



OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

FRANCIS J. PALO, INC.,

Respondent.

OSHRC DOCKET NO. 13-2150

ORDER DENYING MOTION TO DISMISS

On February 3, 2014, this case was designated for simplified proceedings by the Chief Judge. Previously, Complainant, the Secretary of Labor (Secretary), filed a Complaint in this case, dated January 16, 2014. On February 3, 2014, Respondent filed a Motion to dismiss the Complaint, together with a supporting Brief and attachments (Motion), alleging that the Secretary failed to issue and serve upon Respondent the citation in this matter, within six months following the occurrence of any violation, in accord with Section 9(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (Act). Respondent noted that the Motion was filed in lieu of an Answer. See Commission Rules of Procedure 34(b) and 40(b)¹. The Secretary filed a Response in Opposition (Opposition) on February 18, 2014, and a Sur-Reply (Sur-Reply) on March 7, 2014. Respondent filed a Reply to the Secretary's Opposition on February 21, 2014 (Reply). The parties filed Stipulations of Fact on March 7, 2014 (Stipulations).

¹ 29 C.F.R. 2200.34(b) and 2200.40(b). See Occupational Safety and Health Review Commission's Rules of Procedure, 29 C.F.R. § 2200.00, *et seq.*

Respondent's Motion to dismiss is denied. It is undisputed that the citation was dated, signed, and mailed by certified mail to Respondent, on November 18, 2013. It is undisputed that November 18, 2013 is prior to the end date of the six month period following the alleged violation occurrence in this case. Therefore, the citation was timely issued in accordance with Section 9(c) of the Act.

Background

Attached to the Complaint, as Exhibit A, are the citation and notification of penalty issued in this case; a one item serious citation, with two subparts, alleging violations of the excavation construction standards². The total proposed penalty is \$6,930.00. The citation sets forth the inspection dates, as May 21, 2013 through November 13, 2013, and the citation issuance date as November 18, 2013.

Respondent's notice of contest is attached to the Complaint as Exhibit B. In the notice of contest, Respondent admits that OSHA issued the citation on November 18, 2013. Respondent alleges, however, that "this citation was not timely served upon [Respondent] within the statutory statute of limitations period . . . until November 25, 2013." Respondent further contested and denied all alleged violations, proposed penalties, and abatement actions and dates set forth in the citation. Respondent plead and preserved affirmative defenses.

Respondent's Motion to dismiss states that the OSHA inspector only was present at Respondent's worksite on May 21, 2013. Therefore, the six month period for issuing the citation began to run on May 21, 2013 and ended on November 21, 2013. Respondent received the certified mail delivery of the citation and notification of penalty on November 25, 2013.

² Citation item 1(a) alleges a violation of standard 1926.652(a)(1), at the inspection site, on or about May 21, 2013 and times prior thereto, as Respondent's employees were performing work in an excavation at depths ranging from 6.0 feet to 7.3 feet; which excavation consisted of near vertical walls and Type B soil, and that a means or method of excavation cave-in protection was not utilized. Citation item 1(b) alleges a violation of standard 1926.21(b)(2), at the inspection site, on or about May 21, 2013 and times prior thereto, as Respondent's employees, working in the cited excavation, did not receive workplace specific trenching and excavation training.

See Stipulations; USPS tracking form attached to Respondent's Motion. As Respondent's "receipt" of the citation was after November 21, 2013 Respondent contends that the citation was not "issued" before the expiration of six months following the alleged violation occurrence. Respondent argues that this interpretation of the Act's six month issuance requirement is consistent with OSHA's Field Operations Manual (FOM), the Act's legislative history, and procedures under other statutes and court rules, including the Commission Rules of Procedure regarding EAJA applications. Accordingly, Respondent contends that the citation should be vacated and the Complaint dismissed.

The Secretary opposes Respondent's Motion. The Secretary agrees that the alleged violations occurred on May 21, 2013. The citation was dated, signed, and mailed by certified mail to Respondent on November 18, 2013. See Stipulations; citation. Therefore, when the OSHA Area Office mailed the citation by certified mail to Respondent on November 18, 2013, the citation was timely "issued" within the six month limitations period set forth in Section 9(c) of the Act. The Secretary's position is that a citation is issued on the date when it is sent to an employer by certified mail and not on the date when an employer actually receives the citation. The Secretary contends that this position is supported by the clear language of the Act and is consistent with Commission case law.

Discussion

The relevant facts are not disputed. The parties agree that the worksite violations alleged in the citation occurred on May 21, 2013. The parties agree that the six month period for issuing the citation, set forth in Section 9(c) of the Act, began to run on May 21, 2013 and ended on November 21, 2013. The issuance date set forth on the citation is November 18, 2013. The parties stipulated that the Area Director of the OSHA Erie Area Office signed the citation and notification of proposed penalty on November 18, 2013, and that the OSHA Erie Area Office mailed the citation and notification of proposed penalty to Respondent, by certified mail, on November 18, 2013. The parties further stipulated that Respondent received the citation and notification of penalty on November 25, 2013.

The parties dispute whether “issuance” of a citation within six months following occurrence of any violation, is complete upon the act of mailing the citation by certified mail to Respondent or whether “issuance” requires actual receipt of the citation by Respondent.

Section 9(c) of the Act sets forth a limitation period for issuing citations³. “No citation may be issued under this section after the expiration of six months following the occurrence of any violation.” (Emphasis supplied).

The verb “issue” is used several times in the Act to describe actions required by the Secretary. The language of the Act is clear. The language in Section 9 of the Act, describing the six month limitations period, does not define “issued” as requiring the actual “receipt” of the citation by the employer. In contrast, other sections of the Act specifically define a statutory limitations period as dependent upon employer “receipt.” The Act clearly states when “receipt” is the triggering event for the time period calculation.⁴

In Section 9(c), the absence of a stated requirement that an employer actually receive the citation before the end of the six month limitations period, reveals that the six month statutory limitations period is not be defined or calculated by the date of an employer’s receipt of the citation, but rather by the date of the agency action “issuing” the citation. In this case, the OSHA Erie Area Office issued the citation through its actions of dating, signing, and mailing the citation, by certified mail, to Respondent on November 18, 2013.

³ Section 9(c) is a statute of limitations. See AKM LLC dba Volks Constructors v. Secretary of Labor, 675 F.3d 752, 755 (D.C. Cir. 2012); General Dynamics, 15 BNA OSHC 2122, 2127, n.10 (No. 87-1195, 1993).

⁴ For example, Section 10(a) of the Act sets forth the time period within which an employer may file a notice of contest, as follows:

[T]he employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty (Emphasis supplied).

Similarly, Section 10(b) of the Act sets forth the time period for an employer to file a notice of contest regarding a failure to abate citation, as “within fifteen working days from the receipt of the notification issued by the Secretary.” (Emphasis supplied).

Respondent argues that the legislative history of the Act reveals that the six month limitation period set forth in Section 9(c) was intended to put a firm deadline on when an employer “receives” notice of any violations. Motion at 5-6. The cited legislative history does not support Respondent’s contention. The Act’s legislative history reflects the Congressional intent that the Secretary issue citations to an employer with “reasonable promptness,” setting a limitation period that no citation issue “after the expiration of six months following the occurrence of any violation.” In this case, the undisputed actions of the OSHA Erie Area Office in dating, signing, and mailing the citation to Respondent, on November 18, 2013, accord with the plain language of the Act and Congressional intent.

Prior administrative law judge decisions support the conclusion that a citation is timely issued by the Secretary upon mailing. See Valcourt Building Services of Georgia, LLC, 2013 WL 5178022*3-4 (No. 12-0921, 2013)(Citation mailed to Respondent within the six-month limitation period was timely issued); Wean United, Inc., 7 BNA OSHC 2086, 2087-2088 (No. 77-4350, 1979)(Citations were issued outside prescribed six month statutory period as they were “mailed” by the Secretary more than six months after the alleged violations occurred).

OSHA’s Field Operations Manual (FOM) provides that “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.” OSHA Directive number: CPL 02-00-150, eff. date: April 22, 2011, (FOM) at Section XI (A), p. 5-13. The FOM is not binding on OSHA or the Commission and does not create substantive rights for employers. See FOM Disclaimer; Hackensack Steel Corp., 20 BNA OSHC 1387, 1393 (No. 97-0755, 2003). In the instant case, the actions of the OSHA Erie Area Office regarding issuance of the citation are consistent with the guidance set forth in the FOM, as the citation was signed, dated and served by certified mail prior to the end of the six month limitations period. Respondent’s contention that Section 9(c) of the Act requires that an employer actually “receive” a citation within the six months limitation period is not supported by the plain language of the FOM.

Respondent cites several state and federal procedural rules which specifically provide that service by certified mail is complete upon delivery. The state and federal procedural rules cited by Respondent are inapplicable to the Act's requirement that the Secretary issue a citation within six months of the violation occurrence⁵. The state and federal procedural rules cited by Respondent are not persuasive.

As noted by the Secretary, the Act does not require the Secretary to serve the citation by certified mail. Rather, the Act requires the Secretary to issue the citations before the expiration of six months following the alleged violation occurrence and, as set forth in Section 10(a), "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" It is the proposed penalty notification that the Act states shall be by certified mail.

Decision

For the reasons stated above, Respondent's Motion to dismiss is denied. It is undisputed that the citation was dated, signed, and mailed by certified mail to Respondent, on November 18, 2013. It is undisputed that November 18, 2013 is prior to the end date of the six month period following the alleged violation occurrence in this case. Therefore, the citation was timely issued in accordance with Section 9(c) of the Act.

⁵The Commission's Procedural Rules provide that service or filing are *effected at the time of mailing*. See Commission Rules 7(c) and 8(e)(1); 29 C.F.R. § 2200.7(c), 29 C.F.R. § 8(e)(1). *Exception* to the standard rule regarding the effective date of service or filing – upon mailing – is specifically stated, such as in Rules 301 and 302(a) regarding the filing of an EAJA Application with the Commission. See 29 C.F.R. § 2204.301, 29 C.F.R. § 2204.302(a).

Where a Complaint amendment operates as a citation, the Commission has found filing effected upon mailing. In *Bland Construction Co*, 15 BNA OSHC 1031, 1044-1048, n.10 & 13 (No. 87-992, 1991), one question presented was whether the Secretary's Complaint amendment, to add a second citation item, was proper and issued with reasonable promptness. In that case, the Secretary mailed the amended Complaint to Respondent "only one day short of six months after the compliance officer's inspection." *Id.* at 1046. The Commission noted that the amended Complaint, having been filed within the statutory limitations period, operated as a citation. *Id.* at 1048 n.13. Further, pursuant to Commission Rule 8(d) filing was effected at the time of mailing. *Id.* at 1044 n.10. The Commission affirmed the judge's decision allowing the Secretary's amendment and holding that the citation was issued with reasonable promptness.

A separate Simplified Proceedings Notice and Scheduling Order will issue for the orderly continuation of this case pursuant to the Commission's Rules for simplified proceedings.

SO ORDERED.

Dated: April 24, 2014
Washington, D.C.

/s/ Carol A. Baumerich

Honorable Carol A. Baumerich
Judge, OSHRC