

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20<sup>th</sup> Street, N.W., Ninth Floor  
Washington, DC 20036-3419

Phone: (202) 606-5405

Fax: (202) 606-5409

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SECRETARY OF LABOR,	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 01-1063
	:	
FM CONSTRUCTION COMPANY,	:	
Respondent.	:	

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Appearances: Donyell M. Thompson, Esquire New York, New York For the Complainant.	Robert Seiffert, Esquire Oceanside, New York For the Respondent.
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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”), to determine whether Respondent, FM Construction Company, filed a timely notice of contest (“NOC”) of a citation and notification of penalty issued by the Occupational Safety and Health Administration (“OSHA”).

**BACKGROUND**

The underlying citation and proposed penalty arose from an inspection OSHA conducted on April 4, 2001, at Respondent’s work site in Merrick, New York. (C-1.) OSHA sent the citation and notification of penalty by certified mail, return receipt requested, on April 12, 2001, to the address provided by Respondent. (Tr. 5-14.) Santa Micalizzi, the company owner’s sister, signed the green certified mail return receipt acknowledging receipt of the citation and notification of penalty on April 17, 2001. (C-3.) Respondent did not file a NOC, and the citation and proposed penalty became a final order of the Commission by operation of law on May 8, 2001. *See* section 10(a) of the Act.

On May 16, 2001, Respondent’s attorney telephoned OSHA and then mailed the agency a

letter requesting an informal conference, because, according to Respondent's counsel, the company had received the citation and notification of penalty "last week." (Tr. 14-17; C-4.) The Commission received this letter on June 20, 2001. The Secretary filed a motion to dismiss Respondent's late NOC on August 1, 2001. A hearing on this matter was held on January 30, 2002.

### DISCUSSION

The record clearly demonstrates that Respondent did not file a timely NOC. 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 do so results in the citation and penalty becoming a final judgment of the Commission by operation of law. Under Commission precedent, 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. *B.J. Hughes, Inc.*, 7 BNA OSHC 1471 (No. 76-2165, 1979). 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) ("Rule 60(b)"). There is no allegation and no evidence that FM Construction's failure to file a timely NOC was caused by deception on the part of the Secretary or her failure to follow proper procedures. Rather, Respondent appears to argue that the failure to file was a result of excusable neglect and that mitigating circumstances justify relief.

Respondent's request for relief must be denied. It is undisputed that OSHA sent the citation by certified mail to the address provided by Frank Micalizzi, FM Construction's owner. (Tr. 5-14.) It is further undisputed that Mr. Micalizzi's sister, Santa Micalizzi, lived at the designated address and signed for the citation on April 17, 2001. (C-3.) Respondent apparently argues that Santa Micalizzi was not authorized to sign for documents on behalf of the company and that only Frank Micalizzi, the owner, had that authority. According to Commission precedent, service is proper if it "is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to contest or abate." *B.J. Hughes*, 7 BNA OSHC at 1474. Given that Mr. Micalizzi himself gave OSHA his mother's residence as his business mailing address, even though he has not lived at that address for two and a half or three and

a half years, I find that service was reasonably calculated to provide Respondent with knowledge of the citation and notification of penalty.<sup>1</sup> (Tr. 22-23, 28-29.) Mr. Micalizzi testified that he visited his mother's home "at least once a week" to pick up his mail. (Tr. 23, 29.) Yet, he apparently failed to pick up his mail for almost four weeks after his sister signed for the citation. Mr. Micalizzi's explanation that he "went away for a few days," but came back on May 10, 2001, does not explain his failure to pick up his mail until May 11 or 12, 2001. (Tr. 23.) Commission precedent is well settled that businesses must have orderly procedures for handling important documents, and it is clear that Respondent did not have such procedures in place and that this was the reason for its failure to file a timely NOC. *See J.F. Shea Co.*, 15 BNA OSHC 1092, 1094 (No. 89-976, 1991). I conclude, therefore, that Respondent's failure to file a NOC within the prescribed period was not excusable neglect, but, rather, simple negligence, which is not a basis for relief under Rule 60(b).<sup>2</sup> *See Roy Kay, Inc.*, 13 BNA OSHC 2021 (No. 88-1748, 1989).

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

So ORDERED.

/s/  
IRVING SOMMER  
Chief Judge

Date: 15 APR 2002  
Washington, D.C.

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<sup>1</sup>Based on his testimony at the hearing, Mr. Micalizzi evidently used his mother's address for all of his business correspondence. (Tr. 28-29.)

<sup>2</sup>At the hearing, Mr. Micalizzi testified that he did not attend school in the United States and that he does not understand English very well. He did not, however, specifically testify that he did not understand the citation. Even if he had, that would provide no basis for relief, particularly in view of his testimony that he has been in the construction business since the late 1970's and that he regularly enters into agreements on behalf of FM Construction. (Tr. 25-28.)