



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

EVERSOURCE ENERGY SERVICE  
COMPANY,

Respondent.

OSHRC DOCKET No. 20-0761

**ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

The cited employer, Eversource Energy Service Company (Eversource), has filed a motion for summary judgment (Motion) on the ground that the underlying "Citation and Notification of Penalty" (Citation) is time-barred by the six-month limitations period of section 9(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (Act). The Motion is denied.

The question presented is whether under the following facts (about which there exists no genuine dispute) the Citation is time-barred:

*Summary of Facts:* OSHA mailed the Citation by certified mail before the limitations period expired, but the U.S. Postal Service (USPS) never delivered the certified letter to Eversource because OSHA had mistakenly addressed the envelope to the inspected worksite (an electrical substation), to which USPS does not deliver mail. Nine days after the limitations period had expired, OSHA sent an email to an Eversource safety manager regarding the Citation. The safety manager was then unaware that OSHA had cited Eversource, and he was likewise unaware that Eversource had not received the certified letter containing the Citation. The safety manager requested that OSHA email an electronic copy of the Citation to him. OSHA complied and emailed to the safety manager an electronic copy of the Citation, but in its unsigned form.

Then, ten days later, after OSHA had come to realize that the certified letter containing the Citation had not been delivered, OSHA emailed the safety manager an electronic copy of the original *signed* Citation. The next day (twenty days after the limitations period had expired), the safety manager met in person with an OSHA official to discuss the Citation. Eversource thereafter filed a notice of contest within 15 working days of the day that Eversource had first learned that OSHA had cited Eversource for workplace safety violations.

Decision: The Citation is not time-barred by the six-month limitations period of section 9(c).

### FACTS

The record on the Motion establishes the following facts about which there exists no genuine dispute:<sup>1</sup>

On October 8, 2019, in response to the report of an electrical shock accident, a Compliance Safety and Health Officer (“CO”) from OSHA’s “Boston–South” Area Office conducted an inspection of an electrical substation that Eversource owned and controlled. The CO recorded the address of the substation to be “Station 980, Tupper Road, Sandwich, Massachusetts 02563,” and identified the substation to be a “temporary” worksite (as opposed to being a “fixed” worksite). (Ex. G to Motion). The USPS does not deliver mail to the substation.<sup>2</sup> (Exs. F, I, J, K & L to Motion).

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<sup>1</sup> The parties have engaged in limited discovery relating only to the limitations issue. By order dated November 24, 2020, all other discovery in the matter has been suspended pending disposition of the Motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (stating that Fed. R. Civ. P. 56 “mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial” [emphasis added]). By the terms of that order of November 24, 2020, the entry of this order resolving the Motion terminates the suspension of discovery.

<sup>2</sup> Eversource does not maintain an office at the substation, and no employees are permanently assigned to work there. The substation is in a fenced-in enclosure. Access to the substation is via an approximately 300-foot access road (named Barkman Court, which connects

The CO recorded Eversource's mailing address to be as follows: 107 Selden St., Berlin, Connecticut 06037. (Ex. G to Motion). This is an accurate mailing address. (Ex. B to Motion; Eversource's Answer to Amended Complaint).

From November 2019 to January 2020, the CO continued his investigation into the electrical shock accident and routinely communicated by email with a safety manager for Eversource named Jonathan Duffy. Mr. Duffy routinely responded to the CO's emailed requests for certain information.

In March 2020, the Area Director of the Boston-South Area Office approved the issuance to Eversource of the Citation, which alleged five serious violations of the Electric Power Transmission and Distribution standard codified in 29 C.F.R. pt. 1926. The Citation proposed penalties totaling \$53,976. Each of the violations was alleged to have occurred "on or about October 8, 2019." The final day of the six-month limitations period of section 9(c) of the Act for each of the alleged violations was April 8, 2020. (Sec'y Opposition at 2).

Page one of the twelve-page Citation accurately reflects the addresses that the CO had recorded for both the "Inspection Site" in Massachusetts and Eversource's mailing address in Connecticut.

Page one of the Citation reflects an "Issuance Date" of March 18, 2020, but the Area Director signed it two days later, on March 20, 2020. OSHA mailed the Citation that same day, nineteen days before the limitations period would expire. However, the OSHA official who addressed the 10x13-inch envelope containing the Citation, Assistant Area Director (AAD) Katie

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the substation to Tupper Road) and requires passing through two gates, each of which is secured shut by a chain and padlock when no one is present. (Ex. F to Motion). Eversource does not maintain a mailbox or other receptacle at the substation for the delivery of mail, and there is no indication in the record on the Motion that USPS would have delivered any mail there even had Eversource maintained a receptacle for delivery of mail.

Nishimura, mistakenly handwrote on the envelope the address for the Inspection Site (i.e., the substation) that was reflected on page one of the Citation. If AAD Nishimura had correctly followed standard procedures, she would have addressed the envelope to Eversource's mailing address in Connecticut, which was also reflected on page one of the Citation. (Ex. P to Motion). Ordinarily, AAD Nishimura is not involved in physically addressing envelopes in which the Boston-South Area Office sends a citation, but she did so here because the Area Office was short staffed in response to COVID-19. (Ex. C to Motion).

On March 23, 2020, USPS ascertained that the address on the certified letter was insufficient, and so the certified letter was never delivered to Eversource. Four weeks later, on April 21, USPS identified the undelivered certified letter for return to the Area Office. (Ex. M to Motion.) USPS returned the undelivered certified letter to the Area Office on April 28, which was 39 days after the Area Office had mailed it, and 20 days after the limitations period had expired.

On April 17, 2020, AAD John McGrath sent an email to Mr. Duffy of Eversource with the subject "Tupper Road Station Accident Sandwich, MA," in which he wrote: "Afternoon Jon, last month citations were issued and sent pertaining to this accident/inspection and we did not get a response from your office. FYI."

When Mr. Duffy received AAD McGrath's email, neither he nor anyone else at Eversource knew that OSHA had decided to cite Eversource for violations arising out of the October 2019 inspection. Mr. Duffy also did not know that the Citation had not been delivered to Eversource, and he became concerned that the Citation had been delivered but that Eversource had mishandled it. (Duffy Decl., Nov. 23, 2020). Mr. Duffy replied to AAD McGrath's email just a few minutes later, writing: "John, I never received any letters. Could you please provide where it was sent to? Could you also please send electronically as we are working remotely. Thanks."

AAD McGrath emailed a reply about 20 minutes later and attached an electronic copy of the twelve-page Citation in its unsigned form, stating: “Jon, attached is a copy of the citations.”

Sometime between April 17 and April 27, AAD McGrath learned that the certified letter containing the Citation had not been delivered to Eversource. (Ex. T to Motion).<sup>3</sup> After learning this, AAD McGrath sent Mr. Duffy an email on April 27, 2020 with the subject “Original Citations Signed and Cert. Mail Receipt” in which AAD McGrath wrote: “Here it is Jon, talk with you tomorrow.” AAD McGrath attached to this email a scanned electronic copy of the signed Citation.<sup>4</sup>

The next day, April 28 (the same day that USPS returned the misaddressed certified letter to the Area Office), Mr. Duffy and Eversource’s Vice President of Safety, Mr. Kenneth Bogler, met with AAD McGrath at the Area Office for an informal conference pertaining to the Citation. In that meeting, Eversource expressed the view that the Citation was time-barred. Each of the five violations alleged in the Citation was also discussed. (Ex. Q to Motion).

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<sup>3</sup> The record on the Motion does not reflect exactly when or how officials at the Area Office came to realize that the certified letter had not been delivered. The Area Office could have discovered this by tracking the letter on USPS’s mail tracking website by entering USPS’s 20-digit number for the certified letter, which the Area Office had maintained in its file on the matter. (Ex. O to Motion). Doing so would have shown that as of March 23 the certified letter had not been delivered because of “insufficient address” and that as of April 21 the letter was in the process being returned to sender. (Ex. M to Motion).

<sup>4</sup> Included as part of the scanned copy of the signed Citation was USPS Form PS 3600, “U.S. Postal Service Certified Mail Receipt,” which reflected USPS’s 20-digit tracking number for the misaddressed certified letter. (Ex. O to Motion). The PS 3600 form contains spaces for recording the address to which the certified mailing is being sent. AAD Nishimura had not filled in those spaces after she hand-addressed the envelope, and so the PS 3600 form that the Area Office maintained for its records after it had mailed the Citation did not reflect that the letter had been addressed to the inspection site in Massachusetts rather than Eversource’s mailing address in Connecticut.

On May 7, 2020, attorneys for Eversource filed with the Boston-South Area Office a notification of intent to contest (notice of contest) the five citation items and the proposed penalties set forth in the Citation. The notice of contest was filed within fifteen working days of the day Eversource first became aware that OSHA had cited it for alleged violations.

On May 12, 2020, the Area Office filed Eversource's notice of contest with the Occupational Safety and Health Review Commission (Commission) utilizing the Commission's electronic filing system. The Commission's Executive Secretary docketed the matter on May 14, 2020.

### **DISCUSSION**

Section 9 of the Act is addressed to the Secretary's *issuance* of a citation. 29 U.S.C. § 658. Section 9(a) provides that, upon discerning a violation, the Secretary "shall with reasonable promptness issue a citation to the employer." Section 9(c) proscribes the issuance of such a citation "after the expiration of six months following the occurrence of any violation."

Section 10(a) of the Act is addressed to the Secretary's *notification* of the employer that a citation has been issued under section 9(a). 29 U.S.C. § 659(a). Section 10(a) requires the Secretary to notify the cited employer that a citation has been issued "under section 9(a) within a reasonable time after the termination" of the inspection or investigation on which an issued citation is based. This notification triggers section 10(a)'s fifteen-working-day period for the employer to contest the citation or proposed penalties.<sup>5</sup>

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<sup>5</sup> The first sentence of section 10(a) sets forth the described provisions:

If, after an inspection or investigation, the Secretary issues a citation under section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 and that the employer has fifteen working days within

The text of section 10(a) addresses only the matter of notifying a cited employer about any *proposed penalty* and does not address notifying the employer of the alleged violation for which that penalty is being proposed. Even so, the Secretary customarily combines the citation and notification of proposed penalty in a single document that is titled “Citation and Notification of Penalty,” as was done here. *See* 29 C.F.R. § 1903.15(a) (“After, *or concurrent with*, the issuance of a citation, and within a reasonable time after the termination of the inspection, the Area Director shall notify the employer by certified mail or by personal service by the Compliance Safety and Health Officer of the proposed penalty...” [emphasis added]). The Commission regards section 10(a) “as governing the service of citation, as well as the notification of proposed penalty, where ... both documents were served together.” *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474 n. 6 (No. 76-2165, 1979).

The Commission has noted that “until the employer receives the notification of proposed penalty,” section 10(a)’s fifteen-working-day contest period “does not begin to run and the citation cannot become a final order.” *Id.* “Thus, although § 10(a) does not explicitly govern the issuance of a citation, there must be compliance with § 10(a) before a citation is enforceable.” *Id.*

Although section 10(a) specifies the use of certified mail, the Secretary’s regulations interpreting the Act expressly authorize “personal service” as an alternative to certified mail. *See* § 1903.15(a), quoted *supra*. The regulation does not define the term “personal service.” The Commission has ruled that personal service is sufficient notification under section 10(a). *Gen. Dynamics Corp.*, 15 BNA OSHC 2122, 2126 (No. 87-1195, 1993) (determining that the Secretary

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which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.

has “reasonably construed the Act to permit personal service of citations and penalty notices in lieu of certified mail”).

In *B.J. Hughes, Inc.*, the Commission ruled that the Secretary will be deemed to have complied with section 10(a)’s notification requirement when “the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest.”<sup>6</sup> 7 BNA OSHC at 1474. And just weeks after deciding *B.J. Hughes, Inc.*, the Commission held that “if an employer receives actual notice of a citation, it is immaterial to the exercise of the Commission’s jurisdiction that the manner in which the citation was sent was not technically perfect.” *P&Z Co., Inc.*, 7 BNA OSHC 1589, 1591 (No. 14822, 1979).

Eversource does not challenge the proposition that a citation is deemed “issued” under section 9 on the day that it is deposited in the mail in a properly addressed certified letter. (Eversource Reply Br. at 3-4). And the undersigned agrees with the decisions of Commission judges that a signed citation is deemed issued under section 9 on the day that it is mailed. *See Brower Dental Health, PC*, 26 BNA OSHC 1480, 1485 (No. 16-0193, 2016) (ALJ) (concluding that a citation was “issued” for purposes of meeting the limitations period of section 9(c) when it has been signed and mailed by certified mail); *Valcourt Bldg. Servs. of Ga., LLC*, 24 BNA OSHC 1872 (No. 12-0921, 2013) (ALJ) (ruling that a citation was timely issued when it was mailed before the limitations period expired, even though the certified letter was not delivered because it had been addressed to an erroneous address, and then four days after the limitations period expired the citation was delivered to the employer by a commercial delivery service (UPS)); *Earth*

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<sup>6</sup> This standard is consonant with the requirements of due process articulated in *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314-15 (1950). *See David E. Harvey Builders, Inc. v. Sec’y of Labor*, 724 F. App’x 7, 9 (D.C. Cir. 2018) (unpublished).



*Developers, Inc.*, No. 17-1120, 2017 WL 8220399, at \*3 (O.S.H.R.C.A.L.J., Dec. 22, 2017) (determining the citation had not been timely “issued” under section 9(c) where there was no evidence that the Secretary had mailed it before the limitations period expired).

Eversource contends that because the certified letter here was addressed to an invalid mailing address, the certified letter was not “reasonably calculated” to reach Eversource, and so the deposit of the misaddressed certified letter containing the Citation before the limitations period expired did not satisfy section 9(a)’s requirement that the Secretary “issue a citation to the employer” within six months of the occurrence of any violation (as required by section 9(c)).<sup>7</sup> The gist of this contention is that a citation cannot be deemed to have been issued “to the employer” (as section 9(a) requires) on the day that it was deposited in the mail *if* delivery of that mail item as deposited with the USPS is an impossibility because the Secretary erroneously addressed it.<sup>8</sup>

In making this argument, Eversource grafts the “reasonably calculated” standard for assessing the sufficiency of *notification* under section 10(a) onto section 9(a)’s requirement that the Secretary “shall with reasonable promptness issue a citation to the employer” and section 9(c)’s separate requirement that this be done within six months of the alleged violation. No authority has been identified that applies the “reasonably calculated” standard for notification under section 10(a) to the manner that the Secretary issues a citation under section 9.<sup>9</sup>

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<sup>7</sup> See Motion at 21 (“OSHA may not rely on a mailing unless it is addressed within the limitations period in a manner reasonably calculated to bring the citation to the employer’s attention”); Eversource Reply at 1 (“This citation was not [ ] ‘issued’ ‘to the employer’ [when mailed] because it was not then addressed to reach the employer, which is the plain meaning of ‘issue’....”).

<sup>8</sup> See Eversource Reply at 4 (“Eversource ... argue[s] section 9(c) requires that a citation be issued within the limitations period so as to reach the employer”).

<sup>9</sup> Eversource contends also that its Motion is meritorious “with or without the aid of the ‘reasonably calculated’ test.” (Eversource Reply at 2).

Eversource's argument is rejected. OSHA signed and mailed the Citation before the limitations period expired. This is all that matters for purposes of meeting section 9(c)'s requirement that a citation be issued within six months of the alleged violation's occurrence, notwithstanding that the letter was undeliverable due to OSHA's apparent negligence in addressing it to an invalid address. Certified letters containing citations might be undelivered or undeliverable for a variety of reasons under countless scenarios. *See, e.g., Valcourt Bldg. Servs. of Ga., LLC* (OSHA misaddressed the certified letter so the USPS did not deliver it, and OSHA later accomplished delivery of the citation by using a commercial delivery service, rather than USPS certified mail). Identification of the date that a citation is issued for purposes of section 9 is simply not affected by whether the certified letter in which it is mailed is ultimately delivered or is deliverable at all.

The effect of the misaddressed certified letter here was that the Citation was issued on the date that it was deposited in the mail (which was before the limitations period expired), but the issued Citation remained unenforceable until the Secretary met section 10(a)'s notification requirement. *B.J. Hughes, Inc.*,<sup>7</sup> BNA OSHC at 1474 n. 6. Once the Secretary accomplished that notification, Eversource could challenge the notification on the ground that it failed to meet the "reasonably calculated" test that the Commission adopted in *B.J. Hughes* (perhaps, for example, on the asserted ground that the notification by email did not satisfy that test), or that such notification was not "accomplished within a reasonable time after the termination" of the inspection or investigation on which the citation is based as section 10(a) requires (perhaps, for example, on the ground of a prejudicial delay in accomplishing the notification), or that the Secretary had failed to issue the citation "with reasonable promptness" as section 9(a) requires. But where a certified letter containing a citation is otherwise deposited with the USPS within six

months of an alleged violation, the citation cannot be time-barred under section 9(c) regardless of the date or the way that the cited employer is ultimately notified of the citation's issuance under section 10(a).

The remainder of Eversource's Motion addresses the sufficiency of notification under section 10(a) through the prism of its argument on the section 9(c) limitations issue.<sup>10</sup> As indicated above, those contentions are not dispositive as to the limitations issue.<sup>11</sup> Here, regardless of the

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<sup>10</sup> In addition to the section 9(c) limitations defense, Eversource has pleaded defenses that are labeled in its answer as "insufficient process" and "insufficient service of process." Resolution of these defenses involves different analyses than the analysis for the limitations issue presented by the Motion. This order does not adjudicate those two defenses, and both remain subject to adjudication.

<sup>11</sup> One matter worthy of addressing at this stage, however, is Eversource's challenge to the sufficiency of the subsequent notification by email. (Motion at 26-29). Eversource relies in part on the Commission's decision in *Donald K. Nelson Constr., Inc.*, 3 BNA OSHC 1914 (No. 4309, 1976), which decided that where section 10(a) notification is accomplished by personal service, that service must conform to the service requirements Rule 4 of the Federal Rules of Civil Procedure. Rule 4 pertains to service of a summons and complaint in federal practice. Commissioner Cleary dissented from the majority's adoption of Rule 4 as providing the standard for section 10(a) notification, observing that a citation issued under the Act is neither a summons under Rule 4 nor a complaint or other pleading contemplated by the Commission's rules of procedure. *Id.* at 1917.

Subsequent decisions of the Commission effectively overruled *Don K. Nelson Constr.* to the extent that it held Rule 4 applies to assessing the sufficiency of personal service of a citation under section 10(a). In *P&Z Co., Inc.*, 7 BNA OSHC 1589, 1591 (No. 14822, 1979), the cited employer argued that it was not subject to the Commission's jurisdiction because service of the citation had not conformed to the requirements of Fed. R. Civ. P. 4. In rejecting that argument, the Commission effectively adopted Commissioner Cleary's dissenting view in *Don K. Nelson Constr.* that Rule 4 does not apply to notification under section 10(a), noting as follows: "A citation

Area Office's flawed and failed attempt to send the Citation to Eversource by certified mail, the citation was issued before the expiration of the six-month limitations period of section 9(c).

For these reasons, Eversource's motion for summary judgment on the ground that the Citation was issued after the expiration of section 9(c)'s limitation period is DENIED.

SO ORDERED.

s/ William S. Coleman  
WILLIAM S. COLEMAN  
Administrative Law Judge

DATED: March 9, 2021

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... does not institute an action before the Commission and is therefore not 'process' within the meaning of Rule 4." *P&Z Co., Inc.*, 7 BNA OSHC at 1591.

The Commission's ruling in *P&Z Co., Inc.* is consistent with the Commission's earlier decision in *B.J. Hughes, Inc.*, where the Commission adopted the "reasonably calculated" standard for sufficiency of notification under section 10(a) and rejected the corporate employer's contention that the citation had to have been served on a corporate official who possessed the authority to contest the citation or to spend corporate funds to pay the proposed penalty or to abate the alleged violation. 7 BNA OSHC at 1474.

The "reasonably calculated" due process standard for section 10(a) notification adopted in *B.J. Hughes, Inc.* is broader than the punctilious requirements of Fed. R. Civ. P. 4 for service of a summons in federal court proceedings. See *Williams v. GEICO Corp.*, 792 F. Supp. 2d 58, 65 (D.D.C. 2011) (the service requirements of Fed. R. Civ. P. 4 are not necessarily met even if the due process "reasonably calculated" requirement is met); *Freedom Watch, Inc. v. OPEC*, 766 F.3d 74, 81 (D.C. Cir. 2014) (actual notice cannot rescue service that is otherwise defective under Rule 4, absent substantial compliance and "a minor, nonprejudicial defect"). Thus, the Commission's decision in *B.J. Hughes, Inc.* similarly reflects an implicit rejection of the ruling in *Don K. Nelson Constr.* that the sufficiency of notification by personal service under section 10(a) must meet the standards of Fed. R. Civ. P. 4.