



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
U.S. Custom House
721 19th Street, Room 407
Denver, Colorado 80202-2517

Phone: (303) 844-2282

Fax: (303) 844-3759

SECRETARY OF LABOR,
Complainant,

v.

EARTH DEVELOPERS, INC.,
Respondent.

OSHRC Docket No.: 17-1120

Appearances:

Summer Silversmith, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado
For Complainant

Shaun Schipper, Fargo, North Dakota
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER GRANTING MOTION TO DISMISS CITATION

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“Complainant”) conducted an inspection of an Earth Developers, Inc. (“Respondent”) worksite in Valley City, North Dakota on October 6, 2016. As a result of the inspection, OSHA issued a Citation and Notification of Penalty (“Citation”) to Respondent alleging three serious violations of the Act with a total proposed penalty of \$5,976.00. The timeliness of OSHA’s issuance and service of the Citation upon the Respondent is at issue and discussed below.

Procedural History

On September 25, 2017, Respondent filed a *Motion to Dismiss Citation* (“Motion”) in which it argues that the Citation should be dismissed because (1) the Citation was not issued with “reasonable promptness” within the six month statute of limitations under 29 U.S.C. § 658(a) and (c); and (2) Respondent was not notified within a reasonable time after the inspection under 29 U.S.C. § 659(a). In response, Complainant filed the *Secretary’s Opposition to EDI’s Motion to Dismiss* (“Response”). In its Response, Complainant contends that the Citations were timely issued and requests that Respondent’s *Motion* be denied.

Timeline of Events

1. On October 6, 2016, Compliance Safety and Health Officer (CSHO), Joshua Lynn, conducted an inspection at Respondent’s worksite in Valley City, North Dakota. *See* Declaration of Joshua Lynn (Lynn Decl.), ¶ 2; Motion ¶ 2.
2. On March 15, 2017, OSHA generated a Citation, which was signed by the local OSHA Area Director, and prepared for mailing by Kari Thorsteinson, an assistant in the Bismarck, North Dakota Area OSHA Office. *See* Declaration of Kari Thorsteinson (Thorsteinson Decl.), ¶2.
3. Respondent did not receive the Citation until June 8, 2017, *eight months after* the inspection date. *See* Thorsteinson Decl., ¶ 6; Motion ¶ 3.
4. Complainant contends that the original Citation was placed in the U.S. mail, via certified mail, directed to Respondent at the correct address, on March 15, 2017. *See* Thorsteinson Decl. ¶ 2–3.
5. More than two months later, on or about May 22, 2017, CSHO Lynn was

reviewing his list of assigned cases and noticed that there was no reply from Respondent regarding the Citation. *See* Lynn Decl. ¶ 10.

6. CSHO Lynn then followed up with Ms. Thorsteinson, after which it was discovered that OSHA never received confirmation that the Citation was actually delivered to the Respondent. *See* Lynn Decl. ¶ 10, 12.

7. In fact, OSHA's review of the USPS tracking information for the alleged March 15, 2017 mailing, revealed no transaction history at all, not even a record that OSHA deposited the Citation in the mail to begin with. *See* Complainant's Response, at Exhibit 6.

8. Therefore, on May 24, 2017, approximately 7 ½ months after the OSHA inspection was conducted, a new Citation was generated, signed, and sent to Respondent via certified mail. *See* Thorsteinson Decl. ¶ 6.

9. This second generated Citation was delivered to Respondent without issue on June 8, 2017, more than eight months after the OSHA inspection. *See* Complainant's Response, at Exhibit H.

10. CSHO Lynn conducted a telephonic closing conference with Respondent back on March 15, 2017, and implies that he discussed the issuance of the Citation, but the Court notes that CSHO Lynn's declaration does not specifically state he notified Respondent of the Citation it would be receiving. Instead, CSHO Lynn's declaration simply states that his "standard practice in closing conferences is as follows: I always inform the employer of the citations they are being issued, discuss actions they need to take as far as abatement verification and penalty payment, and explain their three options: informal settlement conference, contest, or acceptance." *See* Lynn Decl. ¶8.

11. In contradiction to CSHO Lynn’s stated closing conference routine practices, Respondent’s June 14, 2017 Notice of Contest (after receiving the second generated Citation) reads: “I did not expect to be fined for anything as it has been well over 7 months since we were inspected and I have never received anything.”

12. There is no evidence in the record that Respondent was notified of the first purported mailing on March 15, 2017, or that somehow refused delivery or otherwise avoided service.

13. OSHA characterized the mishap concerning the missing March 15, 2017 Citation as “Original Citations Lost in the Mail” even though USPS tracking records do not show the first Citation ever being deposited in the mail. *See* Complainant’s Response, at Exhibits A, E & G.

14. Although the March 15, 2017 Citation was never delivered to Respondent, and possibly never even placed in the US mail system, Complainant communicated to Respondent that “OSHA accepted your notice of contest of the citation even though it was arguably late.” [as it was not received within 15 working days of the original failed mailing]. *See* Respondent’s Motion, Exhibit 1 (June 27, 2017 e-mail from Tim Williams), p. 3.

Discussion

Section 9(c) of the Act states, “No citation may be issued under this section after the expiration of six months following the occurrence of any violation.” 29 U.S.C. § 658(c). Section 10(a) states, “If, after an inspection or investigation, the Secretary issues a citation under section 9(a), he shall, 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 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.” 29 U.S.C. § 659(a). Most of the issues arising on the Court’s docket under these two statutory provisions concern the timeliness of the *employer’s* notice of contest, not the timeliness of the Complainant’s service of the Citation.

Citing numerous ALJ decisions, Complainant contends that its only requirement is that it “issue” the Citation. Complainant argues that its duties are complete once it prints, signs, and mails the Citation. *See* Complainant’s Response, p. 5 *citing, e.g., Brower Dental Health, PC*, 26 BNA OSHC 1480 (O.S.H.R.C.A.L.J. Dec. 22, 2016); *Valcourt Bldg. Servs. of Georgia, LLC*, 24 BNA OSHC 1872 (O.S.H.R.C.A.L.J. Aug. 5, 2013); *Excel Contractors, Inc.*, Docket No. 16-0633 (July 13, 2016), Slip Op. at 2; *Francis J. Palo, Inc.*, Docket No. 13-2150 (April 24, 2014). Here, there is no evidence that the Citation was actually placed in the mail on March 15, 2017. A follow-up of USPS records revealed to Complainant that there was no record of the USPS initially receiving the certified mail package. Therefore, the Court is not persuaded that, even accepting Complainant’s argument concerning its limited responsibility, that it met its obligation to “issue” the Citation within the six month statute of limitations.

It seems clear to the Court that Section 10 imposes duties on both the Secretary of Labor and cited employers. First, there is a duty by the Secretary to notify the employer by certified mail of the Citation within a “reasonable time.” 29 U.S.C. § 659(a). Then, upon receipt of the notification, the employer has a duty to submit a Notice of Contest within 15 working days if it wishes to contest the Citation. 29 U.S.C. § 659(a). After the expiration of this 15 day period, if an employer has not contested a Citation, the violations automatically become final orders of the Commission and are not subject to review by any court or agency. 29 U.S.C. § 659(a). These

respective time restrictions are two sides of the same coin aiming to further the purpose of the Act of protecting workers' safety and health. As such, both the Secretary and the employer should be held to the same standard under Section 10.

When an *employer* files a late notice of contest, relief is only granted in cases where (1) the delay in filing was caused by the Secretary's deception or failure to follow proper procedures or (2) party's late filing was due to "mistake, inadvertence, surprise, or excusable neglect". See *Atlantic Marine, Inc. v. OSHRC*, 524 F.2d 476 (5th Cir. 1975) (holding an untimely notice of contest may be excused if it was the result of deception on the part of the Secretary); *B.J. Hughes, Inc.*, 7 BNA OSHC 1471 (O.S.H.R.C. 1979) (holding company holiday was still a "working day" and not an excuse for filing a late notice of contest, but that notice of contest was timely because assistant area director misinformed respondent to correct final day to file notice of contest).

Employers have attempted to argue that delay in filing a notice of contest due to internal mishandling of a citation, or lack of proper mail handling procedures, should qualify as excusable neglect. However, the Commission has expressly rejected this argument and instead, ruled many times that the employer needs to have proper paperwork and mail handling procedures in place, and that failure to have these procedures in place does not amount to excusable neglect. See, e.g., *J.F. Shea Co.*, 15 BNA OSHC 1092 (O.S.H.R.C. 1991) (holding error by office assistant did not establish excusable neglect); *Nynex*, 18 BNA OSHC 1944 (O.S.H.R.C. 1999) (holding misdirecting citation within large company was not excusable neglect); *B.J. Hughes, Inc. supra* (holding service on district superintendent at local job site adequate because "the Secretary's representatives should not have to spend time fettering out the

complexities of a corporate hierarchy...”); *Creative Gold, Inc.*, 20 BNA OSHC 1217 (O.S.H.R.C.A.L.J. 2003) (citing to *Henry Beck Co.*, 8 BNA OSHC at 1399 that Commission has held that a business must maintain orderly procedures for handling important documents). Further, it is important to note, that once a Citation is served on an employer, the employer is in the best position to make sure they are in compliance with the time period in which to contest the citations.

Similarly, the Secretary should be held to the same standard of employing proper paperwork and mail handing procedures when *issuing* and *serving* a Citation to ensure that the employer is notified within a reasonable time and within the statute of limitations period. Notification must be expeditiously served upon a proper company official so that abatement can be rapidly accomplished. *See, generally, B.J. Hughes, Inc.* at *3-4. The Commission has rejected the argument that because the respondent *eventually* received the notice of citations that service was proper. *See Donald K. Nelson Construction*, 3 BNA OSHC 1914 (O.S.H.R.C. 1976) (holding that this interpretation of notification would mean that service rules need not be followed so long as service is actually received at any time by the party to whom it was directed).

Here, it is clear the system employed by Complainant to handle the mailing of this Citation was not adequate to ensure that Complainant was properly and timely notified of the alleged violations. It is undisputed that the inspection occurred on October 6, 2016 and that Respondent was not served a copy of the Citation until June 8, 2017. The Secretary is in the best position to ensure proper and timely notification. Complainant’s belief that the Citation was put in the mail five months after the inspection, then the discovery two months later that it might not

have been, and then ultimate service on the employer eight months after the inspection is deficient. Conversely, in a scenario in which an employer properly received a Citation, then mistakenly believed it mailed a notice of contest to the local OSHA office a few days before the deadline, only to discover two months later that its notice of contest was never received, the Court has not doubt that Complainant would vehemently argue that the Citation was final and uncontestable.

Although the actions of the USPS are out of both parties' control, the Court is not convinced that Complainant actually placed the March 15, 2017 Citation in the mail. Proper case management and mail handing procedures are completely within an OSHA Area Office's control. Just as inadequate mail handing procedures are typically no excuse for an employer filing a notice of contest late, inadequate mail handling procedures are no excuse for Complainant in notifying the employer of a Citation within in a reasonable time and within statutory limitations.

ORDER

Accordingly, *Complainant's Motion to Dismiss* is GRANTED. The Citations issued as a result of OSHA Inspection Number 1182684 are hereby VACATED. The trial previously scheduled for February 27, 2018 is canceled.

SO ORDERED.

/s/ *Brian A. Duncan*

Date: December 22, 2017
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission