

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

DORE & ASSOCIATES CONTRACTING, INC.

Respondent.

OSHRC Docket No. 01-0067

DECISION AND REMAND ORDER

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

This matter is before the Commission on an order directing review of a decision by Chief Administrative Law Judge Irving Sommer granting the motion by the Secretary of Labor (“Secretary”) to dismiss as untimely the notice of contest filed by Respondent (“Dore”). We reverse and remand for additional evidentiary findings as set forth herein.

Following an inspection, the Secretary cited Dore on September 21, 2000 for several serious and other than serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651-§§ 678 (“the Act”), for which the Secretary proposed a penalty of \$8400. Dore received the citations on September 25 but did not file a notice of contest within the statutory time period of 15 working days following receipt as set forth in section 10(a) of the Act, 29 U.S.C. 659(a). On October 30, and again on November 28, Dore’s then “general counsel,” Kelly M. Breckenridge, wrote to the Occupational Safety and Health Administration’s Area Office stating that she had not received the citation and notification of proposed penalty until after the contest period had elapsed. In her October 30 letter counsel requested the opportunity to discuss a settlement and reduction of the penalty and in her second letter counsel asked for “an opportunity to respond to these allegations.” Thereafter Dore, now

appearing *pro se*, advised the Commission that “former counsel[] is no longer with our company as of December 1, 2000 and it appears that this matter had been left unattended.” Dore also informed the Commission that the letters from its prior counsel were intended to serve as a notice of contest. The Commission then docketed the case, and it was assigned to Judge Sommer.

The Secretary filed a motion asking that Dore’s notice of contest be dismissed for the reason that Dore had provided no explanation as to why counsel was unable to handle the citation and penalty notification in a timely fashion.¹ Judge Sommer, citing *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2116-17, 1981 CCH OSHD ¶ 25,591, pp. 31,921-22 (No. 80-1920, 1981), noted that unless the Secretary is shown to have engaged in some type of misconduct, a late notice of contest can otherwise be entertained only under Fed. R. Civ. P. 60(b). The judge concluded that Dore had not presented grounds for relief under this rule because it had not established that its untimely filing was due to “mistake, inadvertence, surprise or excusable neglect” or other reasons “such as illness, or a disability which would

¹We note that Commission rule 40(a), 29 C.F.R. § 2200.40(a), requires a party to “confer or make reasonable efforts to confer” with the other party prior to filing a motion and state in the motion if the other party “opposes or does not oppose the motion.” The Secretary apparently did not comply with the rule here.

prevent a party from protecting its interests.”² Accordingly, the judge affirmed the citations and notification of proposed penalty.

Dore, continuing to appear *pro se*, then filed a petition with the Commission for discretionary review of the judge’s decision, claiming that it inadvertently failed to file a timely notice of contest because its former counsel “had been off work due to a back related injury.”³ On the limited record before us here we cannot determine whether Dore has established a basis to excuse the untimely filing of its notice of contest. In this case, as in *Vern’s Mfg., Inc.*, 14 BNA OSHC 1846, 1987-90 CCH OSHD ¶ 29,113 (No. 89-3082, 1990) and *Mannkraft Corp.*, 1993-95 CCH OSHD ¶ 30,254 (No. 93-304), where we remanded to allow an employer appearing *pro se* to present evidence in support of its request for relief under Rule 60(b), there has been no evidentiary hearing nor any affidavits filed from which we can make factual findings on the merits of Dore’s claim for relief from a final order. In conformity with our usual practice, we will remand this matter to allow the Administrative

²Fed. R. Civ. P. 60 provides in pertinent part as follows:

Rule 60. Relief From Judgment or Order

.....

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; Etc. On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect or (6) any other reason justifying relief from the operation of the judgment.

Section 10(a) of the Act provides that unless timely contested, a citation and notification of proposed penalty “shall be deemed a final order of the Commission and not subject to review by any court or agency.”

³We note, however, that Breckenridge herself, in her two letters requesting relief from her failure to file a notice of contest, did not mention a back injury. Rather, she claimed only that the citation and notification of penalty had not reached her desk in time for her to respond.

Law Judge to conduct an appropriate evidentiary proceeding. *See Merchant's Masonry, Inc.*, 18 BNA OSHC 1936, 1999 CCH OSHD ¶ 31,931 (No. 99-189, 1999) (remand to afford employer an opportunity to make showing on a full evidentiary record).

Accordingly, this matter is remanded for further proceedings consistent with this opinion.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Dated: May 24, 2001

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
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Complainant,	:	
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	:	
DORE & ASSOCIATES CONTRACTING,	:	
INC.,	:	
	:	
Respondent.	:	
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	:	
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DECISION AND ORDER

This case 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. Sec. 651 et seq ("the Act"), to determine whether the Secretary's motion to dismiss Respondent's untimely notice of contest should be granted. Respondent has filed no response to the motion.

BACKGROUND

The Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent, resulting in the issuance of two citations and notification of penalties on September 21, 2000. Pursuant to Section 10(a) of the Act, Respondent was required to notify OSHA of its intent to contest the citations within 15 working days of its receipt of the citations, and failure to do so would result in the citations and penalties becoming a final judgement of the Commission by operation of law. It is undisputed that the citations setting forth the alleged violations and proposed penalties were sent by certified mail and received by the Respondent on September 25, 2000. The statutory notice of contest period ended on October 17, 2000 and a notice of contest was not filed by the Respondent on or before said

date. By letter dated October 30, 2000 the general counsel for the Respondent informed OSHA that "I did not receive the citation and notice of penalty until the 15 day period had already passed" and asked that the said time period be waived. On November 28,

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2000, the general counsel further inquired about this matter stating, "As I wrote to you at the that time, the paperwork from your organization did not make it to my desk until after the 15 day period was had already lapsed.", and asked to be able to respond to the allegations.

DISCUSSION

The record plainly shows that the Respondent did not file its notice of contest within the 15 day period. An otherwise untimely notice of contest may be accepted where the delay in filing was caused by deception on the part of the Secretary or by the Secretary's failure to follow proper procedures. An employer is also entitled to relief under the Federal Rules of Civil Procedure 60(b)(1) if it establishes that the Commission's final order was entered as a result of "mistake, inadvertence, surprise or excusable neglect, or under 60(b)(6) for "any other reason justifying relief", including mitigating circumstances such as illness, or a disability which would prevent a party from protecting its interests. Branciforte Builders, Inc., 9 BNA 2113. There is no contention that the Secretary acted improperly in this matter.

The cover letter accompanying the citations states on page 2 under the heading RIGHT TO CONTEST as follows: "You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates without contesting underlying violations. Unless you inform the Area Director in writing that you intend to contest the citation(s) and /or proposed penalty(ies) within 15 working days after receipt, the citation(s) and the proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.

The Commission has held that the OSHA citation ``plainly state(s) the requirement to file a notice of contest within the prescribed period". Additionally, the Commission has held that an employer ``must bear the burden of its own lack of diligence in failing to carefully read and act upon the information contained in the citations" and that Rule 60 cannot be invoked to ``give relief to a party who has chosen a course of action which in retrospect appears unfortunate or where error or miscalculation is traceable to a lack of care".*Accrom Constr. Serv.*, 15 BNA 1123,1126.

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The Respondent had clear notice of the need to contest within the 15 working day period, and it is responsible for its failure to act promptly to its government mail. The circumstances here are insufficient to establish entitlement to relief under Rule 60.

ORDER

For the reasons set out above, the Secretary's motion to dismiss the notice of contest is GRANTED, and the citations and notification of penalties is AFFIRMED in all respects.

DATED: 22 April 2001
Washington, D.C.

/s/
IRVING SOMMER
Chief Judge

