

SECRETARY OF LABOR,

Complainant,

v.

MUNICIPAL SERVICES,

Respondent.

OSHRC DOCKET NO. 01-1230

APPEARANCES:

Terrence Duncan, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

Mark A. Reynolds, President
Municipal Services, Inc.
Fort Edwards, New York
For the Respondent.

BEFORE: G. MARVIN BOBER
Administrative Law Judge

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, as amended, 29 U.S.C. §§ 651-678 (1970) (“the Act”), to review a Citation and Notification of Penalty issued by the Secretary of Labor (“the Secretary”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Respondent’s work site from March 12, 2001, through April 17, 2001. As a result, on May 1, 2001, OSHA issued to Respondent Municipal Services a seven-item serious citation and a one-item “other” citation alleging violations of the Act and proposing a total penalty of \$3,750.00. OSHA mailed the Citation and Notification of Penalty (“the Citation”) to Respondent by certified mail, return receipt requested. However, Respondent did not file a timely Notice of Contest (“NOC”) as required by the Act. An administrative trial was held on April 16, 2002, in Albany, New York, for the purpose of determining whether the Secretary’s motion to dismiss Respondent’s NOC as untimely should be granted.

Background

On February 6, 2001, OSHA's Albany, New York office received a telephone complaint alleging violations of the Act by Respondent at its work site on Canada Street in Lake George, New York. On February 7, 2001, OSHA contacted Respondent and requested its confined space entry training program records and other documents relevant to the complaint items. After reviewing the information provided, OSHA determined that Respondent was not in compliance with the Act. Thereafter, OSHA commenced an inspection, and, pursuant to the inspection, examined records and equipment at the work site. On May 1, 2001, OSHA issued the above-noted Citation. Respondent received the Citation on May 9, 2001, and, under the Act, Respondent had until May 31, 2001, to file its NOC. (Tr. 6-7). As noted above, Respondent did not file a timely NOC. However, in a letter to the Executive Secretary of the Commission, dated July 17, 2001, Respondent stated as follows:

I [Mark A. Reynolds, President] am asking for a late notice of contest due (sic) the fact that I did not carefully read the OSHA letter carefully enough. I am a small businessman and run the fieldwork as well as the office.

On October 2, 2001, the Secretary filed her Motion to Dismiss Respondent's Late Notice of Contest. The administrative trial in this matter was held on April 16, 2002, in Albany, New York, in order to determine whether the Secretary's motion to dismiss should be granted.

DISCUSSION AND CONCLUSION

Whether the Inspection was Proper

At the hearing, Respondent raised the issue of the propriety of the inspection. In particular, Respondent noted that the work at the site was performed between December 13, 2000 and January 18, 2001, and that the inspection took place from March, 12, 2001 until April 17, 2001. The undersigned requested that the Secretary brief the issue of her authority to conduct an after-the-fact inspection. For the reasons set out below, I find that the inspection was proper.

Section 8(a) of the Act, 29 U.S.C. § 657(a), provides, as pertinent, as follows:

[T]he Secretary, upon presenting appropriate credentials to the owner * * * is authorized—(1) to enter * * * any * * * establishment * * * or * * * workplace * * * and (2) to inspect and investigate * * * any such place of employment * * * .

Section 9(a) of the Act, 29 U.S.C. § 658, provides, as pertinent, as follows:

If, upon inspection or investigation, the Secretary * * * believes that an employer has violated a requirement of section 5 of this Act, of any standard, rule or order * * * or of any regulations * * * he shall with reasonable promptness issue a citation to the employer.

As the Secretary indicates, from the commencement of the enforcement of the Act, her enforcement responsibility, including after-the-fact observations and investigations, has been recognized and approved by both the Commission and the Courts. *See Texports Stevedore Co., Inc.*, 1 BNA OSHC 1115 (No. 18, 1973, 1973), *review denied*, 484 F.2d 465, 466 (5th Cir. 1973); *H.B. Zachry v. OSHRC*, 638 F.2d 812, 816 (5th Cir., 1981). *See also Reich v. Manganas*, 70 F.3d 434 (6th Cir. 1995). On the basis of the Act and the foregoing case law, I conclude that OSHA had the authority to conduct the subject inspection after the fact and that the inspection was proper.

Whether the Secretary's Motion to Dismiss should be Granted

Section 10(a) of the Act, 29 U.S.C. § 659, provides, as pertinent, as follows:

If, after inspection or investigation, the Secretary issues a citation under section 9(a), he shall * * * notify the employer by certified mail of the penalty, if any, proposed to be assessed * * * and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen days from the receipt of the notice * * * the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, * * *, the citation and the assessment * * * shall be deemed a final order of the Commission and not subject to review by any court or agency.

The record in this case clearly shows that Respondent's NOC letter was not filed within 15 working days of receipt of the Citation. Based on this fact, and on section 10(a) of the Act, set out *supra*, the Citation has become a final order of the Commission that is "not subject to review by any court or agency." However, pursuant to long-standing Commission precedent, an otherwise untimely NOC may be accepted where the delay in filing was caused by deception on the part of the Secretary 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 "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); *CSX Transp.*, 19 BNA OSHC 1916 (No. 01-0608, 2002) (ALJ). *See also* Fed.

R. Civ. P. 60(b) (“Rule 60(b)”). There is no indication the late filing here was caused by the Secretary’s deception or failure to follow proper procedures. Rather, in view of its NOC letter, Respondent appears to be requesting relief on the basis of “excusable neglect.” Regardless, the facts of this case do not justify Rule 60(b) relief.

Commission precedent is well settled that the OSHA citation plainly states the requirement to file an NOC within the prescribed period and 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.” *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). The Commission has also held that ignorance of procedural rules does not constitute “excusable neglect” and that mere carelessness or negligence does not justify relief. *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). Finally, the Commission has held that “a business must maintain orderly procedures for handling important documents” and that when the lack of such procedures results in an untimely NOC the late filing will be deemed to be simple negligence and not excusable neglect. *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989). In view of these cases, Respondent’s failure to “carefully read and act upon the information contained in the citations” provides no basis for Rule 60(b) relief.

There is a further reason for not granting Rule 60(b) relief in this matter. The Second Circuit recently addressed the issue of a late-filed NOC. That case, *Chao v. Russell P. Le Frois Builders, Inc.*, 291 F.3d 219 (2nd Cir. 2002) (“*Le Frois*”), is factually similar to this case. In *Le Frois*, the OSHA citation was misplaced and then discovered several weeks after the NOC was due. Le Frois filed an untimely NOC, and the Commission granted the company’s request that the late filing be excused.¹ However, the Second Circuit found that the Commission did not have the authority to accept the late filing under Rule 60(b). The Court noted that section 10(a) of the Act “expressly mandates that where an employer fails to file a timely [NOC] in response to a citation, ‘the citation

¹A Commission Judge initially granted the Secretary’s motion to dismiss, finding that the late filing was not due to excusable neglect. The Commission reversed the Judge’s decision, holding that Le Frois was entitled to relief, and remanded the case, after which the Judge vacated the citation.

and the assessment *shall* be deemed a final order of the Commission and not subject to review by any court *or agency*.’ * * * (Emphasis added).

The Commission has not revisited this issue since the Second Circuit’s decision in *Le Frois*. However, the Commission has generally applied the law of the relevant circuit in deciding cases, even though that law is different from Commission precedent. *D.M. Sabia Co.*, 17 BNA OSHC 1413, 1414 (No. 93-3274, 1995). This case arose in the State of New York, which is within the jurisdiction of the Second Circuit. Commission Judges are constrained to follow Commission precedent, and, assuming that the Commission will acquiesce in the Second Circuit’s decision in *Le Frois*, I am bound to conclude that, once Respondent Municipal Services failed to file a timely NOC, the Citation became a final order “not subject to review by any court or agency.”²

ORDER

Based on the foregoing, the Secretary’s Motion to Dismiss is GRANTED, and the Citation and Notification of Penalty issued on May 1, 2001, is AFFIRMED in its entirety.

So ORDERED.

/s/

G. MARVIN BOBER
Administrative Law Judge

Dated: October 5, 2002
Washington, D.C.

²I am sympathetic to the concerns of the *amici curiae* in *Le Frois*, who stated in their brief to the Second Circuit that “[c]losing [the] door [to Rule 60(b) relief] would be particularly harmful to small businesses.” Regardless, as noted above, I am constrained to follow Commission precedent.