



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor,
Complainant
v.
Excel Contractors, Inc.,
Respondent.

OSHRC Docket No. **16-0633**

ORDER DENEYING MOTION TO DISMISS

This matter is before me on Respondent's Motion to Dismiss Complaint filed on May 31, 2016. In response to the Secretary's Complaint, Respondent filed this motion arguing the Secretary's Complaint and Citation are time-barred because the Citation was not issued within six months of the alleged violations as required under § 9(c) of the Occupational Safety and Health Act, 29 U.S.C. § 651, (the Act). Respondent contends although the Citation is dated March 3, 2016, six months after the occurrence of the alleged violations, it was not received until March 11, 2016, eight days after the expiration of the six-month statute of limitations. Respondent argues the Act's requirement that citations be issued within six months of the alleged violations necessitates those citations be received within that timeframe. The Secretary filed his response on June 9, 2016, contending, to the contrary, a citation is issued under the Act upon mailing. Therefore, the Citation was timely issued. Respondent filed a Reply on June 15, 2016.¹

For the reasons set forth the herein, the Respondent's Motion to Dismiss is DENIED.

Background and Facts

The relevant facts are not in dispute. Respondent is a construction contractor that had been hired to rebuild portions of a refinery in Geismar, Louisiana, owned by another company, after a fire in April of 2015. On September 3, 2015, an accident occurred at the refinery in which some of Respondent's personnel were injured. The Baton Rouge Occupational Safety and Health Administration (OSHA) Area

¹ The Secretary filed a motion to strike the Respondent's reply. Respondent then filed a motion for leave to file its reply. Although Commission procedural rules do not allow for the routine filing of replies, in the instant case, I find the Respondent's reply helps to further clarify the issues. The Secretary's motion to strike is denied and Respondent motion for leave to file its reply is granted. I have considered all arguments made by the parties in reaching my decision.

Office was notified of the accident on September 4, 2015, and immediately commenced an investigation. That investigation was conducted by Compliance Safety and Health Officer (CSHO) Ivy Diggs of the OSHA Baton Rouge Area Office. Based on the investigation, the OSHA Baton Rouge Area Office determined Respondent was in violation of the Act and that citations should be issued to Respondent. On March 3, 2016, six months following the accident, OSHA mailed the Citation to Respondent at its P.O. Box address. Respondent does not dispute the Citation was mailed on March 3, 2016.

Respondent alleges, despite holding two closing conferences, OSHA never notified it that it was in violation of the Act or citations were forthcoming. Rather, it first heard of citations being issued to it when it was contacted by a local newspaper on March 7, 2016. On March 9, 2016, it contacted the OSHA Baton Rouge Office Area Director and was notified the Citation had been mailed to it at its P.O. Box address. After checking the P.O. Box several times between March 5 and March 10, 2016, Respondent ultimately received the Citation on March 11, 2016. The Secretary did not respond, or otherwise dispute, any of these facts as alleged by Respondent.

Discussion

Section 9(c) of the Act states, “No citation may be issued under this section after the expiration of six months following the occurrence of any violation.” 29 U.S.C. § 658(c). The Commission has held § 9(c) is a statute of limitations. *General Dynamics*, 15 BNA OSHC 2122, 2127, n. 10 (No. 87-1195, 1993). There is no dispute the Citation was mailed within the six-month statute of limitations. There is also no dispute the Citation was not received by Respondent until after the six-month statute of limitations. The sole issue in dispute is whether, under § 9(c), the Citation was issued upon mailing or upon receipt.

The term “issue” is used multiple times in §§ 9 and 10 of the Act to describe actions required by the Secretary. The Act does not define the term. These same sections of the Act also use the term “receipt” generally as the start of time limits imposed on employers. For example, under § 10(a), the 15-day period in which an employer must contest a citation begins to run upon receipt of the citation. It is well recognized that statutes must be read as a whole, “making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous.” *Lake Cumberland Trust, Inc. v. E.P.A.*, 954 F.2d 1218, 1222 (6th Cir 1992), quoting, *Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1431-32 (9th Cir. 1991)). Had the Congress intended a citation be considered issued upon receipt only, there would have been no need to draw the distinction between timeframes calculated based on issuance and timeframes calculated based on receipt. In short, to equate issuance with receipt would render the use of the two terms superfluous. Proper statutory interpretation requires the terms be given different meaning. Because the Act does not require the employer receive a

citation before the end of the six-month limitations period, the six-month statute of limitation should not be defined or calculated by the date of receipt, but rather upon the Secretary's act of issuing the citation. In this case, the Secretary issued the Citation when his agents dated, signed, and mailed the Citation on March 3, 2016.

The Commission has never spoken directly regarding the definition of "issued" in § 9(c). In at least one case involving amendment of a citation after the notice of contest was filed, but before the expiration of the six-month statute of limitations, the Commission has found the amended citation issued upon mailing. *Bland Construction Co.*, 15 BNA OSHC 1031, 1042-43 (No. 87-992, 1991). In *Bland*, the Secretary mailed an amended complaint to the employer one day prior to expiration of the six-month statute of limitations that reclassified the original citation to a willful violation and alleged an additional willful violation. *Id.* at 1032. The Commission found the amended complaint had been timely filed applying Commission Rule 8(d) which provides "Filing is deemed effected at the time of mailing..." *Id.* at 1042 n. 10. In response to the employer's argument that no citation was issued or notice given within the six-month statute of limitations period, the Commission held the amended complaint "operated as a citation." *Id.* at 1043 n. 11, *citing P & Z Co.*, 7 BNA OSHC 1589, 1591-92 (No. 14822, 1979). Although the Commission did not expressly state its opinion regarding the date OSHA issues a citation, reading these two holdings together leads to a conclusion the Commission considers a citation "issued" upon mailing.

While the Commission has not spoken directly on the definition of "issued" in § 9(c), Commission judges have. In *Wean United Inc.*, 7 BNA OSHC 2086 (No. 77-4350, 1979), Judge Irving Sommer held, under § 9(c) "the time a citation is placed into circulation constitutes the date of issuance." In another case, Judge Ken Welsch found no violation of the statute of limitations because "[t]he citation was issued as required by § 9(c) on [the date it was mailed.]" *Valcourt Building Services of Georgia, LLC*, 24 BNA OSHC 1872, 1874 (No. 12-0921, 2013). In *Valcourt*, the Secretary mailed the citation prior to the expiration of the six-month statute of limitations, but it was returned to the Secretary because the address was incorrect. The Secretary resent the citation, which was not received by the employer until five days after the expiration of the statute of limitations. Judge Welsch found the citation was timely issued when it was originally mailed. Although not binding authority, I find both these decisions instructive. I also note I have found no decisions holding to the contrary.

In finding a citation is issued upon mailing, I am also instructed by Judge Carol Baumerich's Order Denying Motion to Dismiss in *Francis J. Palo, Inc.*, Docket No. 13-2150, cited by the Secretary. In her order, Judge Baumerich found the language of § 9 supports a finding the citation is issued upon mailing. I find Judge Baumerich's order provides a cogent analysis of the issue. Respondent concedes

Judge Baumerich's Order is on point, but simply argues it was wrongly decided. I disagree with Respondent and find Judge Baumerich's rationale persuasive.

Respondent has cited to no authority, binding or otherwise, that supports its position. Although Respondent relies on the Third Circuit's decision in *Bloomfield Mechanical Contracting, Inc. v. OSHRC*, 519 F.2d 1257 (3rd Cir. 1975) and the Commission's decision in *Donald K. Nelson Construction, Inc.*, 3 BNA OSHC 1914 (No. 4309, 1976), I disagree either stands for the proposition a citation is issued only upon receipt.

In *Bloomfield Mechanical*, the Secretary had issued the original citation to the wrong employer. After filing the original complaint, but before the six-month statute of limitations had run, the Secretary became aware he had named the wrong employer. The Secretary did not file an amended complaint until after the statute of limitations had run. And as the court noted, "even then the citation was not amended" to name the proper employer. *Bloomfield Mechanical*, 519 F.2d at 1262. The court concluded no citation had been issued to the employer. The decision says nothing regarding the definition of "issued" in § 9(c) of the Act.

In *Nelson Construction*, the Commission addressed a case in which the Secretary chose not to "notify the employer by certified mail" but rather opted to personally serve the employer. The Commission agreed with the Secretary that although § 10(a) provides notice of a penalty assessment may be made by certified mail, that is not the exclusive method of service. The Commission held "where personal service is substituted for the service requirement of [§ 10(a)]" the requirements of Fed. R. Civ. P. 4(d) must be met. *Nelson Construction*, 3 BNA OSHC at 1915. Contrary to Respondent's contention, the Commission did not "reject" the Secretary's arguments that mailing of the citation constituted service of the citation. Respondent's Reply Brief at pp. 1-2. The Commission explicitly drew a distinction between the service requirements of § 10(a) and personal service under Fed. R. Civ. P. 4. Here, the Secretary met the service requirements of § 10(a) by mailing, via certified mail, the Citation to Respondent within the six-month statute of limitations.

Respondent similarly misreads section XI.A of Chapter 5 of OSHA's Field Operations Manual (FOM) which states, "Accordingly, a citation shall not be issued where any alleged violation last occurred six months or more prior to the date on which the citation is actually signed, dated and served by certified mail as provided by Section 10(a) of the Act." Even if this provision were binding on the Secretary², nothing in its plain language suggests a citation is issued when received.

² It is well settled the FOM is not binding on the Secretary or the Commission and does not create substantive rights for employers. *Hackensack Steel Corp.*, 29 BNA OSHC 1387, 1392-93 (No. 97-0755, 2003) (citations omitted).

It is undisputed the Citation in this matter was signed, dated, and mailed to Respondent by certified mail on the last day of the six-month statute of limitations period. Based upon my interpretation of the language of the Act, I find the Citation was issued within the statute of limitations period.

For the foregoing reasons, Respondent's Motion to Dismiss is DENIED.

SO ORDERED.

Date: **July 13, 2016**

/s/ _____

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