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COMMONWEALTH OF KENTUCKY  
OCCUPATIONAL SAFETY AND HEALTH  
REVIEW COMMISSION

KOSHRC #1436

SECRETARY OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CAREY CONSTRUCTION, INC.

RESPONDENT

**DECISION AND ORDER  
OF REVIEW COMMISSION**

Before **SHIELDS**, Chairman; **RUH** and **BRADEN**, Commissioners.

On June 3, 1986, Complainant filed Motion to Dismiss Respondent's Notice of Contest due to Respondent, Carey Construction, Inc., having failed to file same within the statutorily prescribed fifteen working-day period. On June 12, 1986, letter was received from Samuel M. Ham, Safety Director for Respondent, setting forth that the reason for the delay in filing Notice of Contest was due to certain representations made by agents of Complainant. On June 20, 1986, Complainant filed Motion to Withdraw Motion to Dismiss Notice of Contest, conceding that representations were, in fact, made by agents of Complainant, which caused Respondent not to file its Notice of Contest within the prescribed period of time, and conceding that Respondent would be prejudiced by a dismissal of its Notice of Contest.

Summary of the Case

The facts concerning the delay in Respondent's filing its Notice of Contest are set forth in Respondent's letter of June 10, 1986, and have, in effect, been stipulated by Complainant by virtue of the Motion to Withdraw Complainant's Motion to Dismiss Notice of Contest.

On March 6, 1986, Complainant issued Citation No. 1, setting forth in items 1a and 1b thereof an alleged grouped serious violation of 29 CFR 1926.652(b) and 29 CFR 1926.652(a), relating to shoring of trenches and protection of soil banks adjacent to the trenches, respectively, with a total proposed penalty for the alleged grouped serious violation in the amount of Three Hundred Fifty Dollars (\$350). Although another Citation setting forth other than serious violations was also issued, Respondent has sought to be placed into contest only the alleged grouped serious violations and proposed penalty contained

in Citation No. 1.

At the suggestion of Mr. Foy Hood, Compliance Officer, the Safety Director of Respondent engaged in an informal conference with Mr. Pete Ramsey, another agent of Complainant, who agreed with the Safety Director that certain inconsistencies existed regarding enforcement and interpretation of trenching violations, and informed the Safety Director not to act upon the Citation until further communication was received from Mr. Ramsey. On May 5, 1986, Abatement Notice was received by Respondent, and, upon inquiring of Mr. Ramsey, the Safety Director was told that a determination had been made that the Citation would remain in effect, but there had been a failure to communicate such decision to Respondent. Although a second conference was conducted on May 16, 1986, the only substantive result of this was the Safety Director being informed that he needed to file a Notice of Contest. On May 20, 1986, Notice of Contest was received by Complainant, such receipt being well in excess of the fifteen working-day contest period.

#### Decision of the Commission

After a careful review of the facts and circumstances involved in this late filing of Notice of Contest, we are of the opinion that Respondent's Notice of Contest should be deemed as timely filed, and that Respondent should be afforded evidentiary hearing upon the alleged grouped violations and proposed penalty which are the subject of its Notice of Contest.

KRS 338.141(1) provides, in pertinent part, as follows:

If within fifteen (15) working days from the receipt of the citation an employer, employee or representative of the employees fails to notify the commissioner that he intends to contest the citation, then the citation shall be deemed a final order of the review commission and not be subject to review by any court or agency.

By the clear wording of this section of Kentucky's Occupational Safety and Health Act, failure by an employer to file Notice of Contest within the prescribed period of time will automatically result in the Citation being deemed an unreviewable Final Order of this Commission, and nothing in this section or in other sections contained in the Act makes any provision for the exculpation of an employer from the operation of this jurisdictional requirement even upon a showing by the employer of the existence of extraordinary circumstances.

This Review Commission has never before considered whether the operation of KRS 338.141(1) may be, under these circumstances, suspended, and the within matter thus appears to be one of first impression in this jurisdiction. However, there does exist a line of cases by the Federal Review Commission which deal with the question of whether the operation of 29 USC §659(a) may be

suspended under appropriate circumstances. This section of the United States Code is the Federal corollary to KRS 338.141(1) and is identical in its requirement that a Notice of Contest be filed within fifteen working days from the receipt of the Citation, and in the provision that if such Notice of Contest is not timely filed, the Citation shall be deemed an unreviewable Final Order of the Commission. Similarly, there is not other provision of the Federal Occupational Safety and Health Act which specifically exculpates an employer from the operation and effect of 29 USC §659(a).

Resort is frequently made by this Review Commission to these Federal decisions, especially in those situations in which there exists in this jurisdiction no decision on point by a Hearing Officer or this Commission. These Federal decisions, although not binding upon this Review Commission, are advisory, and many times are highly persuasive. City Cleaning Service, Inc., KOSHRC #691 (1980).

A review of these cases discloses a consistent position by the Federal Review Commission that, if an employer can demonstrate that the Secretary engaged in certain actions generally categorized as "deceptive practices," the Commission may allow administrative consideration of contested citation(s), even though the employer's Notice of Contest was untimely filed.

In Henry C. Beck Company, 24,404 OSHD (1980), an employer's Notice of Contest was filed one day late. However, it was determined that during an informal conference with the Area Director, the employer's Safety Director had noted that January 10 was the final contest date and the Area Director remained silent. The correct final date for filing Notice of Contest was January 9. In holding the failure to timely file Notice of Contest by the employer to be a direct result of the Secretary's Area Director having remained silent to the Safety Director's stated assumption that January 10 was the final contest date, the Review Commission, citing several previous cases, reiterated its established position that an employer may show that an untimely filed Notice of Contest is valid by demonstrating that deception or a failure to follow proper procedures on the part of the Secretary caused the delay.

This "deceptive practices" exception is not limited simply to those situations such as Beck wherein an employer's filing of Notice of Contest was minimally beyond the fifteen-day limit. In Merritt Electric Company, Inc., 25,556 OSHD (1981), the Federal Review Commission upheld a ruling of an Administrative Law Judge that a Notice of Contest was timely filed, even though it was not submitted in writing by the employer until three months after the issuance of the Citation. In this case, the Administrative Law Judge held that an employer was led to believe by an Area Director that he had the right to either a contest or an informal conference, and had led the employer to believe that the requesting of a conference would have had the effect of contesting the Citation.

The within circumstance is very similar to those of Beck and Merrit. Respondent's Safety Director was led to believe that the two informal conferences, the first being suggested by the Compliance Officer and the second being suggested by Mr. Ramsey, had the effect of relieving Respondent of the obligation to strictly comply with KRS 338.141(1). Such action by representatives of the Secretary was the direct cause of the Notice of Contest being untimely filed.

Counsel for Complainant has stated in the Motion to Withdraw Complainant's Motion to Dismiss Notice of Contest that Respondent would be prejudiced by dismissal of its Notice of Contest. We agree. Indeed, we can think of no greater prejudice to an employer than that of being refused administrative review of a Citation where such refusal is solely due to acts and/or omissions committed not by the cited employer, but by agents of the Secretary.

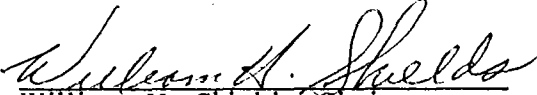
However, in holding that in the within circumstance Respondent's Notice of Contest shall be deemed timely filed, certain qualifications to this "exception" to the operation of KRS 338.141(1) must be made.

First of all, consideration will be given as to whether or not an otherwise untimely filed Notice of Contest should be deemed timely filed only in those circumstances wherein it is alleged by an employer that the Secretary has committed "deceptive practices" or "failure to follow proper procedures," and only wherein it is alleged that the alleged improper practices by the Secretary were the direct cause of the Notice of Contest being untimely filed. We are obviously referring not to any intent to deceive on the part of the Secretary, but rather to acts and/or omissions of the Secretary which are deceptive in their results.

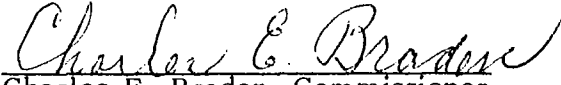
Secondly, in order for an exception to the operation of KRS 338.141(1) to be allowed, it must not only be alleged by the employer that such deceptive practices were committed, but it is also incumbent upon the employer to prove by a preponderance of the evidence that such practices were committed, and that the untimely filing of Notice of Contest was the direct result of the employer's detrimental reliance upon same. In the within situation, deceptive acts and detrimental reliance have both been admitted by Complainant in the Motion to Withdraw Complainant's Motion to Dismiss Notice of Contest. However, in those situations wherein the commission of deceptive acts and/or the employer's detrimental reliance upon same are not stipulated but are in issue, it will be necessary for the Commission to assign the case to a hearing officer who will conduct an initial evidentiary inquiry into the factual basis for the allegations by the employer, and Findings of Fact regarding the employer's assertion must be made by the hearing officer. National Roofing Corp., 24,677 OSHD (1980).

ORDER

IT IS THE ORDER OF THIS COMMISSION that the Motion to Withdraw Complainant's Motion to Dismiss Notice of Contest is **SUSTAINED**, and that the Notice of Contest filed by Respondent on May 20, 1986, contesting the alleged violation of 29 CFR 1926.652(b) and 29 CFR 1926.652(a), and the combined proposed penalty therefor in the amount of Three Hundred Fifty Dollars (\$350) as set forth in Item 1a and 1b of Citation No. 1 shall be **DEEMED TIMELY FILED**. **IT IS FURTHER ORDERED** that the within matter be assigned to a hearing officer and that an evidentiary hearing upon the subject matter of the Notice of Contest be scheduled.

  
William H. Shields, Chairman

  
Carl J. Ruh, Commissioner

  
Charles E. Braden, Commissioner

DATE: July 31, 1986

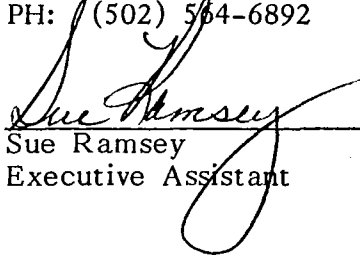
Copy of the foregoing Order has been served on the following parties in the manner indicated:

Hon. Rose Ashcraft (Messenger Mail)  
Assistant Counsel  
Labor Cabinet  
Office of General Counsel  
U. S. 127 South  
Frankfort, KY 40601

Mr. Samuel M. Ham, Safety Director (Cert. Mail  
Carey Construction Inc. #P337 017 013)  
2216 Young Drive  
Lexington, KY 40505

This 31<sup>st</sup> day of July, 1986.

Kenneth Lee Collova  
Executive Director  
KOSH REVIEW COMMISSION  
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Frankfort, KY 40601  
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Sue Ramsey  
Executive Assistant