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SECRETARY OF LABOR,
Complainant,

OSHRC DOCKET NO. 01-1264

v.

GIANT'S WORLD CORP.,
Respondent.
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APPEARANCES:

Terence Duncan, Esq.
Office of the Solicitor
U.S. Department of Labor
New York, New York
For the Complainant

William L. Handler, Esq.
George R. and William L Handler, Esqs.
West Orange, New Jersey
For the Respondent

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”), for determination of the Secretary’s motion to dismiss Respondent’s request to file a notice of contest (“NOC”) out of time.

BACKGROUND

The underlying citation and proposed penalty arose from an inspection OSHA conducted on March 20 and 21, 2001, at a work site of Respondent Giant World Corp. (“GWC”) in Paterson, New Jersey. OSHA sent the citation and notice of proposed penalty to GWC by certified mail, return receipt requested, on April 10, 2001, and GWC received it on April 12, 2001. (Exhs. C-1, C-2).

GWC did not file an NOC, and the citation and proposed penalty became a final order of the Commission by operation of law on May 3, 2001. *See* § 10(a) of the Act.

On July 20, 2001, GWC's attorney mailed a letter to the Commission that essentially requested that GWC be permitted to file an NOC out of time; the reason given for the failure to file a timely NOC was that there was a breakdown in communication and the company believed it had advised its attorneys of the citation. The letter also asserted that the citation named the wrong entity and should have been issued to a "sister" company called "Giant World II Corp." The Secretary moved to dismiss the proffered NOC, and a hearing was accordingly conducted in regard to this issue. Both parties have filed post-hearing briefs. GWC's post-hearing brief raises the additional argument that the July 20, 2001 letter was a timely NOC filed in response to a "letter and notice" the Secretary sent it on July 17, 2001.

DISCUSSION

The record clearly demonstrates that Respondent did not file a timely notice of contest. 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, as indicated above, the failure to do so results in the citation and penalty becoming a final order 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. 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). There is no allegation and no proof that GWC's failure to file a timely NOC was caused by deception on the part of the Secretary or her failure to follow proper procedures. There is likewise no other reason for granting Rule 60(b) relief, for the following reasons.

The Secretary's evidence shows that GWC received the citation and notice of penalty on April 12, 2001. GWC thus had until May 3, 2001, to file an NOC, but it did not do so. At the hearing, GWC offered nothing to rebut the Secretary's proof of the date of receipt of the citation. It

also offered no evidence of the July 17 “letter and notice” it alluded to in its post-hearing brief.¹ Moreover, GWC failed to show that it should be relieved from the terms of the final order. It offered no proof of its purported belief that it had advised its attorneys of the citation, and it offered no other explanation as to why it did not file an NOC within the 15-day filing period. I can only conclude that the failure to file a timely NOC was due to simple negligence, which is not a basis for relief under Fed. R. Civ. P. 60(b). *Roy Kay, Inc.*, 13 BNA OSHC 2021 (No.88-1748, 1989).

Finally, GWC failed to show that the wrong entity was named on the citation. The evidence adduced at the hearing established that the entity named on the citation, “Giant World Corp.,” was the same name the company had on its business cards, facsimile cover sheets, and letterhead. (Tr. 10-13, Exhs. C-3, C-4). The assertion of GWC’s attorney in the July 20, 2001 letter is not evidence that the wrong entity was named and did not rebut the Secretary’s proof on this issue.

In light of the above, I conclude that the citation and notice of proposed penalty were properly served, that GWC did not file a timely NOC, and that GWC 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: 4 APR 2002
Washington, D.C.

¹The Secretary’s activity diary indicates that a demand letter was sent on July 18, 2001, which may be the letter to which GWC referred. (Exh. C-2). However, it is clear that the time within which to file an NOC starts running from the date of the receipt of the citation and notice of proposed penalty and not from any subsequent demand letter. *See* § 10(a) of the Act.