



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

SECRETARY OF LABOR
Complainant,
v.
MARBLE WORKS, INC.,
Respondent.

OSHRC DOCKET
NOS. 92-0990
92-1411

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on January 7, 1993. The decision of the Judge will become a final order of the Commission on February 8, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before January 27, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: January 7, 1993

DOCKET NOS. 92-0990 & 92-1411

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

Complainant,

v.

MARBLE WORKS, INC.,

Respondent.

OSHRC Docket Nos.

92-990 & 92-1411

(Consolidated)

Appearances:

Kathleen G. Henderson, Esq.
 Office of the Solicitor
 U. S. Department of Labor
 Birmingham, Alabama
 For Complainant

Mr. Thomas T. Ziemann, Jr., Esquire
 Miller, Hamilton, Snider and Odom
 Mobile, Alabama
 For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

This consolidated proceeding is before the Occupational Safety and Health Review Commission for decision. On February 21, 1992, and on March 24, 1992, the Occupational Safety and Health Administration (OSHA) issued citations to Respondent, Marble Works, Inc., as a result of separate safety and health inspections conducted at its manufacturing facility in Mobile, Alabama.

The citations issued on February 21, 1992, alleged serious and "other than serious" violations. On March 13, 1992, respondent's secretary and treasurer, Mark Tapia,

representing the Company *pro se*, timely contested the penalties proposed by OSHA in this first set of citations. The underlying violations and abatement dates were not contested.

The citations issued on March 24, 1992, also alleged serious and "other than serious" violations. However, Tapia did not serve Respondent's request for hearing on these later citations until April 24, 1992, seven days after April 17, 1992, the last day within which he could timely contest the citations. The letter served on April 24, 1992, was dated April 16, 1992.¹ Since Respondent failed to file its notice of contest within the time established by Section 10(a) of the Occupational Safety and Health Act of 1970 (Act), the administrative law judge dismissed the notice of contest of the March 24, 1992, citation. However, in Respondent's letter of July 15, 1992, which was received by the Commission after the administrative law judge's dismissal, Respondent asserted facts which might support a finding that the untimely filing should be excused. Under *Atlantic Marine, Inc. v. OSHRC*, 524 F.2d 476 (5th Cir. 1975), the case was remanded for inquiry into the issue of timeliness, and then if deemed appropriate, for a decision on the merits of the case.

On April 30, 1992, the cases involving both the February 21, 1992, and the March 24, 1992, citations were consolidated. A hearing was convened in both matters on October 27, 1992, in Mobile, Alabama. The parties were represented by counsel, although simplified proceedings were in effect.

The parties' evidence initially addressed the timeliness issue. After presentation of evidence and argument on that issue, the undersigned entered a decision on the record holding that Respondent's failure to contest the March 24, 1992, citation within the 15-day period was excused.²

Prior to a presentation of evidence on the merits of the cases, the parties were afforded an opportunity to discuss settlement. Counsel were successful in reaching

¹ This contest letter, like the previous one, contested only the proposed penalties and did not contest the alleged violations or abatement dates.

² The Commission's authority to grant relief from final orders entered pursuant to Section 10(a) of the Act is based upon Rule 60(b), F.R.Cv.P., and *Atlantic Marine, supra*. See *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 1989 CCH OSHD ¶ 28,409 (No. 86-1266, 1989); *Roy Kay, Inc.*, 13 BNA OSHC 2021, 1989 CCH OSHD ¶ 28,406 (No. 88-1748, 1989).

agreement as to all remaining issues in these matters. The terms of the agreement were stated in open court on the record and are hereby adopted and incorporated into this decision and order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent, Marble Works, Inc., was at all times relevant to this proceeding engaged in a business affecting commerce and had employees within the meaning of Section 3(5) of the Act. The Commission has jurisdiction of the parties and the subject matter of this proceeding.

2. Respondent contested only the penalties proposed for citations issued on February 21, 1992 and March 24, 1992. The underlying violations and abatement dates had become final orders of the Commission by operation of Section 10(a) of the Act.

3. Penalties assessed for Item Nos. 1 through 11 of Citation No. 1 and Item No. 1 of Citation No. 2, issued February 21, 1992 (Docket No. 92-990), total \$3,280.

4. Penalties assessed for Item Nos. 1 through 8 of Citation No. 1 and Item Nos. 1 through 3, and 5, of Citation No. 2, issued March 24, 1992 (Docket No. 92-1411), total \$2,500.

ORDER

Based upon the foregoing decision, it is ordered that:

(1) A total penalty in the amount of \$3,280.00 is hereby assessed for Citation No. 1, Item Nos. 1 through 11, and Citation No. 2, Item No. 1, in Docket No. 92-990.

(2) A total penalty in the amount of \$2,500 is hereby assessed for Citation No. 1, Item Nos. 1 through 8, and Citation No. 2, Item Nos. 1 through 3, and Item 5, in Docket No. 92-1411.

Dated this 28th day of December, 1992.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge