

Secretary of Labor,
Complainant,

v.

Coastal Horizontal, Inc., d/b/a
Coastal Power, Inc.,
Respondent.

OSHRC Docket No. **00-1022 (E-Z)**

Appearances:

Carla J. Gunnin, Esq.
U. S. Department of Labor

Office of the Solicitor
Birmingham, Alabama
For Complainant

G. R. Erick Mead, Esq.
Clark, Partington, Hart, Larry,
Bond
& Stackhouse
Pensacola, Florida
For Respondent

Before: Administrative Law Judge Nancy J. Spies

ORDER AND DECISION DISMISSING LATE NOTICE OF CONTEST

Coastal Horizontal, Inc., d/b/a Coastal Power, Inc. (Coastal), filed a notice of contest of the citation and penalty issued by the Secretary on April 28, 2000. The Secretary contends that the notice of contest was untimely and that the citation and penalty constitute a final order pursuant to § 10(a) of the Occupational Safety and Health Act of 1970 (Act). She filed a motion to dismiss. Coastal responded with a motion to set aside the default, and both parties filed further support for their motions. A hearing on the issue was held on August 28, 2000, in Pensacola, Florida. The parties argued their positions at the close of the hearing, and Coastal filed a post-hearing brief. The case is ready for decision. For the reasons below, Coastal is not entitled to relief from its untimely notice of contest.

Background

Following a March 9, 2000, Occupational Safety and Health Administration (OSHA) inspection of a Coastal excavation operation in Navarre, Florida, the Secretary issued Coastal a five-item serious citation with a recommended penalty of \$8,900. The Jacksonville, Florida, OSHA Area Office sent the citation by certified mail on April 28, 2000; and Coastal received it on

May 1, 2000, as shown by a return receipt signed by G.O. Scruggs, a Coastal employee with responsibility for handling Coastal's incoming mail (Exh. C-2; Tr. 20). Coastal was required to notify the Secretary of an intent to contest within 15 working days of its receipt of the citation, or by May 22, 2000.

By letter, dated and telefaxed on May 30, 2000, Coastal contested the amount of the proposed penalties only (Exh. C-3).

Discussion

It is undisputed that Coastal filed its notice of contest to the proposed penalties 8 days after the expiration of the 15 working-day period. The issue here is whether Coastal should be granted relief from the effects of the untimely contest. An untimely filing may be excused where the delay was caused by deception on the part of the Secretary or by the Secretary's failure to follow proper procedures. *Atlantic Marine, Inc. v. OSHRC*, 524 F. 2d 476 (5th Cir. 1975). Relief can be obtained under Rule 60(b)(1) of the Federal Rules of Civil Procedure, if an employer demonstrates that its late filing resulted from mistake, inadvertence, surprise, or excusable neglect. Rule 60(b)(6) allows relief based on mitigating circumstances, such as illness, absence, or a disability that prevents a party from protecting its own interests. Under either theory, the employer has the burden of showing a sufficient basis for relief. *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Branciforte Builders*, 9 BNA OSHC 2113 (No. 80-1920, 1981).

Misconduct

Coastal does not allege any misconduct on the part of the Secretary (Tr. 7).¹ There is no evidence that OSHA officials made misrepresentations, engaged in misconduct, or failed to comply with required procedures that would justify relief from the notice of contest becoming a final order.

Excusable Neglect

Coastal contends that its failure to timely file a notice of contest was excusable neglect because an employee misdirected the certified OSHA citation. Coastal's vice-president, Jennifer Hamilton, testified that she had over-all responsibility for the mail and that the office normally

¹ Although Coastal's pre-hearing motion asserted that the OSHA compliance officer may have caused it some confusion about whether a citation would be forthcoming, Coastal abandoned that position at the hearing. It is noted that neither party called the compliance officer who was present at the hearing.

received certified mail (Tr. 14). Scruggs signed and dated the return receipt for the OSHA Citation and Notice of Penalty on May 1, 2000. Scruggs was an employee who distributed the mail in the office (Tr. 20- 21). Vice-president Hamilton testified that another employee, Terrie Clingle, admitted to her that she took that day's mail off Scrugg's desk and distributed it. According to Hamilton, Clingle's responsibilities also included work with the mail but only after it had been through proper channels (Tr. 14). Hamilton considered that all certified mail should first come to her before being distributed within the office. When Clingle took the mail from Scrugg's desk, she placed the certified OSHA citation on the field superintendent's desk, face downward (Tr. 14). The field superintendent came into the office about every other week (Tr. 14). Hamilton did not discover the citation until May 30, 2000, and on that date she called the OSHA office and telefaxed the letter of contest (Tr. 15, 26).

The Supreme Court discussed "excusable neglect" in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U. S. 380 (1993). The Court concluded that whether a party's neglect of a deadline may be excused presents equitable questions from all the surrounding circumstances, such as (*Id.* at 395):

the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reasons for the delay, including whether it was within the reasonable control of the movant.

Although *Pioneer* involved a Bankruptcy Act Rule, the United States Circuit Courts generally have held that *Pioneer's* analysis of "excusable neglect" applies to Rule 60(b). *Robb v. Norfolk & Western Railway Co.*, 122 F. 3d 354, 361-62 (7th Cir. 1997). The first two *Pioneer* factors would not prohibit granting relief. However, Coastal's reason for the delay (mishandling the incoming mail) appears to have been firmly within its reasonable control. The Review Commission consistently denies relief to employers whose procedures for handling important documents are to blame for untimely contests of OSHA citations. *Montgomery Security Doors & Ornamental Iron, Inc.*, 18 BNA OSHC 2145, 2148 (No. 97-1906, 2000) (record showed a breakdown of business procedures and delay unjustified even assuming it was due to employee sabotage); *NYNEX*, 18 BNA OSHC 1944, 1947 (No. 95-1671, 1999) (no relief where employee redirected certified mail since company was without adequate procedures); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020 (No. 86-1266, 1989) (change in management insufficient excuse for

late filing); *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830, 1989) (employer failed to maintain orderly procedures for handling internal documents to keep citation from getting into wrong hands); but see *Russell B. Le Frois Builder, Inc.*, 18 BNA OSHC 1978 (No. 98-1099, 1999).²

Coastal did not have an orderly office procedure for handling important mail. Vice-president Hamilton testified that it was not unusual for her to go through the mail on Scruggs's desk to take out appropriate mail when Scruggs was not at her desk (Tr. 22). Hamilton speculates that Scruggs perhaps assumed that she (Hamilton) took the certified letter off of her (Scruggs's) desk (Tr. 22). Scruggs could have followed up to make sure that Hamilton, the proper person, actually received the certified mail. Coastal's procedures could predictably result in misdirecting important mail within the company. The fact that another employee, who also had mail handling responsibilities, delivered the citation to the wrong person does not rise to the level of excusable neglect. Coastal failed to show "mistake, inadvertence, surprise or excusable neglect" or any other mitigating circumstance to justify relief under Rule 60(b).

Constitutionality

Coastal argues that regardless of whether its notice of contest was timely, the citation must fail because the Act is unconstitutional on its face and as applied. Coastal contends that "[t]he infliction of [workplace] 'personal injuries and illnesses' . . . is not economic activity in any sense," leaving Congress without authority to enact it under the Commerce Clause. In support of its argument, Coastal cites *U. S. v Lopez*, 514 U. S. 549(1995) (Gun-Free School Zones Act of 1990 unconstitutional under commerce clause because Congress could not regulate gun possession in a local school zone which was unrelated to commerce or economic activity)³ and *U. S. v. Morrison*, ___ U. S. ___, 120 S. Ct. 1740 (2000) (civil remedy provisions for victims of

² The instant case is distinguishable from *Russell B. Le Frois Builder* where the Commission found excusable neglect for an employer who picked up the mail at the post office box and the certified mail fell beneath the car seat. In the instant case, the certified mail arrived at the employer's own office and entered its mail handling process.

³ The Court in *Lopez* noted that it upholds a wide variety of Congressional Acts regulating intrastate economic activity affecting interstate commerce under the commerce clause. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez* at 4346.

gender-motivated violence were unconstitutional because gender-motivated crimes of violence were not in any sense economic activity to be regulated under the Commerce Clause).

First, it is questionable whether Coastal can raise the issue of the Act's constitutionality. Its untimely contest must be dismissed and the citation is a final order. That notwithstanding, the Commission has long held that it lacks the authority to rule on questions of the constitutionality of provisions of the Act on which no court has yet ruled. It can merely apply judicial precedent regarding the constitutionality of the Act. *Adams Steel Erection, Inc.*, 13 BNA OSHC 1073, 1075 (No. 77-3804, 1987). The courts apparently have not addressed the specific question of whether the Act is a valid exercise of Congressional power under the commerce clause.⁴ Even could Coastal properly raise it, the issue cannot be decided here.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ.P.

ORDER

The Secretary's motion to dismiss is GRANTED, and the April 28, 2000, citation and the penalty of \$8,900 are affirmed.

/S/

NANCY J. SPIES
Judge

Date: October 11, 2000

⁴ Multiple courts have held that by enacting the O.S.H. Act Congress intended to exercise the full extent of the authority granted to it by the commerce clause of the Constitution. *Austin Road v. Occupational Safety and Health Review Commission*, 683 F. 2d 905, 907 (5th Cir. 1982); *Godwin v. Occupational Safety and Health Review Commission*, 540 F. 2d 1013, 1015 (9th Cir. 1976); *U. S. v. Dye Construction Co.*, 510 F. 2d 78, 83 (10th Cir. 1975); *Brennan v. Occupational Safety and Health Review Commission*, 492 F.2d 1027 (2nd Cir. 1974).