

SECRETARY OF LABOR,

Complainant,

v.

CONSTRUCTORA MARVIC, INC.,

Respondent.

OSHRC Docket No. 02-1411

### **DECISION AND ORDER**

The Secretary has filed a motion to dismiss Respondent's notice of contest ("NOC") as untimely. Respondent has not filed a response to the motion.

#### **Background**

The Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent, Constructora Marvic, Inc., located in Guaynabo, Puerto Rico, on February 27, 2002. Pursuant to the inspection, OSHA issued Respondent a Citation and Notification of Penalty ("Citation") on June 10, 2002. OSHA mailed the Citation by certified mail, return receipt requested, and, on June 20, 2002, OSHA received the green return receipt card. The receipt had the name and address of the company on it, and there was a signature in the signature space, but the receipt showed neither the printed name of the person who signed for the Citation nor the date of delivery.<sup>1</sup> Based on the date that OSHA received the return receipt card, the last day on which Respondent could file an NOC was determined to be July 12, 2002.<sup>2</sup> However, Respondent did not file an NOC by that date, but, instead, filed its NOC

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<sup>1</sup>The signature on the receipt is not legible. *See* Exhibit B to the Secretary's motion.

<sup>2</sup>Apparently, OSHA initially determined the NOC deadline to be July 11, 2002. *See* OSHA's July 17, 2002 letter to Respondent. *See also* Exhibit B to the motion. However, in her motion, the Secretary states that "for the purposes of this motion and in Respondent's favor," she has assumed the date of receipt of the Citation to be June 20, 2002.

letter on July 15, 2002.<sup>3</sup> On July 17, 2002, OSHA sent a letter to Respondent, advising that the NOC had not been filed within the requisite 15 working day period and that the Citation had thus become a “final order.” OSHA also advised that its decision could be appealed through the Occupational Safety and Health Review Commission (“the Commission”). On August 19, 2002, Respondent sent a letter to the Commission, asking that the decision be reconsidered and that it be given the opportunity to “meet and further discuss our situation.” The company indicated that this was its first experience with an OSHA citation and that it had been under the impression that its letter would be answered with an appointment for an informal meeting. The company also indicated that the penalty seemed high, considering that all of the problems found at the site had been corrected while the inspector was still there, that it had gone to considerable expense in renting substitute scaffolding for the site, and that the amount of the penalty was an issue in light of the company’s financial situation.

#### Discussion

Section 10(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”), requires an employer to notify the Secretary of the intent to contest the citation within 15 working days of receipt, and the failure to file a timely NOC results in the citation becoming a final order of the Commission by operation of law. The record here plainly shows that Respondent did not file its NOC within the required 15-day period. 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

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<sup>3</sup>Although the NOC letter is dated July 10, 2002, the U.S. Postal Service date stamp on the copy of the certified mail form (PS Form 3800) shows that the letter was mailed on July 15, 2002; further, the return receipt card (PS Form 3811) for the NOC letter shows that OSHA received the letter on July 16, 2002. *See* Exhibit C to the Secretary’s motion.

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 indication and no contention that the late filing here was caused by deception on the Secretary’s part or her failure to follow proper procedures. Rather, based on the foregoing, Respondent’s letter would seem to be a request that the untimely filing be excused. However, Rule 60(b) relief is not justified under the circumstances of this case, for the following reasons.

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). The Commission has therefore denied Rule 60(b) relief in cases where the late filing was due to mishandling the citation, changes in management, or absence of the individual responsible for OSHA matters. See, e.g., *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989); *J.F. Shea Co.*, 15 BNA OSHC 1092, 1094 (No. 89-976, 1991); *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991). The Commission has also denied relief in cases where the responsible individual did not appreciate the importance of the filing period due to lack of experience with OSHA. *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

I am sympathetic to the plight of Respondent in this matter, and I have considered the company's statements that this was its first experience with an OSHA citation, that it corrected all of the hazards found while the inspector was still at the site, and that it rented substitute scaffolding, at considerable expense, for use at the site after the inspection. However, I am constrained to follow Commission precedent, and, on the basis of that precedent, set out *supra*, and in view of the circumstances of this case, Respondent is not entitled to Rule 60(b) relief.<sup>4</sup> The Secretary's motion to dismiss is accordingly GRANTED, and the Citation is AFFIRMED in all respects.

So ORDERED.

/s/ \_\_\_\_\_  
Irving Sommer  
Chief Judge

Date: December 30, 2002  
Washington, D.C.

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<sup>4</sup>In deciding this case, I have noted the Secretary's argument that the Commission does not have authority to accept a late-filed NOC pursuant to Rule 60(b), based on *Chao v. Russell P. Le Frois Builder, Inc.*, No. 00-4057 (2d Cir. May 10, 2002). However, this case is not within the Second Circuit's jurisdiction. Moreover, even if the Commission acquiesces in the Second Circuit's decision with respect to cases in that jurisdiction, it is unknown at this point in time whether the Commission will overturn its long-standing precedent in regard to cases falling within other jurisdictions. *See HRH Constr. Corp.*, 19 BNA OSHC 2042, 2044-45 (No. 99-1614, 2002).