

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant,
v.
Align Roofing, LLC.,
Respondent.

OSHRC Docket No. **12-0280**

Appearances:

Benjamin Stark, Esq., U. S. Department of Labor, Office of the Solicitor,
Atlanta, Georgia
For Complainant

Mason Fleming, President, Align Roofing, Jacksonville, Florida
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

The Secretary filed a motion to dismiss Respondent's Notice of Contest asserting that the notice contesting her Citation was filed late, that the Citation is now a final order of the Commission and that Respondent is not entitled to relief under Rule 60 (b) of the Federal Rules of Civil Procedure. Respondent filed no response to this motion.

A hearing was held on the Secretary's motion and on the timeliness of the Notice of Contest in Jacksonville Beach, Florida on April 17, 2012. For the reasons that follow, the Secretary's Motion is granted, the Notice of Contest is dismissed, and the Citation and Notification of Penalty are affirmed.

Discussion

On December 1, 2011, an inspection of Respondent's jobsite was conducted by the Occupational Safety and Health Administration (OSHA). As a result of this inspection a Citation was issued to the Respondent on December 12, 2011. The certified mail receipt indicated that someone at the Respondent's residence signed for receipt of the Citation on December 14, 2011.

Respondent's owner, Mason Fleming, testified that he and his six year old daughter live at the delivery address and he often receives business mail at this location. He further testified that no one at that address signed the receipt on December 14, 2012. The signature on the receipt does not match other signatures of Mr. Fleming on his drivers license and on his letter contesting the Citation. Mr. Fleming testified that he did receive the Citation as early as December 16, 2011. I find December 16, 2011 to be the date Respondent actually received the Citation.

Jeffrey Lincoln, the Secretary's compliance officer, testified that on December 6, 2011, after the inspection but before the issuance of the Citation by OSHA, he had a telephone conversation with Mr. Fleming. Mr. Fleming disagreed with the violations found and stated that he wished to contest the violations. Mr. Lincoln told Mr. Fleming that no Citation had been issued at that time. He also stated that any notice of contest must be written.

Mr. Romeo, the Assistant Area Director in OSHA's Jacksonville, Florida office testified that Mr. Fleming called that office on January 12, 2012, about contesting the Citation. Mr. Fleming testified the telephone contact was on January 9, 2012. I find the testimony of Mr. Romeo more credible as the date was verified from contemporaneous notes in his official file. Mr. Romeo told Mr. Fleming that the time to contest the Citation had expired but told him he could send a late letter to the Review Commission contesting the Citation. Mr. Fleming sent a written notice of contest on January 20, 2012, eight days after this conversation.

The Act requires a written notice of contest be filed within 15 working days of receipt of the Citation. The Secretary calculated the last date for timely notice of contest to be filed was January 6, 2012. Accepting Respondent's assertion that receipt was on December 16, 2011, it is determined that the last date to file a timely notice of contest was January 9, 2012. Respondent did not file any written notice of contest until January 20, 2012, eleven days late. The Citation and Notification of Penalty have become a final order of the Commission pursuant to the Act.

Respondent's delay was not the result of excusable neglect, mistake or inadvertence. He was given verbal and written notice that a written notice of contest was required within 15 working days of receipt of the Citation.

No evidence was produced indicating fraud, misrepresentation or other misconduct by the Secretary. Mr. Fleming only testified as to his confusion as to what constituted a working day. He admitted, however, that by his own calculation, his final day to timely contest the Citation was

January 9, 2012. His written letter of contest was not sent until January 20, 2012. Respondent has failed to demonstrate that it is entitled to relief under Rule 60(b).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

It is hereby ORDERED:

1. The Secretary's Motion to Dismiss Notice of Contest is Granted.
2. Respondent's Notice of Contest is Dismissed.
3. The Citation and Notification of Penalty are affirmed as a final order of the Commission.
4. No relief is granted pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: June 13, 2012
Atlanta, Georgia