

Inglett & Stubbs, Inc.  
01-1915

## APPEARANCES

Frances B. Schleicher, Esq.  
Office of the Solicitor  
U. S. Department of Labor  
Atlanta, Georgia  
For Complainant

Mr. Jeffrey V. Giglio, President  
Inglett & Stubbs, Inc.  
Mableton, Georgia  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

### **DECISION AND ORDER DISMISSING UNTIMELY NOTICE OF CONTEST**

Inglett & Stubbs, Inc. (ISI), is an electrical contractor in Atlanta, Georgia. On June 13, 2001, at an office construction site, an ISI employee was suffocated when the scissor lift he was riding was wedged under a structure. As a result of the fatality, the Occupational Safety and Health Administration (OSHA) conducted an inspection on June 14, 2001. A serious citation was issued to ISI on September 10, 2001.

The serious citation alleges violations of 29 C.F.R. § 1926.451(f)(7) for moving the scissor lift by an employee who was not a competent person and 29 C.F.R. § 1926.454(a) for failing to train employees in the proper use of scissor lifts. A penalty of \$4,500 was proposed for each alleged violation.

ISI's notice of contest to the citation was filed on October 29, 2001, more than 15 days from receipt of the citation. The Secretary moves to dismiss the notice of contest as untimely.

A show cause hearing was held on February 26, 2002, in Atlanta, Georgia. ISI was represented by its president Jeffrey Giglio. The parties offered documents and made closing arguments. The issue for determination is whether justifiable circumstances existed in the late filing of ISI's notice of contest to waive the 15-working day statutory requirement.

For the reasons discussed, justifiable circumstances are not found and ISI's notice of contest is dismissed as untimely. The citation issued on September 10, 2001, is affirmed.

*The Citation*

ISI, an electrical contractor with offices in Mableton, Georgia, employs approximately 600 employees. Approximately 30 employees work at the main office. ISI's annual revenues are a hundred million dollars. Ninety percent of its business is in Georgia. ISI has been in business for 46 years. Although never having participated in an OSHA hearing, ISI has received prior OSHA citations which were resolved (Tr. 13, 19-20).

In June, 2001, ISI was performing electrical work at twin 14-story office buildings for Bell South in Atlanta, Georgia. ISI had been working at the project for approximately one year with 50 employees. On June 13, 2001, an ISI employee was suffocated when the scissor lift on which he was standing caught him between the guardrail on the scissor lift and a structure. This was ISI's first fatality (Tr. 14-15, 23).

On June 14, 2001, OSHA investigated the accident. ISI's safety director Phil Huff participated in the inspection. President Giglio and safety director Huff were aware that OSHA intended to issue a citation to ISI and were waiting for its receipt (Tr. 15-16).

The OSHA citation was issued on September 10, 2001, alleging violations of 29 C.F.R. §§ 1926.451(f)(7) and 1926.454(a), involving employees' use and training on the scissor lift. A total penalty of \$9,000 was proposed.

The citation was received by ISI on September 11, 2001 (Exh. C-1). According to ISI, its receptionist, who handles incoming mail, stamped it received on September 20, 2001 (ALJ Exh. 1; Tr. 16, 20). The notice of contest was due October 2, 2001.<sup>1</sup> For reasons unknown to president Giglio, the citation was forwarded to the payroll clerk's office (Tr. 21). It should have been sent to safety director Huff (Tr. 21). President Giglio was not aware of the citation until October 26, 2001 (Tr. 17, 21-22). ISI filed its notice of contest on October 29, 2001, and requested "an extension of the appeal deadline" (ALJ Exh. 1). ISI acknowledges that the citation was "definitely in our office during that period" (Tr. 22).

### *Discussion*

Section 10(a) of the Occupational Safety and Health Act (Act) provides that unless the notice of contest is filed within 15 working days of receipt, the citation and assessment of

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<sup>1</sup>Even if ISI had received the citation on September 20, 2001, its notice of contest would have been due on October 11, 2001, still well before its receipt on October 29, 2001.

penalty “shall be deemed a final order of the Commission and not subject to review by any court or agency.” 29 U.S.C. § 659. There is no dispute that ISI filed its notice of contest well after the expiration of the statutory 15-working day period (Tr. 7). ISI’s notice of contest should have been filed by October 2 and not October 29, 2001. ISI had participated in earlier OSHA inspections and citations (Tr. 19).

The issue before the court is whether ISI’s untimely filing may be excused in the circumstances. ISI asserts that its notice of contest was late because of a breakdown in its own internal mailing procedure and financial problems associated with dissolving another company (Tr. 16, 19, 22).

The Review Commission has concluded that § 10(a) of the Act does not prevent it from ruling on whether to grant relief for an employer’s late filing of its notice of contest if certain exceptions exist. *Jackson Associates of Nassau*, 16 BNA OSHC 1261, 1264 (No. 91-0438, 1993). 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 failure of the Secretary to follow proper procedures. Also, an employer may be entitled to relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure, if it is shown that a final order was entered as a result of “mistake, inadvertence, surprise, or excusable neglect” or under Rule 60(b)(6) for such mitigating circumstances as absence, illness, or a disability which prevents the party from protecting its interests. *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981). The burden is on the employer to show sufficient basis for such relief. *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

The circumstances in this case show ISI’s neglect and poor business practices in handling its mail caused the delay in filing a timely notice of contest. The citation was received by ISI on September 11, 2001,<sup>2</sup> but did not come to the president’s attention until October 26, 2001. As the Review Commission has observed on numerous occasions, “a business must maintain orderly procedures for handling important documents.” *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989). Rule 60(b)(1) requires a showing of “excusable” neglect rather than mere negligence or carelessness. The fact that ISI’s own administrative or clerical procedures

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<sup>2</sup>Although September 11, 2001, has been recognized as a day of national tragedy, the events of that day have no bearing on this case.

may not have been adequate to ensure that the citation was delivered to a company official authorized to take action does not excuse its untimely filing of its notice of contest. *See Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830, 1989) (the failure of an employee who received the mail to bring it to the attention of the proper officer does not justify relief). A business must maintain orderly procedures for the handling of documents, such as an OSHA citation, and the onus is upon the employer to see that OSHA matters are handled properly. In this case, the untimely filing was due to ISI's negligent handling of the citation.

The citation itself bears the essential information alerting an employer how to preserve its rights. While I am not unsympathetic to ISI's situation, the circumstances here are insufficient to establish that it is entitled to relief. ISI had clear notice of the need to contest the citations within 15 days, and its mishandling of mail was neither excusable nor justified by any misconduct or deception by the Secretary.

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

**ORDER**

Based upon the foregoing decision, it is ORDERED that:

1. Citation 1, Item 1, violation of § 1926.451(f)(7), is affirmed as serious and a penalty of \$4,500 is assessed.
2. Citation 1, Item 2, violation of § 1926.454(a), is affirmed as serious and a penalty of \$4,500 is assessed.

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/s/  
KEN S. WELSCH  
Judge

Date: March 21, 2002