

SECRETARY OF LABOR,

Complainant,

v.

CREATIVE GOLD, INC.,

Respondent.

OSHRC DOCKET NOS. 02-1560 & 02-1561

APPEARANCES:

Donyell M. Thompson, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

David Gronbach, Esquire
Smith, Buss & Jacobs, LLP
Yonkers, New York
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”). The Secretary of Labor (“the Secretary”) filed a motion to dismiss as untimely the notice of contest (“NOC”) of Respondent, Creative Gold, Inc. Respondent filed an opposition to the motion and a cross-motion to dismiss the citations issued by the Secretary. A hearing in this matter was held on January 23, 2003. Both parties have filed post-hearing briefs.

Background

The Occupational Safety and Health Administration (“OSHA”) conducted two inspections of Respondent, a jewelry manufacturing business, in the fall of 2001; the first was from September 12 through October 22, 2001, and the second was on September 20, 2001. Both inspections took place at Respondent’s work site in Newark, New Jersey, and each inspection resulted in the issuance of a Citation and Notification of Penalty (“Citation”). OSHA issued the Citation from the second inspection on December 19, 2001, and mailed it to the company’s Newark address by certified mail, return receipt requested, on December

31, 2001, but the Citation came back unclaimed.¹ OSHA issued the Citation from the first inspection on January 23, 2002, and, because the other Citation had been returned, mailed both Citations in one envelope by certified mail, return receipt requested, on January 24, 2002, to the company's new address in Brooklyn, New York.² The Citations were returned to OSHA, and, on February 25, 2002, OSHA sent the Citations in one envelope by FedEx to Respondent's Brooklyn address. Based on the FedEx delivery report, the Citations were delivered to Respondent's Brooklyn address on February 27, 2002, and a "G. Ramey" signed for the envelope containing the Citations.³ (Tr. 5-13, 21-34, 39-44; Exhs. C-1, C-3, C-7-8, C-10).

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 a 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. In view of the delivery date of February 27, 2002, the NOC filing period here ended on March 20, 2002. No NOC was filed by that date, but Respondent's counsel sent a letter to OSHA on March 26, 2002. The letter stated that various conversations had taken place between Respondent's counsel and OSHA from March 15 to 22, 2002, that Respondent had vacated the Newark premises at the end of 2001, and that the company had abated the alleged violations and had no prior record with OSHA. The letter also stated that the company had contested the proposed penalties

¹Both Citations show the inspection site as "48-50 Main Street, Newark, NJ 07105," but the Citation issued on December 19, and the envelope it was mailed in, show the company's address as "48-58 Main Street, Newark, NJ 07105." *See* C-1, C-7, C-10. The record indicates the latter address was provided to OSHA during the inspection, and C-6, a letter to OSHA from Respondent's counsel, would seem to verify that this was in fact the company's address in Newark. (Tr. 7, 44).

²OSHA learned the company had relocated to Brooklyn, New York, and the Citations were thus sent to 1425 37th Street, Brooklyn, New York 11218, the new address. (Tr. 41-44). While the envelope shows a mailing date of January 24, 2001, it is clear from C-8, the OSHA diary sheet relating to this matter, and the record in general, that the Citations were mailed on January 24, 2002.

³The motion to dismiss and exhibits attached thereto indicated the delivery date was February 26, 2002. However, the Secretary's response to Respondent's opposition clarified that while delivery was attempted on February 26, the actual delivery date was February 27, 2002. *See also* C-3.

during the earlier communications, that counsel had advised its client that OSHA might consider a reduced penalty to settle the Citations, and that counsel anticipated a response from its client after the Passover holiday. Because Respondent had not submitted an NOC letter before the end of the filing period, OSHA sent letters to the company on April 24, 2002, advising that the penalties were due.⁴ On September 10, 2002, Respondent's counsel mailed to the Commission a letter requesting that the company be given the opportunity to file a "late contest of the penalties assessed." The letter repeated many of the statements made in the March 26 letter and indicated that although negotiations had taken place a settlement had not been reached and OSHA had subsequently advised that the NOC filing period had lapsed. The Secretary filed her motion to dismiss on October 1, 2002, and Respondent filed its opposition and cross-motion on October 11, 2002.⁵ As noted above, a hearing was held in this matter on January 23, 2003, and the parties have filed post-hearing briefs. (Tr. 13-20, 30-31, 36-37; Exhs. C-4-6, C-9).

Discussion

The record plainly shows that Respondent did not file an NOC by the end of the 15-day period following the delivery of the Citations. Respondent contends, however, that the service of the Citations was improper. Respondent also contends the Secretary has not met her burden of proving the date it received the Citations, in that the person who signed for them did not have the authority to do so. Finally, Respondent contends its letter of March 26, 2002, was an NOC and was filed within 15 working days of its actual receipt of the Citations. The Secretary contends that the service of the Citations was proper. She also contends that she did not consider the March 26 letter an NOC and that, even if it was, it was not filed within 15 working days of the delivery date of the Citations.

As to Respondent's first contention, section 10(a) of the Act states that the Secretary "shall ... notify the employer by certified mail of the [citation and] penalty...." However, the

⁴Although both letters state that the Citations were delivered on February 26, 2002, the record establishes that the Citations were delivered on February 27, 2002. *See* footnote 3.

⁵The Secretary's motion to consolidate the two cases was granted on October 16, 2002.

Commission has held that the test for proper service of a citation is “whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest.” *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474 (No. 76-2165, 1979). *See also Henry C. Beck Co.*, 8 BNA OSHC 1395, 1398-99 (No. 11864, 1980); *NYNEX*, 18 BNA OSHC 1944, 1947 (No. 95-1671, 1999). The Commission has also held the date of receipt should generally be the date an employee signs for the mailing at the work site address to which the Secretary directed the citation; this is so because the Secretary cannot control who signs for the mailing, even by naming a specific individual at the site, or when the mailing actually reaches the proper company employee. *Henry C. Beck Co.*, 8 BNA OSHC at 1399. Finally, the Commission has held that an employer should not be allowed to claim a later receipt date by showing that the person in charge of the site did not sign for the citation and that when the mailing is accepted at the site where a company employee is in charge, the employer has effectively received the required notice; in so holding, the Commission noted that any other rule would allow an employer whose internal mail-handling procedures were inadequate to delay receipt of a citation. *Id.*

The record shows that OSHA mailed the first-issued Citation by certified mail on December 31, 2001, to the address the company had given the OSHA compliance officer (“CO”); however, the Citation was returned to OSHA unclaimed. OSHA next mailed out both Citations by certified mail in one envelope on January 24, 2002, to Respondent’s Brooklyn address, the CO having learned from an interview with an employee that the company had relocated, but the Citations were again returned to OSHA.⁶ OSHA then sent

⁶As Respondent notes, the OSHA assistant area director testified at the hearing that each Citation was mailed out separately by certified mail and that, after they came back, they were then sent by FedEx in one envelope. (Tr. 8-12, 21-30). However, based on the record as a whole, I conclude that the Citations were sent as set out above. My conclusion is supported by C-8, the diary sheet, which indicates that both Citations were mailed out together on January 24, 2002 and that they were also sent together by FedEx on February 25, 2002. My conclusion is also supported by C-10, the envelopes that were returned to OSHA; the return receipt card attached to the envelope mailed

(continued...)

both of the Citations by FedEx in one envelope to the Brooklyn address, on February 25, 2002.⁷ FedEx attempted delivery on February 26, 2002, but the business was closed due to a holiday, and FedEx thus delivered the Citations the next day. (Tr. 5-13, 21-34, 39-44; Exhs. C-3, C-8-10). *See also* Exh. B to Secretary's motion.

In support of its position that service of the Citations was improper, Respondent presented Mordy Jalas, the owner and manager of the business. Mr. Jalas testified that his company downsized and moved from Newark to Brooklyn at the end of 2001. He further testified that his business received packages every day and that there was a receptionist at the entrance of the Brooklyn address; however, there were two other businesses at the same address that used the same entrance and he had had problems with packages being lost or stolen, and he therefore had an agreement with UPS, the carrier he used, that only he had the authority to sign for packages delivered to his company.⁸ Mr. Jalas said that he was an Orthodox Jew, that his business had been closed on February 26 and 27, 2002, because of the Jewish holiday of Purim, and that while someone could have been in the building on February 27, 2002, he had not been there and had not signed for the FedEx package containing the Citations.⁹ He also said that he did not have an employee named "G. Ramey," that someone from one of the other companies must have signed for the Citations, and that although he was not sure when he actually received them he thought that it had been

⁶(...continued)

on December 31, 2001, reflects the inspection number for the first-issued Citation, while the return receipt card attached to the envelope mailed on January 24, 2002, reflects both inspection numbers.

⁷The FedEx envelope and the first-issued Citation were directed to Mordy Jalas at Creative Gold, while the Citations sent in January 2002 were directed simply to Creative Gold. *See* C-3, C-10.

⁸Mr. Jalas indicated that many of the packages he received contained gold jewelry and that, according to his agreement with UPS, if someone else had signed for a package and he did not receive it, UPS reimbursed him for the loss. (Tr. 48-51).

⁹Mr. Jalas noted that the other two businesses were "not Jewish." (Tr. 50).

sometime in March shortly before the NOC deadline.¹⁰ Mr. Jalas indicated that he sent the Citations promptly to his attorney, who said that he would take care of them. (Tr. 45-59).

Based on the foregoing, I conclude that the Secretary's service of the Citations was proper. The Secretary attempted to serve the Citations by certified mail and, when that was unsuccessful, sent the Citations by FedEx. Although Respondent objects to the service, the Secretary cannot be faulted for Respondent's apparent failures to pick up the certified mailings and to notify the U.S. Postal Service of its move to Brooklyn.¹¹ The Secretary likewise cannot be faulted for using FedEx, under the circumstances, and Respondent's assertion that she should have resorted to the service set out in Federal Rule of Civil Procedure 4 is rejected.¹² *See NYNEX*, 18 BNA OSHC 1967, 1970 at n.8 (No. 95-1671, 1999). I further conclude that the date of receipt of the Citations was February 27, 2002. Mr. Jalas testified that the individual who signed for the Citations was not his employee and that he did not receive the Citations until sometime in March. However, these reasons, in view of the above Commission precedent, are insufficient to allow Respondent to claim a later receipt date, particularly since the record indicates that the company's mail-handling procedures were inadequate. I note first Mr. Jalas' testimony that the Citations were found in the receptionist's office a week or two after they were delivered. (Tr. 53-56). I note also Mr. Jalas' testimony indicating that this was not an unusual situation when he returned to his business after an absence. (Tr. 53-56). Finally, I note that, even if the person who signed for the Citations was not Respondent's employee, the company should have had adequate

¹⁰Mr. Jalas said the Citations were found in the receptionist's office a week or two after they were delivered; he also said there could be a great deal of mail in the receptionist's office when he returned after an absence and that mail could be there without his realizing it had come. (Tr. 53-56).

¹¹Mr. Jalas admitted that he never notified OSHA of the move. (Tr. 53). Further, while C-6 advised OSHA the company was no longer at the Newark address, it did not give the new address.

¹²Also rejected is Respondent's assertion that the Secretary's service deprived it of due process. *NYNEX*, 18 BNA OSHC at 1970-71.

procedures in place to ensure the receipt and proper routing of important documents.¹³ Based on the record, Respondent's contentions with respect to the service and date of receipt of the Citations are rejected, and the rejection of these contentions makes it unnecessary to address the company's further contention that the March 26, 2002 letter was an NOC.

Respondent's final contention is that, even if its NOC was untimely, the late filing should be accepted under Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"). Commission precedent is well settled that an untimely NOC may be accepted where the delay in filing was due to deception on the Secretary's part 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); *see also* Rule 60(b). However, 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 (No. 86-1266, 1989). The Commission has also held 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). Finally, the Commission has held that ignorance of procedural rules does not constitute "excusable neglect" and that mere carelessness or negligence does not justify relief. *Acrom Constr. Serv.*,

¹³Despite the agreement that Mr. Jalas said he had with UPS, there was no evidence of similar agreements with other carriers, and I reject Respondent's suggestion that Mr. Jalas' agreement was with the U.S. Postal Service. (Tr. 48-51). Regardless, Respondent may not claim a later date of receipt of the Citations by asserting that either the carrier or OSHA was somehow at fault.

Inc., 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991).

In view of my findings set out *supra*, it appears that the late filing in this case was due in part to Respondent's inadequate mail-handling procedures. It further appears that the untimely NOC was also due to the failure of Respondent's counsel to ascertain the NOC filing deadline and to file a written NOC by that date. Mr. Jalas testified that he received the Citations shortly before the end of the NOC filing period and that he sent them promptly to his attorney, who said he would take care of them. (Tr. 53-56). In addition, C-5 and C-6 indicate that Respondent's counsel had received the Citations by at least March 15, 2002, since, according to the letters, he had various conversations with OSHA from that date to March 22, 2002, and had advised OSHA orally that Respondent was contesting the penalties.¹⁴ Despite these conversations, however, Respondent's counsel was evidently not aware of the NOC filing deadline until after writing his letter of March 26, 2002. *See* C-5, page 2. Moreover, notwithstanding its various assertions in this regard, Respondent introduced no evidence to establish that its counsel was somehow misled during the conversations with OSHA about the need to file a written NOC within 15 days of the date of receipt of the Citations.¹⁵

It is Respondent's burden to show that it is entitled to Rule 60(b) relief, and, in light of the evidence of record, Respondent has failed to demonstrate that the untimely filing in this case was caused by the Secretary's deception or failure to follow proper procedures or to "any other reason justifying relief." I am sympathetic to Respondent's plight in this matter,

¹⁴Although the Secretary disputes that Respondent's counsel ever called the OSHA office, it would appear that he did, based on the March 15, 2002 entry on C-8; otherwise, OSHA would likely not have had the name and number of Respondent's counsel. Thus, for purposes of the Rule 60(b) discussion, I find that the conversations indicated in C-5 and C-6 occurred.

¹⁵Respondent's assertions in this regard are specifically rejected, including its suggestion that OSHA led it to believe that a settlement would be reached and that a formal NOC was not required. Also rejected is Respondent's assertion that the Secretary's failure to follow proper procedures, *i.e.*, not forwarding the March 26, 2002 letter to the Commission and not filing a complaint in this matter, merit dismissal of the Citations.

and I have considered the statements in the letters from Respondent's counsel that the company had never been cited before, that the cited conditions were all abated, and that the company cannot remain in business if it must pay the proposed penalties. 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.¹⁶ The Secretary's motion to dismiss is accordingly GRANTED, and the Citations are AFFIRMED in all respects.

So ORDERED.

/s/
Irving Sommer
Chief Judge

Date: April 3, 2003
Washington, D.C.

¹⁶In deciding this case, I am aware of the Second's Circuit's decision that the Commission has no authority to accept a late-filed NOC pursuant to Rule 60(b). *Chao v. Russell P. Le Frois Builder*, 291 F.3d 219 (2d Cir. 2002) ("*Le Frois*"). I am also aware that this case could be appealed to the Second Circuit. However, it is unlikely Respondent would do so, in view of the *Le Frois* decision, and, for this reason, I have decided this matter pursuant to Rule 60(b). See *HRH Constr.*, 19 BNA OSHC 2042, 2044-45 (No. 99-1614, 2002). Regardless, the end result for Respondent is the same whether this case is decided under Commission precedent or the *Le Frois* decision.