussing a narrative in the Lane file. (AR 4313-4314, 7727, Osborne Dep., pp. 74:13-75:7.) Likewise, on

August 16, 2021, Jameson Berry, who was IOSHA's director of construction in 2020 and 2021, **approved deleting part of a narrative** within the Lane file "instead of adding the information mentioned in the narrative." (AR 2731; AR 7714, Osborne Dep., p. 23:9-12.) These alterations and deletions to the Lane file were intentional, occurred after the Safety Orders were issued, after the Petition was filed, were expressly approved by IOSHA supervisors Berry and Galloway, and violated agency policy. (*Id.*; AR 7727-7728, Osborne Dep., pp. 23: 9-12, 63:25-64:1-4, 74:4-5, 74:13-75:7, 78, 79:6-16.) It is IOSHA policy to never delete anything from a file after the Safety Orders are issued. (AR 7727-7728, Osborne Dep., pp. 74:4-5, 74:13-75:7, 78-79.)

II. Standard of Review.

Under AOPA, the Court may set aside prejudicial agency action that is contrary to constitutional right, in excess of statutory authority or limitations, short of statutory right, without observance of procedure required by law, or otherwise unlawful. Ind. Code § 4-21.5-5-14, 15.

III. Conclusions of Law.

A. Respondents' service of the Safety Orders on Lane was legally deficient.

16. The Safety Orders needed to be served on Lane at the Jobsite unless Lane provided a different address during an inspection. Ind. Code § 22-8-1.1-25.1(c). Even if the Court accepts Respondents' argument that the Form was properly filled out and binds Lane (which it does not), IDOL nevertheless improperly served the Safety Orders because it did not mail the Safety Orders to the person identified on its own Form as the "designated recipient[.]" (Resp., p. 33, n.2.) Respondents claim the designated recipient for the Safety Orders was "J.R. Glascock," but the record proves Respondents did not mail the Safety Orders to him. (Sept. 15, 2021, Mot., Ex. B, pp. 13-15, 20.) Rather, they were mailed to "The Lane Construction

Corporation" and received by "Carlos." (*Id.* at pp. 13-15.) Thus, Respondents' service of the Safety Orders was insufficient.

17. In reaching this conclusion, the Court notes that a state agency bears the responsibility of ensuring service of a notice of violation, particularly where a company faces civil – and potentially criminal – liability. This is a fundamental tenet of due process, applicable even in administrative proceedings. Following the statutory process is protective of an entity's judicial review rights. Respondents' attempt to use this highly suspect Form is an attempt to abdicate that responsibility here.

B. IDOL violated Lane's due process rights by refusing to certify the petition for administrative review to the Indiana Board of Safety Review.

18. Due process requires an opportunity to be heard, confront witnesses, and present every available defense. *Morton v. Ivacic*, 898 N.E.2d 1196, 1199 (Ind. 2008). The Safety Board conducts hearings on challenges to Safety Orders. Ind. Code § 22-8-1.1-30.1(b), 31. Petitioners filed an appeal of the Safety Orders, but IDOL refused to certify the appeal to the Safety Board in a May 4, 2021, letter signed by the Deputy Commissioner of Labor. (Sept. 15, 2021, Mot., Ex. B, p. 13.) Because of this refusal, Petitioners did not have an opportunity to be heard, confront witnesses, or present defenses at the administrative level in violation of their due process rights under the Constitution and Indiana's Constitution. *Morton*, 898 N.E.2d at 1199; *McIntosh v. Melroe Co., a Div. Of Clark Equipment Co., Inc.*, 729 N.E.2d 972, 975 (Ind. 2000).

19. Respondents claim that IDOL properly refused to certify Petitioners' appeal to the Safety Board because the appeal was untimely, but the Safety Board, not the Deputy Commissioner of Labor, should have decided this issue. Ind. Code § 22-8-1.1-30.1(b). By refusing to forward the administrative appeal to the Safety Board, IDOL impermissibly blocked

the Petitioners from challenging the propriety of the Safety Orders, including the manner of service of those Safety Orders upon the Petitioners.

C. This Petition was timely and properly filed.

20. Respondents argue the Petition was untimely and Petitioners failed to exhaust their administrative remedies, but they are incorrect. Respondents' arguments are premised on the Safety Orders being properly served, which they were not. Moreover, Petitioners tried to exhaust their administrative remedies by filing a petition for administrative review, but IDOL refused to certify it to the Safety Board. Petitioners then filed their present Petition within 30 days of IDOL's refusal to certify the administrative review petition to the Safety Board. Petitioners timely filed this Petition, and Petitioners did not fail to exhaust their administrative remedies. Rather, Respondents prevented Petitioners from pursuing their administrative remedies.

D. The willful Safety Order violated Lane's due process rights.

21. Safety orders issued under OSHA regulations are penal in nature and therefore implicate the Due Process Clause of the Constitution, and courts must construe such regulations narrowly. *Gates & Fox Co., Inc. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986); *Matter of Metro-East Mfg. Co.*, 655 F.2d 805, 810-811 (7th Cir. 1981); *Dravo Corp. v. Occupational Safety & Health Review Com'n*, 613 F.2d 1227, 1231-1233 (3d Cir. 1980); *Diamond Roofing Co., Inc. v. Occupational Safety & Health Review Com'n*, 528 F.2d 645, 649-650 (5th Cir. 1976). To satisfy due process, OSHA regulations must be "state[d] with ascertainable certainty[.]" *Metro-East Mfg. Co.*, 655 F.2d at 811 (quoting *Diamond Roofing Co.*, 528 F.2d at 649); *see also Podgor v. Ind. Univ.*, 381 N.E.2d 1274, 1283 (Ind. Ct. App. 1978). When completing this assessment, courts look only at the plain language of the regulation

as "a regulation cannot be construed to mean what an agency intended but did not adequately express" when civil sanctions are involved. *Dravo Corp.*, 613 F.2d at 1232, 1233-1234 ("an employer should not be subject to penal sanctions for nonadherence to safety standards without adequate notice in the regulations of the exact contours of his responsibility").

22. The willful Safety Order cites Lane for violating 29 C.F.R. § 1926.800(r)(6)(ii), which provides: "No employee shall ride haulage equipment unless it is equipped with seating for each passenger and protects passengers from being struck, crushed, or caught between other equipment or surfaces." In their response and at oral argument, Respondents admitted that the plain language of section 1926.800(r)(6)(ii) does not require doors on mantrips. (Jan. 10, 2024, Resp., pp. 37, 44; Jan. 24, 2024, hrg.) In addition, because there is no evidence that Respondents provided Petitioners notice of IDOL's interpretation that section 1926.800(r)(6)(ii) requires mantrips have doors – despite the lack of such language in the rule – the willful Safety Order violated Lane's due process rights to adequate notice.

E. Sanctions under the Court's inherent authority are warranted.

23. This Court has inherent authority to issue sanctions. *Noble Cty. v. Rogers*, 745 N.E.2d 194, 198-199 (Ind. 2001). The Petition was filed about a year after the Southern District of Indiana sanctioned State defendants, their attorney, and the Indiana Attorney General's Office because of false representations to the judge, false discovery responses, and a brief that contained falsities. *Littler v. Martinez*, 2020 WL 42776 at 26-30, 32-38 (S.D. Ind. Jan. 3, 2020). In *Littler*, the sanctions included entry of a default judgment against State defendants and an award of attorneys' fees to plaintiff. *Id.* at 23-24, 33-38.

24. Despite the recent *Littler* decision, Respondents and their counsel have engaged in conduct that is unacceptable in this Court, including repeated and continuing disobedience of

Court orders, misrepresentations to the Court and Petitioners' counsel, and spoliation of evidence. Respondents have the burden of showing their disobedience of the orders was not willful, *Wilson v. State*, 988 N.E.2d 1211, 1219 (Ind. Ct. App. 2013), but they failed to do so. In fact, their continued refusal to submit at least one document they claim is privileged for *in camera* review and their unexplained and uncured removal of material from the file after issuing the Safety Orders in derogation of agency policy confirm their disobedience is willful.

25. Respondents' misconduct has caused significant delays and needlessly forced Petitioners and the Court to expend significant resources. Given the totality of circumstances, including the briefs, agency record, and statements Respondents' counsel made at hearings, the Court concludes that Respondents and their counsel have acted in an unreasonable manner with disregard for Petitioners, the Court, and the orderly process of justice.

26. The communications that Respondents belatedly produced are material and show that IOSHA's interpretation of section 1926.800(r)(6)(ii) was reached only days before IDOL issued the willful safety order and that Respondents spoliated evidence. (AR 915, 2731, 4313-4314, 7854.) Respondents do not dispute they altered their Lane file **after** the Petition was filed. (Resp., p. 48.) The spoliation substantially prejudices Petitioners because, under AOPA, the evidence available to Petitioners to challenge the Safety Orders is limited, and Respondents have altered this very evidence. Ind. Code § 4-21.5-5-11.

27. The Court concludes that entering a ruling in favor of Petitioners and against Respondents and vacating the Safety Orders is an appropriate sanction for the misconduct. Further, an award of attorneys' fees and costs of this action to Petitioners may be warranted. Petitioners may submit a petition for fees and costs within 30 days of the date of this Order. In addition to setting forth an amount of fees and costs claimed, Petitioners may submit argument

regarding the allocation of any award between Respondents and their counsel. Respondents may file a response in opposition within 30 days of Petitioners' filing with any reply by Petitioners due 15 days thereafter. Either party may request a hearing on the fee petition.

F. Remand would be futile.

28. Even in the absence of vacating the Safety Orders as a sanction, remanding this matter would be inappropriate because it would be futile. Any attempt by Respondents to cure the insufficient service of the Safety Orders is time barred. Ind. Code § 22-8-1.1-25.1(c). Additionally, Respondents' spoliation of evidence denies Petitioners' fundamental due process on remand as Petitioners would have to litigate their claims without the complete, unaltered agency record. Finally, the willful Safety Order violated Petitioners' due process rights, and Respondents cannot cure this defect as due process requires adequate notice before the Safety Orders are issued.

IV. Summary.

For the above reasons, the Court SETS ASIDE and VACATES IDOL's March 25, 2021, Safety Orders issued to Lane. The Court retains jurisdiction over this matter to consider Petitioners' claim for costs and fees.

Date: 6/10/2024

James A. Joven, Judge
Marion Superior Court, Civil Division 13

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