

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,

Complainant,

v.

BAKER SUPPORT SERVICES, INC.,

Respondent.

OSHRC Docket No. 99-1095

DECISION

Before: ROGERS, Chairman, VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

The issue before us is whether relief from a final order should be granted to Baker Support Services, Inc. (“Baker”). The final order resulted from Baker’s failure to file a notice of contest (“NOC”) within fifteen working days after it received a citation and notice of proposed penalty from the Secretary of Labor’s Occupational Safety and Health Administration (“OSHA”). Section 10(a) of the Occupational Safety and Health Act (“the Act”), 29 U.S.C. § 659(a),¹ provides that a citation and proposed penalty are deemed a final

¹Section 10(a) states:

If, after an inspection or investigation, the Secretary issues a citation under section 9(a) of this Act, he shall, within a reasonable time after the
(continued...)

order of the Commission if the cited employer fails to notify the Secretary within that 15-day period that it intends to contest them. For the reasons that follow, we affirm Judge Robert Yetman's decision and conclude that relief is not warranted.

BACKGROUND

Baker has a contract with the Navy to operate and maintain equipment at the Navy Radio Transmitter Facility ("NRTF") at Barrigada, Guam. On January 22, 1999, at that worksite, Baker received from OSHA a citation and notice of proposed penalties for numerous violations observed there during a safety inspection in October 1998.² Baker's site manager at the time, Lewis Linville, signed for that certified mail citation, which was addressed to Baker's post office box address in Barrigada. Baker contested the citation within fifteen working days, and that case since has been settled by the parties. *Baker Support Services, Inc.*, Docket No. 99-342 (January 6, 2000).

The citation at issue here was sent by OSHA to the same worksite by certified mail on March 12, 1999. It alleged one serious violation, based on a health inspection at that

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termination of such inspection or investigation, *notify the employer by certified mail* of the penalty, if any, proposed to be assessed under section 17 of this Act and that the 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, and no notice is filed by any employee or representative of employees under subsection (c) of this section within such time, *the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.*

(Emphasis added.)

²Specifically, the January 11 citation alleged seven serious violations pertaining to exits, first aid equipment and training, and electrical circuits, and it proposed penalties totaling \$12,750.

worksite in late January and early February 1999.³ Baker filed an NOC to that citation on June 11, 1999, after it received OSHA's penalty collection notice dated May 18, which was also sent to Baker's post office box address in Guam. Baker does not dispute that it submitted its NOC more than fifteen working days after its representatives at the Guam worksite received that citation.⁴

Baker avers that OSHA's area director informed its counsel that he considered the NOC untimely. On June 16, 1999, Baker's counsel filed with the Commission a petition to accept its NOC. It asserted, among other things, that OSHA had disregarded "clear instructions" from Baker, prior to issuing the March 12 citation, regarding the individual whom Baker had designated to receive OSHA's communications. Thus, it argued, its receipt on May 24, 1999, of OSHA's May 18 collection letter should be deemed the date it received notice of the citation.

As justification for its late NOC, Baker relies on contact instructions it gave in the context of the January citation. In its February 1, 1999, letter and NOC sent to OSHA regarding that citation, Baker's Director of Contracts, Glen V. Murphy, requested that discussions regarding that citation be directed to him at Baker's office in Dallas, Texas. The letter states:

In response to the Citation . . . issued on 11 January 1999 and received by Baker on 22 January 1999, Baker Support Services, Inc. hereby requests an

³Specifically, this citation alleged that Baker had failed to make the initial determination required by OSHA's lead standard, 29 C.F.R. § 1910.1025(d)(2), as to whether its lead soldering operations at that worksite may expose an employee to lead at or above the action level. The proposed penalty was \$2000.

⁴Although the return receipt for the certified mail is not in the record, the Secretary avers that it shows that Linville signed for the March 12 citation on March 19. The Secretary's averment regarding the timing is consistent with the date of Linville's April 9, 1999, response to OSHA in the form of a letter in which Linville identified himself as Baker's site manager, and stated that the violation alleged in the March 12 citation was abated on April 8. He enclosed the relevant monitoring results.

Informal Conference. Our Site Manager, Louis [sic] Linville[,] at Barrigada, Guam, will handle the Informal Conference. . . .

If no formal [sic] conference is set or agreed upon within the allowable response time, Baker Support Services, Inc. hereby contests each and every charge filed.

If you need additional information or wish do [sic] discuss any matters, please call at [telephone number]. If I am unavailable, please contact Ms. Cheryl Turner, Human Relations Manager, at [telephone number].

(Emphasis added.) Linville signed the employer's return post card to OSHA certifying that the NOC to that prior citation had been posted and served on affected employees.

An informal conference was held in that case on February 10, 1999, but the Secretary and Baker were unable to settle the issues at that time. On that date, Baker again informed the Secretary that it wished to contest the January 11 citation. This letter was signed by Project Manager Charles A. Crews at NRTF Lualualei, Waianae, Hawaii. It advised the Secretary that Baker's "point of contact in this matter" would be Murphy, and that Murphy "will make the necessary arrangements to formalize our position in this matter."

JUDGE'S DECISION

Administrative Law Judge Robert Yetman denied Baker's petition to accept its late-filed NOC citation as timely. He noted that Baker had been able to timely contest the prior citation, which had been addressed to and served at the Guam worksite two months earlier. The judge specifically found that the Secretary "had no reason to believe that the prior citation was improperly served in view of the fact that Respondent exercised its right to contest that citation." The judge also concluded that "the generalized language contained in Respondent's letter contesting the first citation inviting the Secretary to contact a corporate office in Dallas, Texas, to 'discuss any matters' cannot be stretched to place the Secretary on notice that all citations should be forwarded to corporate headquarters." He held that the failure of a company employee to bring a citation to the attention of a responsible company

official does not warrant relief from the consequences of an untimely notice of contest, where the service of the citation otherwise is adequate.

DISCUSSION

Under long-standing Commission precedent, a citation is properly served where “the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest.” *B. J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474, 1979 CCH OSHD ¶ 23,675, pp. 28,707-08 (No. 76-2165, 1979). We find that the service of the March 12 citation meets that test.⁵

As the judge found, some two months earlier OSHA had served another citation at the same worksite, by the same means -- certified mail -- as specified in section 10(a) of the Act, and Baker had timely contested that citation. Thus, absent special circumstances the March 12 citation would be considered reasonably calculated to provide the required notice and opportunity to contest.

Baker argues that in issuing the March 12 citation OSHA disregarded its “clear instructions” that it wanted Murphy in its corporate office in Dallas, Texas, to receive OSHA’s communications. We agree with the judge, however, that the requests on which Baker relies did not notify OSHA that it should send any future citation to the Dallas office. Baker’s letter did not even trigger a duty on OSHA’s part to inquire whether any new citation

⁵Baker relies on the Third Circuit’s holding that a certified mail notice of proposed penalty issued to a corporation must be sent to the corporate headquarters. *Buckley & Co. v. Secy. of Labor*, 507 F.2d 78, 81 (3d Cir. 1975). See also *Capital City Excavating Co. v. OSHRC*, 679 F.2d 105, 110 (6th Cir. 1982). *Buckley* also held that the notice must “be given to one who has the authority to disburse corporate funds to abate the alleged violation, pay the penalty, or contest the citation or proposed penalty.” 507 F.2d at 81.

In *B. J. Hughes*, the Commission declined to follow the approach in *Buckley*, and applied instead the more flexible test mentioned above -- whether service in a particular case was “reasonably calculated” to give proper notice to the cited employer.

should be directed to corporate headquarters in Dallas rather than to the worksite in Guam.

As noted above, the “instructions” which Baker relies on are set forth in its two contest letters pertaining to the January citation. The first letter states that either Murphy or Baker’s Human Relations Manager in Dallas would be the point of contact for additional information or discussion of “any matters.” The second letter repeats that Murphy is the contact person but refers only to “this matter,” *i.e.*, the contest of the prior citation. Reading these two letters together, and particularly considering that the second letter was written by a manager at a different office, not the Dallas office, we agree with the judge that Baker merely notified OSHA as to how the *January citation* should be handled *after* the notice of contest had been filed. We do not believe that either letter notified OSHA that Baker was making any requests with respect to future citations. Nor did they trigger a duty on OSHA’s part to inquire of Baker whether its previously successful citation service method on Guam should be changed. Baker has not established that the service of the March 12 citation was inadequate, or that relief from the final order in this case is warranted.⁶

Accordingly, we affirm the judge’s finding that Baker is not entitled to relief from the final order resulting from its untimely filing of a NOC in this case.⁷

⁶Baker argues that the Commission also should excuse its late-filed NOC under Federal Rule of Civil Procedure 60(b), which authorizes discretionary relief from a final order in certain circumstances. However, Baker does not point to circumstances other than OSHA’s failure to serve the citation on the Dallas office as grounds for such relief. We have found no fault with OSHA’s method of service. In any event, as noted above (n. 4), the citation came to the attention of Linville soon after its issuance. Baker has the burden of establishing grounds for granting it Rule 60(b) relief. *E.g.*, *Craig Mechanical Inc.*, 16 BNA OSHC 1763, 1993-95 CCH OSHD ¶ 30,442 (No. 92-372, 1994), *aff’d without opinion*, 55 F.3d 633 (5th Cir. 1995). It has not averred sufficient grounds here.

⁷Commissioner Weisberg notes initially his strong disagreement with the position suggested by the Secretary in her brief that the Secretary may with impunity disregard a letter from a company requesting that OSHA mail the citation to a specific individual or to a specific location. In his view, the “reasonably calculated” standard for proper notice followed by the Commission in *B.J. Hughes* would require, in appropriate circumstances, that the Secretary comply with such reasonable requests. Because Commissioner Weisberg concludes that such

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a request was not made here, he finds it unnecessary to address more precisely the circumstances in which the Secretary must serve a citation in the manner requested by an employer.

In response to his dissenting colleague, Commissioner Weisberg relies upon the longstanding Commission precedent in *B.J. Hughes* that service is proper so long as "reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest." Applying that test, he concludes, given that only two months earlier the Secretary had issued a citation to Baker at its Guam worksite and the company had timely contested it, that the Secretary's service of the March 12, 1999 citation to Baker at its Guam worksite was reasonably calculated to give notice and thus was proper.

Commissioner Weisberg believes that Baker's February 1 letter to OSHA cannot be read as a directive that all future citations be sent to corporate headquarters in Dallas. To view it otherwise would be a stretch of such magnitude that it would pose a challenge to Plastic Man of comic book fame. As Judge Yetman held: "[T]he generalized language contained in [Baker's February 1] letter contesting the first citation inviting the Secretary to contact a corporate office in Dallas, Texas, to 'discuss any matters' cannot be stretched to place the Secretary on notice that all citations should be forwarded to corporate headquarters." Nor does Commissioner Weisberg believe that the generalized language contained in this letter even registers a blip on the radar screen so that the Secretary reasonably should have inquired whether the March citation should be mailed to corporate headquarters rather than to the worksite in Guam where the earlier citation had been sent and been timely contested by the company.

In response to Commissioner Visscher's argument that Baker's February 1 and 10 letters clearly put the Secretary on notice that "citation matters were being handled from Baker's corporate office, rather than its Guam worksite," Commissioner Weisberg notes that the February 1 letter informed OSHA that Lewis Linville, the Guam site manager, would be handling the informal conference with OSHA. He further notes that the February 10 letter was written by Charles Crews, the project manager from Baker's office in Hawaii. Commissioner Weisberg also takes issue with his dissenting colleague's contention that even though Baker's February 1 and 10 letters only make direct reference to the January citations, nevertheless, since these letters were received by OSHA's regional office in San Francisco at the time the inspection resulting in the March citation was taking place in Guam, this constituted sufficient notice to require the Secretary to inquire where the March citation should be sent. Commissioner Weisberg notes that neither letter makes reference to or even alludes to "any ongoing inspection in Guam." There is no evidence that even suggests that Baker's corporate headquarters in Dallas, Texas was then aware of the January 29-February

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12 inspection being conducted by OSHA in Guam.

Commissioner Weisberg notes that his dissenting colleague's position in the instant case appears at odds with his colleague's decision in *NYNEX*, 18 BNA OSHC 1967, 1999 CCH OSHD ¶ 31,942 (No. 95-1671, 1999) (Visscher, Commissioner, concurring), where the Commission declined to grant relief under Rule 60(b). In his concurring opinion in *NYNEX*, Commissioner Visscher states that "the company had specifically requested service on a named individual." 18 BNA OSHC at 1972, 1999 CCH OSHD at p. 47,409. Despite this instruction, OSHA mailed the citation to *NYNEX* at its Braintree office, *but neglected to address it to the requested management official*. As a direct result of OSHA's failure to address the citation as requested, the citation was misdirected to *NYNEX*'s New York City branch office where it apparently languished. It was only during the course of its follow-up procedures when the subject of the citation was raised by OSHA during a telephone conversation with *NYNEX*'s representative at Braintree that the company first became aware of the citation. Shortly thereafter, *NYNEX* filed a notice of contest. Although Commissioner Visscher noted in *NYNEX* that OSHA's failure to serve the citation as requested by the company "would not ordinarily be sufficient" he denied relief to *NYNEX* simply because it was a *NYNEX* employee who "appears" to have incorrectly forwarded the mis-addressed letter to the company's New York City branch office. The Commission denied 60(b) relief on the ground that the company had failed to provide evidence as to its procedures for handling important documents in its New York City branch office, the location to which the citation was incorrectly forwarded *solely* as a result of OSHA's failure to address the citation *in the manner specifically requested by the company*.

In the case before us, Commissioner Visscher also argues that Baker timely filed its notice of contest, based upon its receipt of a penalty collection letter from OSHA on May 24 which he treats as a notification of citation. In support thereof, Commissioner Visscher cites *NYNEX* for the holding that the triggering date for the notice of contest period was deemed to be the date the citation was received by the company's New York City office, rather than the Braintree office where it was first mailed. Commissioner Weisberg notes that in *NYNEX* the citation OSHA sent by certified mail was never signed for at Braintree, but was forwarded by the Post Office to *NYNEX*'s New York branch office where it was signed for by a clerical employee. Here, it appears that the March 12 citation that was sent by certified mail was signed for by Lewis Linville, the company's Guam site manager. Commissioner Visscher does not advance any reason why service of the citation was not effected when it was received and signed for by Linville in Guam. As in *NYNEX*, Baker similarly has failed to provide evidence as to its procedures for handling important documents at its Guam site. Finally, Commissioner Weisberg also notes that the penalty collection letter which Commissioner Visscher would rely on to trigger commencement of the notice of contest

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/s/

Thomasina V. Rogers
Chairman

/s/

Stuart E. Weisberg
Commissioner

Dated: June 30, 2000

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period, was mailed to the same Guam address as the citation and was responded to by Baker within 15 days.

Commissioner Visscher attempts to explain his inconsistent treatment of these two cases by arguing that NYNEX failed to file a notice of contest within 15 working days of receipt by the New York City branch office whereas Baker did respond within 15 days of receiving the citation at its Dallas office. Commissioner Weisberg notes that in both cases it can be argued that the appropriate company officials first received notice of the citation as a result of OSHA's follow-up procedures, i.e. the OSHA compliance officer's telephone call to Braintree in NYNEX and the penalty collection letter in *Baker*. In both cases the notice of contest was filed within 15 days of that notice. He notes that his dissenting colleague considers service of the citation effected when it was received and signed for by a clerical employee in NYNEX's New York office but not when it was received and signed for by Baker's site manager in Guam, ostensibly because in NYNEX "the company had the Postal Service forward it to a NYNEX office in New York City." Notwithstanding the "lack of clarity" in NYNEX as to whom the part-time, substitute mail carrier delivering the citation spoke to at the Braintree office and the circumstances under which the citation came to be forwarded by the Post Office to NYNEX's New York City office, Commissioner Weisberg notes that the point is that in NYNEX the company had specifically requested service on a named individual but OSHA neglected to address it to the requested management official and as a result it was misdirected to NYNEX's New York City office. This would not have occurred *but for* OSHA's neglect and failure. In *Baker* there was no such request that the citation be mailed to a specific individual or to a specific location.

VISSCHER, Commissioner, dissenting:

The Guam worksite of Baker Support Services, Inc. ("Baker") was the subject of two concurrent OSHA enforcement actions. Baker was first inspected in October, 1998, but did not receive a citation from the inspection until January 22, 1999. While the 15-day period for contesting that multi-item citation was running, Baker was again inspected and was issued the citation in this case on March 12.

The citation from the October, 1998 inspection was sent to a post office box in Barrigada, Guam. Thereafter, Baker sent two letters to OSHA's Area Office in San Francisco, dated February 1 and February 10, each indicating that Baker was contesting the citation items and penalty amounts. The February 1 letter, from Glen Murphy, Director of Contracts at the company's Dallas, Texas headquarters, stated that "[i]f you need additional information or wish to discuss any matters, please call [the number given is that of Mr. Murphy in Dallas]. If I am unavailable, please contact [Baker's Human Resources Manager, also in Dallas]." The February 10 letter was from Charles Crews, Project Manager, in Waianae, Hawaii, and similarly stated that "BSSI point of contact in this matter will be Mr. Glen Murphy, Director of Contracts, in our Corporate Office located in Dallas, Texas . . . Mr. Murphy will make the necessary arrangements to formalize our position in this matter."

Despite these letters, which were both received by OSHA while the second inspection was taking place, the citation from the second inspection was not sent to Baker's office in Dallas, Texas, but was presumably sent to the same post office box in Guam. It is not clear from the very limited record what happened to this citation.¹ Baker avers, however, that its corporate office knew nothing about the second citation until it received a notice of payment due on May 24.

The Secretary claims that service of a citation on a local worksite, including, as here, the post office box for that worksite, is always permitted. As the majority opinion notes, the

¹The Secretary avers that Baker's Guam employee, Linville, signed the certified mail receipt for the March 12 citation. Linville sent a letter to OSHA on April 9 stating that the alleged violation (for failure to determine whether or not employees had been exposed to lead at or above the action level) had been abated. We do not know why Linville, who forwarded the earlier citation, sent only the letter on abatement regarding the March citation, but did not otherwise respond to it. There have been no evidentiary hearings in this case, although Baker requested such a hearing before the judge.

only two courts of appeals that have considered this question have sharply disagreed with the Secretary's position. *See Buckley & Co. v. Secretary of Labor*, 507 F.2d 78, 81 (3d Cir. 1975) ("notification must be given to one who has the authority to disburse corporate funds to abate the alleged violation, pay the penalty, or contest the citation or proposed penalty [meaning] at the very least, a notice to the officials at the corporate headquarters, not the employee in charge at the particular worksite"); *Capital City Excavating Co. v. Donovan*, 679 F.2d 105, 110 n.4 (6th Cir. 1980) ("a notification to a corporate employer must be sent to corporate headquarters unless the employer has directed that it be sent to a different address").

Nor, in my view, do the Commission's cases support the Secretary's claim. The Commission has gone further than the two courts of appeals cited above in allowing service of the citation on a local worksite. *See B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474, 1979 CCH OSHD ¶ 23,675, p. 28,707-08 (No. 76-2165, 1979) ("we accept as valid, service upon an employee at a local worksite who will know to whom the documents should be forwarded"). In *B.J. Hughes*, the Commission decided "that the test to be applied in determining whether service is proper is whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest." *Id.* It follows that the Secretary may not simply assume that sending a citation to a local worksite, or a post office box for a local worksite, is sufficient. Rather, the Secretary must take reasonable steps, in light of any contrary information she may have, to determine if service on a local office will in fact provide the employer with knowledge of the citation.

In this case, the January citation had been sent to the Guam post office box, after which a timely contest was filed. Without an indication to the contrary, the Secretary could properly have assumed that the subsequent citation would also get to a proper official within the company if sent to the Guam post office box. But both of the letters Baker sent to OSHA in early February specifically informed the Secretary that the company was handling the January citations from its corporate headquarters in Dallas. The majority believes that these

letters should have no bearing on the Secretary's decision as to where to send the March citation, since the letters only made specific reference to the January citations. Baker's February 1 letter, however, asks the Secretary to contact the corporate office regarding "any matters." Furthermore, even if the letters only make direct reference to the January citations, they certainly put the Secretary on notice that citation matters were being handled from Baker's corporate office, rather than its Guam worksite. And the fact that the letters were received by OSHA at the very time the inspection resulting in the March citation was taking place was sufficient notice to the Secretary, in my view, to have required that she at least inquire as to where the March citation should be sent.

While I would agree that this is a close case, I note that Baker does not argue that it did not get notice of the citation. Baker simply argues that it did not get notice until May 24, at which time it filed a timely notice of contest. I agree, and would find that Baker timely filed its notice of contest, based upon receipt of the citation on May 24. *See NYNEX*, 18 BNA OSHC 1967, 1969, 1999 CCH OSHD ¶31,942, p. 47,406-07 (No. 95-1671, 1999)(triggering date for notice of contest period deemed to be date the citation was first received by New York City office, rather than Braintree office where it was first sent).² To agree that Baker did not get notice until May 24 is not to say that the citation should be vacated, nor would the Secretary in any way be penalized or prejudiced by such a decision. It simply allows

²In arguing against relief for Baker, Commissioner Weisberg claims that my position for granting relief to Baker in this case is inconsistent with the position I took in *NYNEX*, a case in which I filed a separate opinion concurring with the decision to deny relief. 18 BNA OSHC at 1971, 1999 CCH OSHD ¶31,942, p. 47,409. For all his effort, my colleague has missed the point of *NYNEX*. In that case, the Secretary sent the citation to a local NYNEX office, where the company then had the Postal Service forward it to a NYNEX office in New York City. The Commission considered service of the citation effected when it was received by the New York City office -- where the company had directed that the citation be sent. Unlike Baker, though, NYNEX then failed to file a notice of contest within 15 working days of receipt by the New York City office, and the Commission found no "excusable neglect" for failing to do so. Here, however, Baker *did* respond within 15 working days of receiving the citation at its Dallas office.

Baker the opportunity to defend itself on the merits of the citation. I see no reason to deny Baker that opportunity here.

/s/

Gary L. Visscher
Commissioner

Date: June 30, 2000