
SECRETARY OF LABOR,

Complainant,

v.

AMANA CONSTRUCTION CO., INC.,

Respondent.

OSHRC DOCKET NO. 02-0042

Appearances: Terrence Duncan, Esquire
U.S. Department of Labor
Office of the Solicitor
New York, New York
For the Complainant.

Mohammed Khair Hussein
Amana Construction Company
Paterson, 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 the purpose of determining whether the Secretary’s motion to dismiss Respondent’s notice of contest as untimely should be granted.

Background

Following an inspection of the Respondent’s work site in Wayne, New Jersey, the Occupational Safety and Health Administration (“OSHA”) issued a citation alleging serious violations of the Act and proposing a penalty of \$7,800.00. Section 10(a) of the Act requires the employer to notify OSHA of the intent to contest a citation within 15 working days of receiving it, and failure to file a timely notice of contest results in the citation and proposed penalty becoming a final judgment of the Commission by operation of law. OSHA issued the citation to the Respondent on September 17, 2001, by certified mail, and it was received on September 21, 2001. Based on this date, OSHA determined that the 15-day period for filing a notice of contest ended on

October 15, 2001. The Respondent's representative wrote to the Commission for help in this matter, stating he had lost the letter from OSHA without opening it and did not know its contents.

Discussion

The record plainly shows that the Respondent did not file its notice of contest within the required period. Commission procedure is well settled that an otherwise untimely notice of contest may be accepted where the delay in filing was caused by deception on the Secretary's part or by 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" under Federal Rule of Civil Procedure 60(b). There is no allegation and no evidence that the failure to file here was caused by deception on the part of the Secretary or her failure to follow proper procedures. Rather, what is alleged herein is that the Respondent lost the envelope sent by OSHA containing the citation and the accompanying booklet which described the company's rights and responsibilities. The citation which was received by the Respondent clearly stated: "Unless you inform the Area Director in writing that you intend to contest the citation(s) and/or proposed penalty(ies) within 15 working days after receipt, the citation(s) and the proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency." This same admonition was stated in the OSHA 3000 booklet which accompanied the citation. The Respondent's representative testified that he had received the OSHA material in the mail but had lost it and thus had no knowledge of the filing requirement. He knew it was from OSHA, but he made no effort to call and ascertain its contents or ask for a copy to be sent. The Respondent's failure to file a timely notice of contest was thus due to simple negligence and not excusable neglect, in that he did not maintain proper mail handling procedures and, further, in that he did not rectify the situation by contacting OSHA and requesting duplicates of what was lost. Had he done so, and had he read all the documents, he would have been on notice of the notice of contest filing requirement.

