



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

Secretary of Labor,
Complainant

v.

Prestige Roofing, Inc.,
Respondent.

OSHRC Docket No. **15-2054**

DECISION AND ORDER ON DEFAULT

This matter is before the Occupational Safety and Health Review Commission on the Secretary's Motion to Dismiss Case and Affirm Citation as Final Order in which the Secretary asserts Respondent did not timely file its Notice of Contest pursuant to § 10(c) of the Occupational Safety and Health Act, 29 U.S.C. § 651 (the Act). Because the citations at issue in this proceeding had become a final order of the Commission pursuant to § 10(a) of the Act, I deemed Respondent's Notice of Contest a request for relief under Federal Rule of Civil Procedure 60(b) (Rule 60(b)) and provided Respondent the opportunity to submit evidence and argument in support. Respondent submitted no supplementary evidence or response to the Secretary's motion. In ruling on the Secretary's motion, I have considered Respondent's submissions to the Commission with its Notice of Contest and the Secretary's submissions.

For the reasons that follow, I find Respondent is not entitled to relief pursuant to Rule 60(b) and GRANT the Secretary's Motion to Dismiss.

Background

This matter arises out of an inspection of a construction worksite by the Fort Lauderdale Area Office of the Occupational Safety and Health Administration (OSHA) in November of 2014. The inspection was conducted by OSHA Compliance Safety and Health Officer (CSHO) Jossie Aviles of that same office. As part of the inspection, CSHO Aviles met with Ramon Rodriguez who represented himself to be the site supervisor for Prestige Roofing, Inc.,

Respondent in this matter. As a result of that inspection, OSHA issued a single serious citation to Respondent for a safety violation in December of 2014. The penalty proposed was \$2000.00.

OSHA mailed the Citation to the address Mr. Rodriguez provided to CSHO Aviles for Respondent during the inspection. On December 11, 2014, Omarys Izquierdo signed for the Citation (Exh. D of the Secretary's Motion). The Citation informed Respondent it had 15 working days from the date of receipt to contest the citations therein. Excluding weekends and Federal holidays, the 15-day period expired on January 8, 2015.¹ Respondent did not file a notice of contest by the January 8, 2015, deadline. Accordingly, the Citation became a Final Order of the Commission under § 10(a) of the Act.

On May 15, 2015, OSHA's Finance Office, Delinquent Accounts and Collection Service, sent a letter notifying Respondent of the penalty it owed that had not been paid. On May 20, 2015, Frank Izquierdo² of Prestige Roofing, Inc., sent an email to the email address provided in that letter stating the "fine in the amount of \$2,056.67 does not belong to Prestige Roofing, Inc." and asking the Secretary to "Please make corrections and advise confirm receipt of this email." On June 26, 2015, CSHO Aviles unsuccessfully attempted to reach Mr. Rodriguez by telephone. On September 25, 2015, Santiago Gala, owner of Prestige Roofing, Inc., sent a letter to Condell Eastmond, area director for the Fort Lauderdale Area Office, again reiterating Prestige Roofing, Inc. was not performing the roofing work at the inspected worksite and requesting the penalty be assigned to another company, Prestige Roofing of South Florida. Each of these letters indicated the address for Prestige Roofing, Inc. was the same as that provided to CSHO Aviles by Mr. Rodriguez during the inspection.

On October 2, 2015, CSHO Aviles returned a call to Omarys Izquierdo. During that conversation, CSHO Aviles informed Ms. Izquierdo the citation had become a final order and told her to file a contest letter directly with the Commission. She requested to speak with Mr. Eastmond. Mr. Eastmond spoke with Ms. Izquierdo and Mr. Gala that same day and told them to file a notice of contest directly with the Commission.

¹ The Secretary contends the 15-day period expired on January 6, 2015. I calculate the 15-day period to end on January 8, 2015. This discrepancy is not material.

² The relationship between Omarys Izquierdo and Frank Izquierdo to Prestige Roofing, Inc. was not clarified on this record. Both presented themselves to the Secretary as representatives of Respondent.

Procedural Background

On December 3, 2015, the Commission received a letter dated October 2, 2015, from Mr. Gala in which he sought to contest the citations issued to Respondent. He submitted with the Notice of Contest the May 20, 2015, email and the September 25, 2015, letter. The matter was docketed by the Executive Secretary of the Commission. On March 4, 2016, the Secretary filed a Motion to Dismiss in lieu of a Complaint. On March 24, 2016, Chief Judge Covette Rooney assigned the matter to me.

Upon review of the Secretary's Motion, I issued an Order Regarding Respondent's Late Notice of Contest on April 1, 2016. In that order, I noted the citation had become a final order of the Commission by operation of law and the Secretary had filed a Motion to Dismiss Respondent's notice of contest. I ordered Respondent to file a response to that motion on or before April 15, 2016. To date, the Court has received no response.

On May 5, 2016, I issued an Order to Show Cause directing Respondent to show cause by May 20, 2016, why it should not be found to have waived its right to present evidence in support of its request for relief or, in the alternative, in default. The order was sent to Respondent at the address provided in its notice of contest via certified mail. Although no return receipt was received, United States Postal Service tracking records show the order was delivered to that address on May 11, 2016. To date, the Court has received no response or any other correspondence from Respondent.

DISCUSSION

Commission Rule 101(a), 29 C.F.R. § 2200.101(a), provides in relevant part:

Sanctions. When any party has failed to plead or otherwise proceed as provided by these rules or as required by the ... Judge, he may be declared to be in default ... on the initiative of the ... Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default....Thereafter, the ... Judge, in [her] discretion, may enter a decision against the defaulting party....

A judge has very broad discretion in imposing sanctions for noncompliance with the Commission's Rules of Procedure or the judge's orders. *See Sealtite Corp.*, 15 BNA OSHC 1130, 1134 (No. 88-1431, 1991). The Commission, however, has long held dismissal is too harsh a sanction for failure to comply with certain prehearing orders unless the record shows

contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of disregard for Commission proceedings. *See Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-389, 2001). I find Respondent's conduct here shows a pattern of disregard of Commission proceedings and abandonment of its Notice of Contest. Respondent has provided no response to my orders, despite having received them. I also find Respondent's conduct has caused prejudice to the Secretary by impeding his ability to proceed in this matter. Although I do not find the sanction of default is warranted, I do find, in not responding to repeated opportunities to present facts in support of its request for relief, Respondent has waived its right to do so.

Pursuant to the Act, an employer is required to notify the Secretary of its intent to contest (notice of contest) a citation within 15 working days of receipt. Failure to timely file a notice of contest results in the citation becoming a final order of the Commission by operation of law. The record reveals Respondent did not file its notice of contest within the requisite 15-day period set out in the Act. A late notice of contest may be accepted, however, where it is established the delay in filing was due to deception by the Secretary, or where the delay was caused by the Secretary's failure to follow proper procedures. A late notice of contest also may be excused under Rule 60(b), if the final order was entered as a result of "mistake, inadvertence, surprise or excusable neglect." *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981)(citations omitted). The moving party has the burden of proving it is entitled to relief under Rule 60(b).

The determination of excusable neglect pursuant to Rule 60(b)(1) is an equitable one, taking into account of all relevant circumstances surrounding Respondent's failure to file a timely notice of contest, including the danger of prejudice to the Secretary, the length of delay and its potential impact on the judicial proceedings, the reason for the delay and whether Respondent acted in good faith. *Pioneer Investment Servs. v. Brunswick Assoc.*, 507 U.S. 380, 395 (1993); *Craig Mechanical, Inc.*, 16 BNA OSHC 1763 (No. 92-0372-s, 1994); *Merritt Electric Company*, 9 BNA OSHC 2088 (No. 77-3772, 1981); *Henry C. Beck Co.*, 8 BNA OSHC 1395 (No. 11864, 1980). Neither a lack of prejudice to the Secretary nor good faith on the part of Respondent in attempting to comply with the statutory filing requirement alone will excuse a late filing. *Fitchburg Foundry Inc.*, 7 BNA OSHC 1516 (Nos.77-520 & 76-1073, 1979). The

Commission has held that whether the reason for the delay was within the control of the Respondent is a “key factor” in determining the presence of “excusable neglect.” *A. W. Ross, Inc.*, 19 BNA OSHC 1147 (No. 99-0945, 2000).

That Respondent did not contest the Citation within the requisite time period is not disputed. The record reveals Respondent’s first contact with OSHA following receipt of the citation was its May 20, 2015, email. This email was sent more than four months after the original contest due date. Respondent did not contact the OSHA area office until September 25, 2015. It did not file its Notice of Contest with the Commission until December of 2015. Respondent’s formal Notice of Contest was not filed until almost a year after the Citation was issued. By operation of law, the Citation and proposed penalty must be deemed a final order of the Commission, unless Respondent can demonstrate it is entitled to relief.

None of the record evidence show deception or a failure to follow proper procedures on the part of the Secretary. It is undisputed Respondent received the Citation. Respondent wrote in its notice of contest it received the Citation in December, 2014. The Citation explained in several locations the time limit for filing a notice of contest, that it must be in writing and where to send it. The Citation unambiguously stated in conspicuous typeface Respondent had 15 working days after receipt within which to file a notice of contest. Nowhere does Respondent assert it was given any information contrary to that contained in the Citation regarding the deadline for filing of a notice of contest. Respondent’s October 2, 2015, letter states Respondent called the local OSHA office in December of 2014, was told OSHA would investigate its allegations, but was never contacted again by OSHA. Respondent submitted no evidence in support of its assertion it contacted OSHA in December of 2014, and the Secretary’s sworn affidavits indicate the first telephone contact with Respondent was not until October of 2015.³ Even accepting as true Respondent’s assertion it was told OSHA would investigate its contention it was not properly named as the employer, I do not find this rises to the level of deception or failure to follow proper procedures on the part of the Secretary.

Where, as here, a party is partly to blame for the delayed filing, relief from the final order must be sought under Rule 60(b)(1) and the party’s neglect must be excusable. *See Pioneer*

³ In addition to telephone contact, Respondent asserts it sent several emails. The only email Respondent submitted, however, was the May 20, 2015, email. Respondent’s failure to submit these earlier emails raises an inference they do not exist.

Investment Serv., 507 U.S. at 393. The Commission requires an employer to exercise due diligence before it will find excusable neglect. *Keefe Earth Boring Company, Inc.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991); *Craig Mechanical*, 16 BNA OSHC at 1763. Based upon the record as a whole, I find the delayed filing was within the control of Respondent and could have been avoided if Respondent had exercised reasonable diligence.

The earliest documentary evidence of Respondent's contact with OSHA is the May 20, 2015, email, sent more than four months after the deadline for contesting the Citation. Respondent provided no explanation for having waited until receipt of a delinquency notice to contact the Secretary. In its October 2, 2015, Notice of Contest Respondent asserts it sent "several emails and more calls" to OSHA upon receipt of the Citation in December, 2014. The record contains no evidence of any emails or other written correspondence prior to January 8, 2015. If such emails existed, Respondent should have produced them to the Court. *Capeway Roofing Systems, Inc.*, 20 BNA OSHC 1331 (No. 00-1968, 2003) (citations omitted); *see also Regina Const. Co.*, 15 BNA OSHC 1044, 1049 (87-1309, 1991) (failure to present evidence within a party's control raises an inference the evidence would not support its position). Assuming Respondent made some verbal contact with OSHA prior to January 8, 2015, that contact did not rise to the level of formality required for a valid notice of contest. *Acrom Construction Services, Inc.*, 15 BNA OSHC 1123 (No. 88-2291, 1991) (finding a notice of contest must be in writing). Respondent has not met its burden to establish it acted in good faith to attempt to contest the Citation prior to the January 8, 2015, deadline.

If Respondent believed OSHA was investigating its claims, due diligence required Respondent to act prior to the deadline. *Secretary v. Barretto Granite Corporation*, 830 F.2d 396, 400 (1st Cir. 1987). Respondent's failure to engage in any follow-up with OSHA was mere negligence on his part. The Commission has long held an employer's carelessness or negligence, even by a layperson, in failing to timely file a notice of contest does not amount to "excusable neglect" that would justify relief under Rule 60(b). *Acrom Constr. Serv.* 15 BNA OSHC at 1126. Respondent has failed to show evidence of due diligence or a good faith effort to comply with the requirements of the Act sufficient to warrant relief under Rule 60(b).

Finally, I have considered the lack of evidence of prejudice to the Secretary. The Secretary presented no evidence the delay in filing imposed an impediment to litigation of the

merits of the Citation. Such a lack of prejudice is insufficient to meet Respondent's burden when, as here, Respondent failed to show more than simple negligence or good faith.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is HEREBY ORDERED that the Secretary's Motion to Dismiss is **GRANTED**.

It is further ORDERED that the notice of contest filed in this case is DISMISSED and the Citation and Notification of Penalty is **AFFIRMED** in all respects.

SO ORDERED.

Date: **June 28, 2016**
Atlanta, Georgia

/s/ _____
Heather A. Joys
Judge