

It is so ordered.

/s/
W. Scott Railton
Chairman

/s/
James M. Stephens
Commissioner

/s/
Thomasina V. Rogers
Commissioner

Dated: August 11, 2004

SECRETARY OF LABOR,

Complainant,

v.

GEORGE HARMS CONSTRUCTION CO, INC.,

Respondent.

OSHRC Docket No. 02-0371

APPEARANCES:

Terence Duncan, Esq.
Office of the Solicitor
U.S. Department of Labor
New York, New York
For the Complainant

John F. Neary, Esq.
Connell Foley, LLP
Roseland, New Jersey
For the Respondent

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”), pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”), for determination of the Secretary’s motion to dismiss Respondent’s request to file a late notice of contest (“NOC”).

BACKGROUND

The underlying citation and proposed penalty (“citation”) arose from an inspection OSHA conducted from November 29, 2001 through December 11, 2001, at a work site of Respondent George Harms Construction Co., Inc., (“Harms”) in Clifton, New Jersey. OSHA sent the citation to Harms’ post office address, by certified mail, return receipt requested, on December 13, 2001 and Harms received it on or before December 31, 2001. (Exh. C-1).¹ Harms did not file an NOC, and the citation became a final order of the Commission by operation of law on January 22, 2002. *See* section 10(a) of the Act.

On February 28, 2002, OSHA mailed to Harms a debt collection notice. On March 8, 2002, Edward Nyland, Harms’ President, called OSHA, spoke with Assistant Area Director (“AAD”) Steve Kaplan, and

¹ The received date stamped on the return receipt card was partially obscured by the signature of the employee who accepted it; the month and year are clearly indicated, but not the day. The mailing, however, was evidently received by Harms at least on or before December 31, 2001, and the parties so stipulated. (Tr. 17, 109, Exh. C-1).

informed him that he had no record of the citation. Also on March 8th, Mr. Nyland mailed a letter to the Commission that essentially requested that Harms be permitted to file an NOC out of time; the reason given for the failure to file a timely NOC was “clerical error.” (Tr. 11, 66-68, 84-85, Exhs. C-2, C-5, R-2).

The case was docketed at the Commission, and, on April 1, 2002, the Secretary filed a motion for an extension of time to file her complaint.² Three weeks later, on April 23, 2002, the Secretary filed a motion to dismiss the proffered NOC as untimely. Harms cross-moved for permission to file an NOC *nunc pro tunc* and to compel the Secretary to file a complaint. A hearing on the timeliness of Harms’ NOC was conducted, and both parties have filed post-hearing briefs.

In its brief, Harms requests that the untimely filing of the NOC be excused under Federal Rule of Civil Procedure 60(b)(1)&(6). Harms also asserts that the Secretary’s motion to dismiss was untimely, that the Secretary waived her right to object to the NOC when she filed her motion for an extension of time to file her complaint, and that the late filing of the NOC should be excused because the citation was not addressed to Mr. Nyland.

DISCUSSION

It is clear that Respondent did not file a timely notice of contest. Section 10(a) of the Act requires an employer to notify OSHA of the intent to contest a citation within 15 working days of receiving it, and, as indicated above, the failure to do so results in the citation and penalty becoming a final order of the Commission by operation of law. Under Commission precedent however, an otherwise untimely NOC may be accepted if the employer can show that the late filing was caused by the Secretary’s deception or her failure to follow proper procedures. A late filing may also be excused if the final order was entered as a result of “mistake, inadvertence, surprise or excusable neglect” or for “any other reason justifying relief, including mitigating circumstances such as absence, illness or a disability that would prevent a party from protecting its interests.” *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981); *See also* Fed. R. Civ. P 60(b).

Here, Harms presented evidence that it had specific procedures for the handling of mail and the delivery of important documents. Mr. Nyland also testified that when he works at a site and is therefore out of the office, as he was in December, 2001, his mail is forwarded to him on a daily basis, and that he has never had a problem receiving his mail. The evidence also showed that Mr. Nyland acted quickly and in good faith promptly upon discovering the fact of the citation. (Tr. 73-77, 97-98, 103-104, Exhs. C-2, C-5, C-3). Also, because the Secretary proceeded to litigate the matter by serving a motion to extend her

² On November 18, 2002, I granted the Secretary’s motion for an extension of time.

time to file her complaint, I find that the late NOC caused her no prejudice.³

When determining whether a party's neglect may be excused under Rule 60(b)(1), however, the Commission considers a key factor to be whether the delay was within the reasonable control of the employer. *CalHar Constr. Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-0367, 2000). It is on this issue that Harms' proof falls short because C. Pelsing, the Harms employee who signed for the citation, did not testify. In addition to being the only Harms employee known to have had possession of the citation at any time before its disappearance, Ms. Pelsing was also the employee at the company responsible for retrieving the mail at the post office, accepting certified documents, and date-stamping and distributing the mail. She, therefore, would have personal knowledge relating to whether office procedures were followed and what may have happened to the certified document she signed for in December. Moreover, Mr. Nyland was able to testify only that he had had no prior problems receiving his mail, and that he was unaware of any other mail delivery issues within the company. (Tr. 73-81, 84, 94-98). By virtue of her position, Ms. Pelsing would know better whether other Harms employees had had previous problems receiving mail under the office's procedures then in effect. There was no indication that Ms. Pelsing is no longer employed by the company and no reason for her absence from the hearing was given. Without her testimony, I cannot make a determination that the failure to file a timely NOC was not within the company's control and I am accordingly constrained to conclude that Harms failed to show that its neglect should be excused.⁴

With respect to Harms' request for relief under Rule 60(b)(6), the record is devoid of evidence that an illness, absence, disability or similar occurrence, traditionally relied on by courts as a basis for relief under that section, caused the company to miss the filing deadline. *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981). Nor am I persuaded by Respondent that the Secretary's motion to extend her time to serve a complaint satisfied this section's requirements, as that motion was made *after* the contest period had expired.

As is indicated above, Harms also argues that: (1) the late filing should be excused because the Secretary did not address the citation to Mr. Nyland; (2) the Secretary waived her right to seek dismissal

³ *See CalHar Constr. Inc.*, 18 BNA OSHC 2151 (No. 98-0367, 2000), for a discussion of the factors the Commission will consider in determining whether a company's delay in filing an NOC was the result of "excusable neglect."

⁴ The problem of the missing evidence was not alleviated by Mr. Nyland's testimony that Ms. Pelsing told him that she did not recall receiving anything from OSHA. (*See*, Tr. 98). While I found Mr. Nyland to be a credible witness, his testimony on this point establishes only that Ms. Pelsing made that statement to Mr. Nyland; it does not prove to me that she in fact, could not recall accepting the citation. Indeed, Mr. Nyland himself admitted that Ms. Pelsing might have been confused by the fact that the sender's name on the citation was "Department of Labor." (Tr. 77).

when she filed her motion to extend her time to serve a complaint; and (3) the Secretary's motion to dismiss was untimely. Harms' argument relating to the Secretary's failure to address the citation to Mr. Nyland is denied because neither the Act nor principles of due process require OSHA to direct a citation to a specific individual within the company, even when there is proof that an express request to do so was made at the closing conference. *Nynex*, 18 BNA OSHC, 1944 (No. 95-1671, 1999). Nor, in this case, could such a failure be deemed a basis for Rule 60(b) relief. Harms did not expressly request that the citation be forward to Mr. Nyland; at best there was some proof that other OSHA matters had been handled by him and that the debt collection notice contained the salutation, "Dear Mr. Nyland," and I find this proof insufficient to establish that the Secretary failed to follow proper procedures. Further, there was no causal connection between OSHA's failure to so address the citation and Harms' delay in filing the NOC because Ms. Pelsing was under instructions to give all mail concerning OSHA matters to Mr. Nyland regardless of whether it had his name on it. (Tr. 34-35, 75-77, 94, 101-102, Exhs. C-1&2, R-3, 5 & 6).

Harms arguments with respect to (2) and (3) are not completely without merit; the Secretary's motion for dismissal was served more than five weeks after the late NOC and the matter was clearly in the appropriate hands at the Department of Labor, as the Secretary's first action was to seek an extension of time to serve a complaint. However, as is discussed above, once Harms failed to file a timely NOC, the citation became a final order of the Commission *by operation of law*. See Section 10(a) of the Act. Moreover, because the Secretary's application raises questions relating to the Commission's jurisdiction to hear the merits of the case, the Secretary could not waive her right to seek dismissal, and her motion therefore could have been filed at any time. See Fed. R. Civ. P. 12 (h)(3).⁵ Accordingly, Respondent's arguments on these issues are also rejected.

In light of the above, I conclude that the citation was properly served, that Harms did not file a timely NOC, and that Harms is not entitled to relief pursuant to Rule 60(b). The Secretary's motion to dismiss is accordingly GRANTED, Respondent's cross-motion is DENIED, and the citation is AFFIRMED in all respects.

So ORDERED.

⁵ For the same reasons, I am also not persuaded that statements in the Secretary's motion for an extension of time to file her complaint amounted to an admission that the case should settle and that Respondent's late NOC ought to be accepted.

/s/
IRVING SOMMER
Chief Judge

Date: February 3, 2003
Washington, D.C.