

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

Oregon Occupational Safety &)	Docket No. 17-00038SH
Health Division (OR-OSHA),)	
)	
Plaintiff,)	
)	
vs.)	Citation No.: I8767-070-17
)	
CELL CRETE CORP.)	
)	
Defendant.)	AMENDED¹
)	ORDER OF DISMISSAL

This case was transferred to the Hearings Division on October 27, 2016. On December 6, 2017, Charles J. Paternoster, attorney for defendant, Cell Crete Corp., was mailed a letter which raised the jurisdictional question and allowed the defendant 10 days to present its position on the timeliness issue. Mr. Paternoster's submission was received on December 20, 2017. The Department of Justice's response was received on January 5, 2018.

EXHIBITS

For the purpose of ruling on the jurisdictional issue, the following documents are admitted into the record:

1. A certified copy of the Citation and Notification of Penalty, issued on August 28, 2017;
2. A copy of USPS Form 3811, Domestic Return Receipt, dated August 31, 2017;
3. An October 20, 2017 letter from Charles J. Paternoster, AAL to Oregon OSHA;

¹ This order is amended to reflect the correct WCB Case Number.

4. A December 5, 2017 Transfer of Appealed Case To Hearings;
5. A December 12, 2017 letter from Monte Marshall, Assistant Presiding Administrative Law Judge to Charles J. Paternoster, AAL;
6. A December 20, 2017 letter, with attachments, from Charles J. Paternoster to Monte Marshall; and,
7. A January 3, 2018 letter, with attachments from Kyle J. Martin, Assistant Attorney General, to Monte Marshall.

FINDINGS OF FACT

Plaintiff, OR-OSHA, issued the citation herein on August 28, 2017. The citation was served on the defendant on August 31, 2017, as established by the Certificate Proof of Personal Service showing the date of certified service. The defendant's request for hearing was filed on October 20, 2017.

CONCLUSIONS AND OPINION

ORS 654.078(1) provides that an employer cited for a violation of the Safe Employment Act may contest the citation by filing a written request for hearing with OR-OSHA within 30 days after receipt of the citation. OAR 438-085-0026(14) defines filing of a request for hearing as actual receipt at any permanently-staffed office of the Department of Consumer and Business Services, or mailing, if mailing is established by receipt, of registered or certified mail bearing the stamp of the United States Postal Service showing the date of mailing. ORS 654.078(3) provides that if no request for hearing is filed as required by ORS 654.078(1), no hearing shall be granted, and the citation becomes final and is not reviewable by any agency or court. The statute is jurisdictional; it does not allow for exceptions based on extenuating circumstances.

In this case, there is no dispute that the citation was received on August 31, 2017. The request for hearing was filed on October 20, 2017, the date it was received by Oregon OSHA. Filing was 49 days after the defendant received the citation, beyond the 30 days allowed by statute. It was, therefore, not filed timely, and must be dismissed as a matter of law. OAR 438-085-0141(2). Any relief must come from the Director who, pursuant to OAR 437-001-0270(2), has the authority to vacate or amend a citation to prevent a manifest injustice.

In reaching this conclusion, I acknowledge defendant's contention that because it did not receive the citation at its California office until October 12, 2017, its appeal was timely. However, the citation was properly served on defendant's registered agent in Oregon on August 31, 2017 which is sufficient to trigger the statutory appeal period. Consequently, defendant's appeal was untimely.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED the request for hearing, filed on, October 20, 2017, is dismissed.

Notice to all parties: You are entitled to judicial review of this Order. Proceedings for review are to be instituted by filing a petition in the Court of Appeals, Supreme Court Building, Salem, Oregon 97310, within 60 days following the date this Order is entered and served as shown hereon. The procedure for such judicial review is prescribed by ORS 183.480 and ORS 183.482.

Entered at Salem, Oregon, on March 16, 2018, with copies mailed to:

Workers' Compensation Board

/s/ Monte Marshall

Monte Marshall

Assistant Presiding

Administrative Law Judge