

SECRETARY OF LABOR,

Complainant,

v.

CASON ROOFING, INC.

Respondent.

OSHRC Docket No. 01-1381

## ORDER

This case is before the Occupational Safety and Health Review Commission (“the Commission”), pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) (“the Act”), for the purpose of determining whether the Secretary of Labor (“the Secretary”) properly served the citation and notification of penalty in this matter and whether Respondent, Cason Roofing, Inc. (“Respondent” or “Cason”), timely filed its notice of contest (“NOC”).

The Occupational Safety and Health Administration (“OSHA”) inspected a work site of Cason in Urbana, Ohio on August 18, 1999. As a result of the inspection, OSHA issued Cason a citation and notification of penalty, and the citation was hand delivered to an individual in Cason’s office on September 30, 1999. Section 10(a) of the Act requires an employer to notify OSHA of the intent to contest a citation within 15 working days of receiving it, and the failure to file a timely NOC results in the citation and penalty becoming a final order of the Commission by operation of law. It is undisputed that Cason did not file its NOC until July 5, 2001.<sup>1</sup> In dispute, however, is when Cason actually received the citation and whether the NOC was timely filed. A hearing addressing this issue was held in Columbus, Ohio. Both parties have filed post-hearing briefs, and Cason has filed a reply brief.

According to long-standing precedent, the Commission has the authority to reconsider a final order resulting from a late-filed notice of contest where there is a basis for relief under Rule 60(b), Fed. R. Civ. P. 60(b). *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). On that basis, I find that the Commission has jurisdiction over the parties and the subject matter of this proceeding.

Sufficient relevant facts are not in dispute. On August 18, 1999, OSHA Compliance Officer

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<sup>1</sup>Cason filed a copy of the NOC with the Commission on July 9, 2001.

(“CO”) Elbert Charles Shelton inspected Cason’s work site. (Tr. 7.) Andrew Cason, the company’s owner, was on vacation at that time, but he contacted the CO upon his return. (Tr. 32-34.) The CO requested information on the company’s safety procedures, and he informed Mr. Cason that there would be a further meeting to discuss the inspection. (Tr. 34-35.) Mr. Cason was under the impression that he would be afforded the opportunity for an “informal hearing.” (Tr. 37-38.) On August 31, 1999, OSHA mailed the citation to Respondent by certified mail, but it was sent back to OSHA with a “return to sender” stamp on the envelope and the return receipt unsigned. (Tr. 7-8.) CO Shelton testified that on September 30, 1999, he hand delivered the citation to Jamie Cason, Mr. Cason’s wife, at Respondent’s place of business, and that Mrs. Cason signed the certified mail receipt. (Tr. 9-10). Mrs. Cason, on the other hand, testified that she did not sign the certified mail receipt and that the signature on the receipt did not look like her signature. (Tr. 22-23.) Mr. Cason also testified that the signature on the certified mail receipt did not look like his wife’s signature. (Tr. 46.)

On December 16, 1999, OSHA sent a letter to Respondent regarding the penalties owed. (Tr. 36; R-2.) Upon receiving the letter, Mr. Cason contacted the CO to inform him that he had not received the citation and that he would like an informal hearing, but the CO told him that it was too late. (Tr. 37-38). Mr. Cason contacted OSHA again on December 21, 1999, and requested a copy of the citation. (Tr. 39.) After receiving a copy of the citation by facsimile on that day, Mr. Cason contacted OSHA once more and was told, again, that it was too late to contest the citation. (Tr. 39-40.) On February 23, 2000, Mr. Cason received another letter from OSHA demanding payment of the penalties resulting from the inspection. (Tr. 39-41; R-3.) After he received a third letter demanding payment, this one dated May 8, 2000, and sent by the Department of Treasury, Mr. Cason contacted William Murphy, the area director of the OSHA office that had issued the citation, who told him to put down everything in a letter and mail it to him. (Tr. 41-42; R-4.) On July 24, 2000, Mr. Cason sent a letter to Mr. Murphy explaining what had happened, but he received no reply. (Tr. 43-44; R-5.) On June 28, 2001, Mr. Cason hired an attorney, who filed a NOC with OSHA on July 5, 2001.

Under well-settled Commission precedent, an untimely NOC may be accepted under circumstances in which the delay in filing was a result of the Secretary’s deception or failure to follow proper procedures. A NOC may also be accepted if the late filing was a result of “mistake,

inadvertence, surprise, or excusable neglect” or “any other reason justifying relief.” *See Branciforte Builders*, 9 BNA OSHC at 2117. Respondent contends that the citation was not served on it and that it was therefore not obliged to file a NOC. For the reasons set out below, I find that the service of the citation was adequate and that the failure to timely file a NOC was due to mistakes made by both parties which had the effect of compounding one another.

There is no dispute that the original mailing of the citation was not perfected by the return to OSHA of a signed certified mail receipt. The parties do dispute, however, the facts surrounding the hand delivery of the citation on September 30, 1999. In reviewing the testimony of the two key witnesses, CO Shelton and Mrs. Cason, I find Mrs. Cason’s memory of the event to be the more reliable. Mrs. Cason testified unequivocally that she did not recognize the CO, that the handwriting on the certified mail receipt was not hers, and that she did not see the citation.<sup>2</sup> (Tr. 22-23.) CO Shelton’s recollection was not as unequivocal. Although he testified that he delivered the citation to Mrs. Cason and saw her sign the receipt, he did not identify Mrs. Cason in the hearing room. (Tr. 9-10.) In addition, when asked on direct examination “[w]ho is Ms. Cason?,” he replied “I don’t – I don’t know.” (Tr. 9.) The CO also testified that he did not know if Mrs. Cason told him if she had a family relationship with the owner, Mr. Cason. *Id.* It is reasonable to infer that Mrs. Cason’s recollection would be the more accurate, under the circumstances of this event, and I accord greater probative weight to her clear and unambiguous testimony regarding the disputed hand delivery. I find, therefore, that there was no proper service of the citation on September 30, 1999.

The record shows that OSHA faxed a copy of the citation to Mr. Cason and that Mr. Cason received the fax on December 21, 1999. The Commission has 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.” *Gen. Dynamics Corp.*, 15 BNA OSHC 2122, 2126-27 (No.87-1195, 1993.) *quoting P & Z Co.*, 7 BNA OSHC 1589, 1591 (No. 14822, 1979). I conclude that the service by fax in this case was adequate because it is clear that Mr. Cason received the fax and thus had actual notice of the citation and proposed penalties. Consequently, service of the citation was perfected on December 21, 1999, and Respondent had 15 working days from that date to file its NOC.

I further conclude that, while Respondent did not meet the 15-day filing requirement, the

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<sup>2</sup>Mr. Cason also testified the handwriting on the receipt was not that of his wife. (Tr. 46.)

untimely filing was due to mistakes of fact and law made in good faith by both parties. OSHA cannot be cast as a barmecide here, but rather, under the mistaken belief that service was perfected on September 30, 1999, its personnel incorrectly informed Mr. Cason at least twice that it was “too late” to file a NOC and that there was nothing he could do. Mr. Cason, in turn, reasonably relied on these statements and did not hire an attorney until he realized that the U.S. Treasury was about to take action to collect the penalties. For these reasons, I find that relief is warranted. Accordingly,

Respondent’s NOC is accepted as timely filed. This matter will be set for a hearing on the merits at a time, date and place to be determined.

So ORDERED.

/s/  
Michael H. Schoenfeld  
Judge, OSHRC

Date: December 23, 2002  
Washington, D.C.