

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, :  
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 Complainant, :  
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 v. :  
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 RICOP CONSTRUCTION COMPANY, :  
 :  
 Respondent. :

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OSHRC DOCKET NO. 01-0955

Appearances: Paul Spanos, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Cleveland, Ohio  
For the Complainant.

Terri A. Forrest  
RICOP Construction Company  
Columbus, Ohio  
For the Respondent, *pro se*.

Before: Administrative Law Judge Michael H. Schoenfeld

***DECISION AND ORDER***

***Background and Procedural History***

This case is before the Occupational Safety and Health Review Commission (“the Commission”), pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) (“the Act”), for the sole purpose of determining whether the Secretary’s motion to dismiss Respondent’s notice of contest (“NOC”) as untimely should be granted.

The Occupational Safety and Health Administration (“OSHA”) inspected a work site of RICOP Construction Company (“RICOP”), in Newark, Ohio, from March 30 to April 5, 2001. As a result, OSHA issued RICOP a citation and notification of penalty on April 24, 2001. 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 the failure to file a timely NOC results in the citation and penalty becoming

a final order of the Commission by operation of law. It is undisputed that OSHA mailed the citation in this case by certified mail, return receipt requested, that RICOP received the citation on April 26, 2001, and that the 15-day NOC filing period ended on May 17, 2001.<sup>1</sup> It is also undisputed that RICOP did not file its NOC until May 18, 2001. On July 13, 2001, the Secretary filed her motion to dismiss the NOC as untimely, and on July 20, 2001, RICOP filed a response seeking relief pursuant to Federal Rule of Civil Procedure 60(b) (“Rule 60(b)”). A hearing addressing this issue was held on October 16, 2001, in Columbus, Ohio. Both parties have filed post-hearing briefs.

### ***Jurisdiction***

According to long-standing precedent, the Commission has the authority to reconsider a final order resulting from a late-filed notice of contest where the employer seeks Rule 60(b) relief. *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981). On that basis, I find that the Commission has jurisdiction over the parties and the subject matter of this proceeding.

### ***The Relevant Evidence***

The record shows that on May 2, 2001, RICOP representatives Terri Forrest and Clayton Warren had an informal settlement conference with OSHA AD Deborah Zubaty. At the conference, Zubaty advised the representatives that they had until May 17, 2001, to contest the citation. She also discussed the issues the representatives had with the citation and said that she would get back with them with more information on May 10, 2001.<sup>2</sup> On May 11, 2001, Zubaty phoned RICOP and spoke

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<sup>1</sup>Although OSHA did not receive the return receipt through the mail, Terri Forrest, the company’s controller, showed it to Deborah Zubaty, the area director (“AD”) of the Columbus OSHA office, during an informal conference on May 2, 2001. Forrest said RICOP had received the citation on April 26, 2001, and Zubaty calculated the NOC filing period based on that date. Zubaty correctly informed Forrest that the contest period ended on May 17, 2001. (Tr. 14-19; 38; 43-45).

<sup>2</sup>One of these issues was the fact that while OSHA had cited RICOP under the residential construction standards after a January 2001 inspection, RICOP was cited under the nonresidential construction standards after the subject inspection. Zubaty told the RICOP representatives at the May 2, 2001 conference that the residential classification had been wrong. During a phone conversation on May 11, 2001, Zubaty told Forrest and Warren she had changed RICOP’s SIC code in OSHA’s internal records relating to the subject site to nonresidential construction. (Tr. 20-23; 38-42).

with Forrest and Warren, stating that she would be faxing them an informal settlement agreement that amended the citation.<sup>3</sup> The fax was sent later that day, at 5:36 p.m., but Forrest and Warren did not see it until May 14, 2001, the following Monday morning, because RICOP's office hours were 8 a.m. to 5 p.m. (Tr. 15-21; 47-53). The cover sheet to the fax stated as follows:

As discussed, attached is an Informal Settlement Agreement for your review. If you agree, please sign and fax to our office. Keep a copy for your records. Your last date of contest is 5/17/01. Please call if you have any questions.

RICOP did not execute the informal settlement agreement or file an NOC by May 17, 2001.<sup>4</sup> The next morning, on May 18, 2001, Warren phoned OSHA and left a message requesting that Zubaty return his call. When Zubaty called Warren later that day, she advised him that the contest period had ended and that if RICOP wanted to file a late NOC it would need to do so with the Commission. RICOP filed a letter contesting the citation that same day, by both faxing and mailing it by certified mail to Zubaty's attention in the Columbus area office. On May 22, 2001, Zubaty sent a letter to RICOP, stating that it should file its NOC with the Commission with a copy to her office. RICOP did so, and the Commission received it on May 31, 2001.<sup>5</sup> (Tr. 18-19; 25; 43).

### ***Discussion***

Commission precedent is well settled that an untimely NOC may be accepted in cases in which the delay in filing was a result of the Secretary's deception or failure to follow proper procedures. An employer is likewise entitled to relief if it can show that the Commission's final order was entered due to "mistake, inadvertence, surprise, or excusable neglect" or "any other reason

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<sup>3</sup>The agreement vacated one serious item and reduced the penalties proposed for the other serious item and one of the "repeat" items; it also reclassified the other "repeat" item as serious, changed the standard alleged to have been violated, and reduced the penalty proposed. *See C-2*.

<sup>4</sup>Forrest and Warren testified they had taken no action because Zubaty indicated during the May 11 phone call that she would call them by May 17 to let them know her decision about whether she would make any further amendments to the citation. (Tr. 41-43; 48-50). Zubaty, on the other hand, testified that she did not remember telling them that she would call back, and her notes reflected no such information. (Tr. 23-25).

<sup>5</sup>The letter sent to the Commission was different from the one sent to OSHA. Regardless, for purposes of this case, May 18, 2001 will be considered the date that RICOP filed its NOC.

justifying relief,” including mitigating circumstances such as absence, illness or a disability that would prevent a party from protecting its interests. *See* Rule 60(b). *See also Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981), and cases cited therein. RICOP contends that it is entitled to Rule 60(b) relief in this matter either because (1) the Secretary was deceptive and/or failed to follow proper procedures, or (2) the untimely filing was due to excusable neglect.

RICOP contends that OSHA’s classifying its work at the site as residential construction at the time of the first inspection, and then reclassifying its work as nonresidential at the time of the subject inspection, was deceptive or a failure to follow proper procedures, and that Zubaty’s changing its SIC code to nonresidential construction was misconduct. RICOP asserts that it relied on the first classification and proceeded accordingly at the site and that the reclassification without prior notice put it in the position of being cited unfairly and not knowing which standard to follow. RICOP concludes that based on this evidence, it is entitled to relief. I disagree. The question to resolve is whether deception on the Secretary’s part, or her failure to follow proper procedures, caused the late filing of the NOC in this case. That OSHA reclassified RICOP’s work at the site, and that Zubaty changed the company’s SIC code, may well have been confusing to RICOP and seemed unfair.<sup>6</sup> These actions on OSHA’s part, however, have no relation to the untimely filing of the NOC, but, rather, go to the merits of the citation items themselves. As indicated *supra*, the Commission’s jurisdiction in this matter does not extend to the merits of the citation items, and the only issue before me is whether the motion to dismiss should be granted. RICOP’s contention provides no grounds for Rule 60(b) relief, and it is accordingly rejected.

RICOP’s next contention is based on the testimony of Forrest and Warren that Zubaty told them on May 11 that she would call back by May 17 to let them know about making any further

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<sup>6</sup>In explanation of OSHA’s actions in this matter, Zubaty testified that work at a site could change from residential to nonresidential, depending on what phase it was in, and that an employer might be unsure which standards to follow. She noted, however, that the two types of construction were explained and interpreted in OSHA instructions. She further noted that the nonresidential requirements were the more stringent and that by complying with them the employer would also be in compliance with the residential requirements. Finally, she noted that OSHA often cites an employer under both standards and then, at the informal conference, decides which standard is appropriate and amends the citation accordingly. Zubaty also indicated that there was nothing improper about changing an employer’s SIC code. (Tr. 29-35).

amendments to the citation.<sup>7</sup> (Tr. 41-43; 48-50). RICOP asserts that it relied on Zubaty's statement that she would call back, that her failure to do so caused the NOC to be late, and that, under these circumstances, the untimely filing should be found to be due either to misconduct on Zubaty's part or excusable neglect on RICOP's part. Again, I disagree. As noted above, Zubaty testified that she did not recall saying she would call back, and her notes contained no such information. (Tr. 23-25). In addition, as set out *supra*, the statements in the cover sheet sent with the informal settlement agreement say nothing about Zubaty getting back with RICOP. In fact, the last sentence on the cover sheet advises RICOP to "[p]lease call if you have any questions," indicating it was up to RICOP to contact Zubaty if it desired more information. I find, therefore, that Forrest and Warren misunderstood what Zubaty said and that Zubaty did not promise to call back by May 17.

Even if Zubaty had told Forrest and Warren she would call back, the Commission has held that OSHA's failure to call an employer back, after assurances that it would do so, constitutes neither misconduct nor excusable neglect for purposes of Rule 60(b) relief. *Craig Mechanical, Inc.*, 16 BNA OSHC 1763, 1765-66 (No. 92-372, 1994). *See also Calhar Constr., Inc.*, 18 BNA OSHC 2151, 2154 (98-367, 2000). The Commission found this to be so because of the unequivocal language on the face of the citation itself warning that an employer must file an NOC within 15 working days or accept the finality of the citation. *Craig Mechanical*, 16 BNA OSHC at 1765-66. In fact, the Commission has long held that the OSHA citation plainly states the requirement to file a notice of contest within the prescribed period, that ignorance of procedural rules, even by a layman, does not constitute "excusable neglect," and that Rule 60(b) 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 really to a lack of care." *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126-27 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991); *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1787, 1989).

In addition to the foregoing, the record shows that Zubaty specifically advised RICOP's representatives on two different occasions that the NOC contest period ended on May 17. Zubaty

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<sup>7</sup>In particular, Forrest and Warren testified that Zubaty had said she would look at the OSHA video and call them with her decision as to one of the citation items. They also indicated they did not know whether to contest the citation until they had Zubaty's final decision. (Tr. 41-43; 48-50).

testified that she informed the RICOP representatives of the May 17 date at the May 2 conference, and the cover sheet that Zubaty sent with the informal settlement agreement stated that the “last date of contest is 5/17/01.” (Tr. 15-18). Further, Forrest conceded that she was aware that May 17 was the end of the contest period. (Tr. 15-16; 43-45). She also conceded that she had attended the informal conference relating to the citation that resulted from the January 2001 inspection, although, as Zubaty testified, that citation had settled. (Tr. 23; 38-39). There is no evidence that Zubaty intended to or in fact deceived Respondent about the due date for the NOC. Zubaty’s statements and her testimony, which I find to be credible, show no attempt at leguleian deceit.

Based on the evidence of record, I conclude that Rule 60(b) relief is not justified in this case. In so finding, I am aware of the testimony of Forrest indicating that she believed, first, that Zubaty had the authority to extend the contest period, and, second, that the date was “still open.”<sup>8</sup> (Tr. 40; 45). I am also aware of Warren’s testimony that he called Zubaty “immediately” on the morning of May 18 when he realized she had not called the day before, which lends credence to the testimony of both Forrest and Warren that they believed that Zubaty would call back by May 17. (Tr. 49; 52). Finally, I am aware that RICOP promptly filed its NOC on May 18 after Zubaty told them to do so. Regardless, in view of Zubaty’s two specific warnings to the company about the NOC filing period, and in light of the Commission precedent set out above, which I am constrained to follow, the late filing in this case was not due to misconduct on the Secretary’s part or excusable neglect on RICOP’s part. The Secretary’s motion to dismiss is accordingly GRANTED.<sup>9</sup>

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<sup>8</sup>Forrest apparently believed that Zubaty could extend the NOC period because she was the OSHA AD. Zubaty, however, testified that she did not have the authority to accept a late NOC. (Tr. 27). Further, as indicated above, section 10(a) of the Act specifically requires the NOC to be filed within 15 days, and, if it is not, the citation and penalty are “deemed a final order of the Commission and not subject to review by any court or agency.” The only exception to this rule is when the employer can establish that it is entitled to Rule 60(b) relief.

<sup>9</sup>In granting the motion, I have considered the Commission’s decision in *B.J. Hughes, Inc.*, 7 BNA OSHC 1471 (No. 76-2165, 1979), which RICOP cites in support of its position. In that case, however, the late filing was excused because the employer had relied on an incorrect NOC filing date that was provided by the OSHA area director and the assistant area director. 7 BNA OSHC at 1476-77. I have also considered two recent decisions of the Commission in which it held that the late-filed NOC’s were due to excusable neglect. *See Northwest Conduit Corp.*, 18 BNA OSHC 1948 (No. 97-851, 1999); *Russell B. Le Frois Builder, Inc.*, 18 BNA OSHC 1978 (No. 98-1099, 1999).

***ORDER***

Respondent's Notice of Contest is DISMISSED.

So ORDERED.

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Michael H. Schoenfeld  
Judge, OSHRC

Dated: Washington, D.C.

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The circumstances in those cases are likewise very different from the ones here, and I conclude that the decisions in those cases do not apply to this matter.