

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

THOMAS E. PEREZ, SECRETARY OF LABOR,

Petitioner,

v.

No. 11-2372

LESSARD ROOFING & SIDING, INC.,
LESSARD BROTHERS CONSTRUCTION, INC.,
And their successors and/or alter egos ,

Respondents.

PETITION FOR JUDGMENT OF CIVIL CONTEMPT

Pursuant to section 11(b) of the Occupational Safety and Health Act of 1970 (“OSH Act”), 29 U.S.C. § 660(b), the Secretary of Labor¹ petitions this Court to adjudge Lessard Roofing & Siding, Inc. (Lessard Roofing), Lessard Brothers Construction, Inc. (Lessard Brothers), their owner, Stephen Lessard, and their successors and/or alter egos, to be in civil contempt of this Court’s Decree Enforcing Final Orders of the Occupational Safety and

¹ The current Secretary of Labor, Thomas E. Perez, is automatically substituted for the former Secretary, Hilda Solis, pursuant to Fed. R. App. P. 43(c)(2).

Health Review Commission (Commission). A proposed order finding civil contempt is attached to this petition.

BACKGROUND

This proceeding derives from eleven separate inspections conducted from 2003 to 2011 at eleven different worksites in Maine, where Lessard Roofing and Lessard Brothers were engaged in construction. Following each inspection, OSHA issued at least one citation² to Lessard Roofing or Lessard Brothers, alleging multiple serious, repeat, and/or willful violations of, *inter alia*, OSHA fall-protection, safe-scaffold, safe-ladder, electrical-safety, head-protection, and other requirements. 29 U.S.C. § 666. Neither Lessard Roofing nor Lessard Brothers contested any of the citations, and the citations and penalties became final orders of the Commission by operation of law. 29 U.S.C. § 659(a).

The Commission's final orders require Lessard Roofing and Lessard Brothers to abate the violations described in the citations and to pay civil penalties of \$ 404,485,³ and the willful fall protection citation items in the

² Inspection Nos. 314960857, 314840828, 112527346, 112526975, 112526264, 112520952, 309984714, 309673523, 112515507, 307475657, 112802046.

³ The penalties in the citations total \$407,560, but Lessard Roofing made a partial payment of \$3,075 toward the penalty in Inspection No. 309673523, which was \$7,000.

2011 citation (No. 314960857) require Lessard Brothers to “submit documentation describing the steps it is taking to ensure compliance.”

Neither Lessard Roofing nor Lessard Brothers complied with the Commission’s final orders. They did not submit documentation of abatement or pay the penalties.

Because of Lessard Roofing and Lessard Brothers’s refusal to comply with the Commission’s final orders, the Secretary obtained an order, pursuant to OSH Act § 11(b), 29 U.S.C. § 660(b), from this Court on December 19, 2011. (Docket No. 11-2372, Entry ID: 5604254) The enforcement decree provides in pertinent part:

that the citations issued under Occupational Safety and Health Administration (OSHA) Inspection Numbers 314960857, 314840828, 112527346, 112526975, 112526264, 112520952, 309984714, 309673523, 112515507, 307475657, and 112802046 (Lessard inspection numbers) are hereby enforced. Accordingly, Lessard Roofing & Siding and Lessard Brothers Construction shall:

1. abate the violations described in the citations issued under the Lessard inspection numbers;
2. pay the \$404,485 in penalties assessed by the citations issued under the Lessard inspection numbers;
3. cease and desist from violating in any like or related manner OSHA standards or the General Duty Clause, Section 5(a) of the OSH Act, 29 U.S.C. § 654(a), as set forth in the citations under the Lessard inspection numbers; and

4. advise William J. Coffin, Area Director, U.S. Department of Labor, in writing within twenty (20) days of the date of this Decree of the steps Lessard Roofing & Siding and Lessard Brothers Construction have taken to comply with this Decree.

Stephen Lessard, the owner and president of both Lessard Roofing and Lessard Brothers, was personally served with copies of the Court's Judgment and Decree.

Despite the Court's December 19, 2011 Decree, the Lessard companies have continued to violate the fall protection standards covered by the Court's Decree, putting their employees at risk of serious harm. On July 18, 2014, OSHA inspected a Lessard Brothers worksite in Lewiston, Maine, at which three employees were doing roofing work without the required fall protection.⁴ See Declaration of Maryann Medeiros, attached as Exhibit 1. Neither Lessard Roofing nor Lessard Brothers has paid the \$ 404,485 in penalties, plus interest and fees, as ordered by this Court. Additionally, neither Lessard Roofing nor Lessard Brothers has submitted documentation of their compliance steps for the willful fall protection citation items in the 2011 citation (No. 314960857), or for several other citation items.⁵ Further,

⁴ Inspection No. 985960.

⁵ The companies have not submitted the required documentation for the rest of the violations in Inspection No. 314960857; for the violation in Inspection No. 309673523; or for one violation in Inspection No. 112527346.

the abatement steps Lessard Brothers did report to OSHA include actions that do not constitute abatement of the hazards identified in the citations.⁶

GOVERNING LAW

An employer who violates an appellate court's order issued pursuant to Section 11(b) can be found in contempt of court. *Reich v. Sea Sprite Boat Co.*, 50 F.3d 413, 416 (7th Cir. 1995). "Before a court can enter a finding of contempt for failure to follow a court order, the complaining party must prove, by clear and convincing evidence, that the person has not been reasonably diligent and energetic in attempting to accomplish what was ordered." *United States v. Berg*, 20 F.3d 304, 311 (7th Cir. 1994) (internal quotation marks and citation omitted).

Potential sanctions for contempt include the daily failure-to-abate penalties (including prospective daily penalties) provided in OSH Act § 17(d), 29 U.S.C. § 666(d), recovery of the Secretary's costs of bringing the action, incarceration of an individual corporate officer who flouts the court's order, and any other sanction that the court deems necessary to secure

⁶ For example, Lessard Brothers's Feb. 3, 2012 letter to OSHA describes generic instructions to employees to "inspect all equipment" and "recognize hazards" in response to two citations relating to the hazards of high voltage power lines in Inspection No. 112802046. Lessard Brothers submitted three versions of the letter, but all three share the same deficiencies.

compliance. *Sea Sprite*, 50 F.3d at 416-17. Employers who otherwise ignore ordinary enforcement actions may be induced to comply by the severity of these potential contempt sanctions. *Id.* at 415-16.

Federal injunctions and orders enforcing decisions of administrative agencies apply to the parties, their officers, their successors in interest, and other affiliated persons and entities who have actual notice. Fed. R. Civ. P. 65(d); *Sea Sprite*, 50 F.3d at 417 (president and sole shareholder of corporation who receives actual notice of court's order is no less bound by it than is the corporation itself: "An order issued to a corporation is identical to an order issued to its officers, for incorporeal abstractions act through agents."); *Metro-Goldwyn Mayer, Inc. v. 007 Safety Products, Inc.*, 183 F.3d 10, 16 (1st Cir. 1999).

REQUESTED RELIEF

Lessard Roofing and Lessard Brothers have defied this Court's December 19, 2011 order by failing to comply with any of the requirements prescribed by the Court's order.⁷ Compliance is necessary to ensure that the

⁷To the extent that this Court may require additional evidence to determine whether there is clear and convincing evidence that Lessard Roofing, Lessard Brothers, and Stephen Lessard have not been reasonably diligent in attempting to comply with the Court's order, there will be opportunity to conduct discovery if the Court assigns the case to a special master. *See Sea Sprite*, 50 F.3d at 414-15 (appellate masters have authority to compel the production of evidence).

Lessard companies' employees are protected from hazardous working conditions as required by the OSH Act. Lessard Roofing, Lessard Brothers, their successors and/or alter egos, and their owner and officer, Stephen Lessard, are in civil contempt of this Court's order, and action by the Court is necessary to bring them into compliance. *See Sea Sprite*, 50 F.3d at 417.

The Secretary therefore requests the following relief:

(a) that the Court adjudge Lessard Roofing & Siding, Lessard Brothers Construction, Stephen Lessard, and any successors or alter egos bound by the Section 11(b) enforcement order, to be in civil contempt of the Court's December 19, 2011 Decree;

(b) that the Court impose sanctions necessary and appropriate to compel compliance with its order, including, if necessary, incarceration of Stephen Lessard; and

(c) that the Court grant such other relief as it deems just and proper.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

ANN ROSENTHAL
Associate Solicitor for
Occupational Safety and
Health

CHARLES F. JAMES
Counsel for Appellate Litigation

s/ Lisa A. Wilson
LISA A. WILSON
Attorney
U.S. Department of Labor
Office of Solicitor
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5471
Wilson.lisa.a@dol.gov

2. Lessard Roofing & Siding, Inc., Lessard Brothers Construction, Inc., their owner, Stephen Lessard, and their successors and/or alter egos must provide to Maryann Medeiros, OSHA Area Director for Augusta, Maine, written certification within twenty days of the date of this order that they have abated the violations enumerated in the citations issued under OSHA inspection numbers 314960857, 314840828, 112527346, 112526975, 112526264, 112520952, 309984714, 309673523, 112515507, 307475657, and 112802046 (Lessard inspections numbers).
3. Lessard Roofing & Siding, Inc., Lessard Brothers Construction, Inc., their owner, Stephen Lessard, and their successors and/or alter egos must pay, within twenty days of the date of this order, penalties in the amount of \$404,485, plus interest and fees, assessed by the citations issued under the Lessard inspection numbers.
4. Lessard Roofing & Siding, Inc., Lessard Brothers Construction, Inc., their owner, Stephen Lessard, and their successors and/or alter egos shall be subject to coercive sanctions, including incarceration and such other relief as this Court deems just and

proper, for any noncompliance after twenty day form the date of
this order.

ENTERED BY ORDER OF THE COURT

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 2015, a copy of the foregoing Petition for Judgment of Civil Contempt was filed electronically with the Clerk of the Court for the United States for the First Circuit using the CM/ECF system.

I further certify that the other participants in the case are not CM/ECF users. I have mailed the foregoing document by certified mail, return-receipt requested, to:

Stephen Lessard
P.O. Box 293
Greene ME 04236

s/ Lisa A. Wilson
LISA WILSON
Attorney
U.S. Department of Labor
Office of the Solicitor, Room S-4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210-0001
(202) 693-5471

Exhibit 1

(Lessard Roofing), Lessard Brothers Construction, Inc. (Lessard Brothers), and their successors and/or alter egos.

3. To date, the Lessard companies have failed to provide, or have provided insufficient versions of, abatement certifications required by the willful fall protection citation items in the 2011 citation (Inspection No. 314960857) and other citation items in the Commission final orders, and ordered by the Court in its Decree.
4. To date, neither Lessard company has paid the penalties, plus interest and fees, as ordered by the Court in its Decree.
5. The Augusta Area Office conducted an additional inspection of a Lessard Brothers worksite on July 18, 2014 (Inspection No. 985960).
6. Based on Inspection No. 985960, the Augusta Area Office issued citations on January 8, 2015, alleging two willful and two repeat violations for the lack of fall protection and fall protection training and one serious violation for the improper use of, and lack of training on, scaffolds, and proposing penalties of \$287,000.
7. Lessard Brothers did not contest the citations, which have become final orders of the Commission.

I swear under penalty of perjury pursuant to 28 U.S.C § 1746 that the foregoing is true to the best of my knowledge and that this document was executed on February 13, 2015 in Augusta, Maine.

Executed on February 13, 2015.



MARYANN MEDEIROS
Area Director
Augusta Area Office
Occupational Safety and Health Administration