



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

DAVIS BROTHERS CONSTRUCTION
COMPANY, INC.,

Respondent.

OSHRC Docket No. 02-1740

DECISION

Before the Commission is a decision and order of Administrative Law Judge Sidney Goldstein finding that Respondent Davis Brothers Construction Company, Inc. failed to file a timely notice of contest pursuant to section 10(a) of the Occupational Safety and Health Act, 29 U.S.C. § 659(a). Having reviewed the entire record in this case, we find no substantial error in the judge's decision. Accordingly, we affirm his decision.

/s/ _____

W. Scott Railton
Chairman

/s/ _____

Thomasina V. Rogers
Commissioner

/s/ _____

James M. Stephens
Commissioner

Dated: 11/04/2004



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

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DAVIS BROTHERS CONSTRUCTION
COMPANY, INC.,

Respondent.

OSHRC DOCKET NO. 02-1740

APPEARANCES:

For the Complainant:

Lindsay McCleskey, Esq., Tom Paige, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:

Thomas Scott, W.C. Blayney & Associates, Humble, Texas

Before: Administrative Law Judge: Sydney J. Goldstein

DECISION AND ORDER

This matter comes up on Complainant's motion to dismiss Respondent's late notice of contest. On February 10, 2003, an evidentiary hearing was held in Houston, Texas, in response to Respondent's request for relief from judgment.

Facts

On August 8, 2002, OSHA issued a citation and notification of penalty to Respondent, Davis Brothers Construction Company (Davis)(Tr. 9; Exh. C-2). On August 14, 2002, Davis notified OSHA that it was in receipt of the citation, and requested an informal conference (Tr. 11; Exh. C-4). On August 29, 2002, the informal conference was held at OSHA's Denver area office (Tr. 28, 32). Brad Baptiste, OSHA's assistant area director, Thomas Scott, a safety consultant with W.C. Blayney & Associates, and Randy Blankenship, a Davis employee, were present at the informal conference (Tr. 35-36). Baptiste testified that he made a "couple of different" settlement offers to the Davis representatives, who told him that they did not have the authority to settle the case (Tr. 30). Scott and Blankenship told Baptiste that they would get back to him with an answer, or would send in a contest letter prior to the September 9th deadline (Tr. 31). Thomas Scott testified that following the conference, he discussed OSHA's settlement offers with

Mr. Blankenship, and told him that he was going to recommend that Davis' owner, Tom Davis, contest the case (Tr. 36). Scott then testified that after Blankenship left, he signed a copy of a prepared notice of contest letter and left it with a receptionist, whom he later identified as Ms. Joan Gamble (Tr. 36-37).

Herbert Gibson, OSHA's Denver Area Director, testified that when OSHA's receptionists receive documents they date stamp them, pull the file and give both to him (Tr. 27, 44). Gibson further stated that after a notice of contest is received, it is entered into OSHA's computer database. A certificate is then generated and sent to the Occupational Safety and Health Review Commission along with the original notice of contest, and a copy of the citation (Tr. 24). If a notice of contest is not received, an abatement letter and penalty collection letter is sent to the employer (Tr. 16).

On September 9, 2002, an abatement letter was sent to Davis Brothers (Tr. 17; Exh. 5). Davis did not reply to that letter. On September 23, a second abatement letter was mailed (Tr. 18; Exh. 6). In response to the second notice, W.C. Blayney sent a letter dated October 4, 2002, stating that a notice of contest had been left at the Denver OSHA Office on August 29, 2002. A notice of contest letter signed by Thomas Scott, and dated August 14, 2002 was enclosed with the October 4 correspondence (Tr. 19-20; Exh. 7).

Herbert Gibson testified that he did not see the notice of contest until October 7, 2002, and could find no copy of it, or reference to it in Davis' case file (Tr. 21-22). Gibson further testified that in his 25 years at the Denver area office, his staff has never lost a notice of contest letter (Tr. 46).

Discussion

A citation that is not contested within 15 days automatically becomes a final order of the Commission pursuant to §10(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. Sections 651-678; hereafter called the "Act"). The Commission is without jurisdiction to review that final order except in limited circumstances. For instance, where the late filing has resulted from a deception or a failure to follow proper procedures the party is entitled to a hearing on any allegations of misconduct. *B.J. Hughes Inc.* 7 BNA OSHC 1471 (No. 76-2165, 1979); *Atlantic Marine Inc. and Atlantic Dry Dock Corp.*, 524 F.2d 476 (5th Cir. 1975).

In this case, Davis alleges that a notice of contest *was* filed in a timely manner, but that OSHA failed to follow its own procedures and lost the contest letter. There is, however, insufficient evidence in the record to support Davis' position. Complainant convincingly established that its OSHA office maintains orderly procedures for the handling of important documents. According to the uncontradicted testimony of Herbert Gibson, OSHA has never lost a notice of contest letter. Respondent's case, on the other hand, depends solely on the uncorroborated memory of Mr. Scott.

Davis failed to show that the Secretary's well established procedures were abandoned in this instance, resulting in the loss of its notice of contest, *see, Keefe Earth Boring Company, Inc.*, 14 BNA OSHC 2187, 1991-93 CCH OSHD ¶29,277 (No. 88-2521, 1991)[Respondent bears the burden of showing a sufficient basis for relief from judgment]. Complainant's motion is, therefore, GRANTED.

So Ordered.

/s/

Sidney J. Goldstein
Judge, OSHRC

Dated: April 23, 2003