



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

CEASAR MARQUEZ, and its successors,

Respondent.

OSHRC DOCKET NOS. 04-0967
04-0610

DECISION AND ORDER

This matter (Docket No. 04-0967) arose as a result of a serious citation issued to Respondent on April 16, 2004. A timely notice of contest, complaint and answer were filed and the matter was scheduled for trial. A second case involving Respondent (Docket No. 04-0610) issued on March 26, 2004, was originally assigned to Judge Sidney J. Goldstein. At the request of the parties and in the interest of judicial economy, that case was reassigned to the undersigned for litigation.¹ By order dated August 3, 2004, the hearings for both cases were cancelled based upon the representations of the representatives for both parties that the cases had been settled. The parties were directed to file settlement documents by September 3, 2004.

By motion dated September 15, 2004, Complainant seeks orders vacating Respondent's notices of contest and affirming the citations issued to Respondent in both cases. In support of these motions, Complainant states that an oral agreement for both cases was reached with Respondent's counsel and settlement agreements were mailed to Respondent's counsel for signature. According to Complainant, the settlement agreements were not returned because Respondent's counsel was unsuccessful in contacting his client. Accordingly, Complainant seeks to vacate Respondent's notices of contest and affirm the citations on the ground that Respondent has abandoned his defenses for both matters.

¹Docket No. 04-0610 involves one serious citation alleging five violations with subparts and a proposed penalty in the amount of \$4,732 resulting from an inspection of Respondent's worksite on February 2, 2004. This case was scheduled for trial contemporaneously with Docket No. 04-0967.

In response to Complainant's motions, Respondent's counsel agrees with Complainant's recitation of the facts leading to the oral settlement agreements and states that his client issued instructions to him to settle both cases "as economically as possible." However, Respondent's counsel states that the last communication that he had with his client was during June 2004. Therefore, he is without specific authorization to sign the proposed settlement agreements on behalf of his client. Counsel states that he made several attempts to contact his client by telephone and certified mail without success. During a telephone conference between the parties and the undersigned, Respondent's counsel speculated that Respondent may have returned to Mexico.² In any event, Respondent's counsel indicated that he had exhausted every method to contact his client in an attempt to either have Respondent sign the agreements or to obtain authorization to sign on his behalf. However, despite counsel's unsuccessful attempts to contact his client, he states that it is his belief that Respondent intends to contest the citations in these matters and opposes Complainant's motions to vacate the notices of contest and affirm the citations.

Despite the dedicated and persistent efforts of counsel to represent Respondent's interests in these matters, the record supports the conclusion that Respondent, Ceasar Marquez, as the employer to whom citations were issued, has abandoned the defenses to which he is entitled by filing notices of contest. Furthermore, the record supports the conclusion that scheduling and conducting a hearing would be an exercise in futility since Respondent's whereabouts are not known and notice of the time and place of the hearing could not be accomplished.

Accordingly, in view of Respondent's abandonment of his defenses to these matters, (a) the notice of contest dated May 28, 2004, as to Docket No. 04-0967 is vacated and Serious Citation No. 1 issued April 16, 2004, IS AFFIRMED and a penalty in the amount of \$5,600 is assessed thereto; (b) the notice of contest received by the Secretary of Labor on April 12, 2004, as to Docket No. 04-0610 is vacated and Serious Citation No. 1 issued February 19, 2004 is AFFIRMED and a penalty in the amount of \$4,732 is assessed thereto.

FINDINGS OF FACT

_____ All findings of fact relevant and necessary to a determination of all issues have been made above.
Fed. R. Civ. P. 52(a).

²By motions dated September 16, 2004, Respondent's counsel seeks to withdraw from representing Respondent on the ground that he has been unable to contact his client for purposes of resolving these matters and states that "an ongoing attorney/client relationship [is] impossible." Those motions are DENIED.

ORDER

A. Docket No. 04-0967

1. Serious citation 1 item 1 is affirmed and a penalty in the amount of \$2,800 is assessed.
2. Serious citation item 2(a) is affirmed.
3. Serious citation item 2(b) is affirmed.
4. A total penalty in the amount of \$2,800 is assessed for items 2(a) and 2(b).

B. Docket No 04-0610.

1. Serious citation 1 item 1(a) is affirmed.
2. Serious citation 1 item 1(b) is affirmed.
3. Serious citation 1 item 2(a) is affirmed.
4. Serious citation 1 item 2(b) is affirmed.
5. Serious citation 1 item 3 is affirmed.
6. Serious citation 1 item 4(a) is affirmed.
7. Serious citation 1 item 4(b) is affirmed.
8. Serious citation 1 item 5 is affirmed.
9. A penalty in the amount of \$600 is assessed for items 1(a) and 1(b).
10. A penalty in the amount of \$382 is assessed for items 2(a) and 2(b).
11. A penalty in the amount of \$1,500 is assessed for item 3.
12. A penalty in the amount of \$1,500 is assessed for items 4(a) and 4(b).
13. A penalty in the amount of \$750 is assessed for item 5.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: October 21, 2004