

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| | : | |
| v. | : | OSHRC Docket 01-0376 |
| | : | |
| RWS BUILDING COMPANY, | : | |
| Respondent, | : | |

Appearances: No Appearance
 For the Complainant

Douglas J. Suter, Esquire
Issac, Brant, Ledman & Teetor
Columbus, OH
For the Respondent

BEFORE: MICHAEL H. SCHOENFELD
 Administrative Law Judge

DECISION AND ORDER

Background and Summary of Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) (“the Act”). On January 31, 2001, the Occupational Safety and Health Administration (“OSHA”) visited Respondent’s work site in Columbus, Ohio. As a result of the inspection, OSHA issued a citation to Respondent on February 9, 2001, alleging 4 violations of construction safety standards appearing in Title 29 of the Code of Federal Regulations (“CFR”). Respondent timely contested the citation. A hearing was held in Columbus, Ohio on June 4, 2001.

Jurisdiction

It is alleged and undenied that at all relevant times Respondent has been an employer engaged in construction. There is no dispute that Respondent uses goods or materials which have moved in interstate commerce. I find as fact that Respondent is engaged in a business affecting interstate

commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of section 3(5) of the Act. Accordingly, the Occupational Safety and Health Review Commission (“the Commission”) has jurisdiction over the parties and the subject matter.

Discussion

At the hearing in this matter Respondent appeared through counsel. The date and time for the hearing were agreed upon during a telephone conference on May 31, 2001 between the parties and the Administrative Law Judge. At that conference, the parties agreed that if witnesses were not available for the hearing or if a settlement was not reached by 12:00 noon on Friday, June 1, 2001, that the hearing would proceed on Monday, June 4, 2001 at 12:00 noon. At 1:02 p.m., on Friday, June 1, 2001, a Notice confirming the day and date (Monday, June 4, 2001), time (12:00 noon) and place of the hearing (Franklin County Court, Columbus, Ohio) was sent to each counsel. The facsimile transmission report, generated automatically by the machine in the office of the Chief Judge, indicates that transmission of 1:02 p.m., on June 1, 2001, proceeded without fault. Subsequent conversations between the Administrative Law Judge’s Administrative Assistant and personnel in the office of the Solicitor of Labor in Cleveland, Ohio, not only confirm that the facsimile notice was not only timely received in the Solicitor’s Cleveland office but that, in fact, the transmission was seen and read by counsel assigned to this matter. Further, Respondent’s counsel confirmed that he had spoken to Complainant’s counsel on Friday June 1, 2001, regarding a settlement offer and there was no indication at that time that the Secretary was considering not proceeding in this case. No advance notice was afforded to either Respondent or the Commission that the Secretary was not going to be present at the hearing. Nonetheless, there was no appearance at the hearing by the Secretary.

At the hearing, Respondent moved for a decision against the Secretary vacating the citation and the proposed penalties on the grounds that the Secretary failed to appear at the hearing. In the absence of any mitigating facts or circumstances, the Secretary’s failure to appear warrants vacating the citation and notification of proposed penalty as issued by the Secretary.

Pursuant to Rule 64, 29 CFR § 2200.64¹, Respondent's motion is GRANTED. Accordingly, the citation and notification of proposed penalty are hereby VACATED.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.
2. Respondent was not in violation of the construction safety standards as alleged in Citation 1, Items 1, 2, 3 and 4 of the citation issued to it on February 9, 2001.
3. The proposed civil penalties are vacated in their entirety.

ORDER

1. Citation 1, Item 1, 2, and 3 and all associated proposed penalties are VACATED.

/S/
Michael H. Schoenfeld
Judge, OSHRC

Dated: June 18, 2001
Washington, D.C.

¹ Rule 64 provides:
(a) *Attendance at hearing.* The failure of a party to appear at a hearing may result in a decision against that party.