

SECRETARY OF LABOR,

Complainant,

v.

BIG POLL CONSTRUCTION, INC.,

Respondent.

OSHRC Docket No. 02-1639

DECISION AND ORDER

The Secretary has filed a motion to dismiss Respondent's notice of contest ("NOC") as untimely. Respondent has filed no response to the motion.

Background

The Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent, Big Poll Construction, Inc., located in Brooklyn, New York, on May 16, 2002. As a result, OSHA issued Respondent a Citation and Notification of Penalty ("Citation") on June 25, 2002. OSHA mailed the Citation by certified mail, return receipt requested, and Respondent received the Citation on June 27, 2002. 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 Occupational Safety and Health Review Commission ("the Commission") by operation of law. Based on the date that it received the Citation, Respondent was required to file its NOC by July 19, 2002. However, Respondent did not file an NOC by that date, and, in fact, did not file its NOC until August 7, 2002. In its NOC letter, Respondent stated that the reason the NOC was not filed within the required 15-day period was due to "a misunderstanding between us and our engineer ... regarding a letter sent to your department by G and R Consultants, confusing his letter and response with our responsibility in answering any complaint or/and violations." The Secretary filed her motion to dismiss Respondent's NOC as untimely on December 4, 2002, and, as noted above, Respondent has not filed a response to the motion.

Discussion

The record clearly shows that Respondent did not file an NOC within the requisite 15 working 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 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 the Secretary’s deception or failure to follow proper procedures. In light of the statement in its NOC letter, set out above, Respondent would appear to be requesting that the late filing in this case be excused under the circumstances. Respondent’s statement will therefore be construed as a request for Rule 60(b) relief. However, no such relief is warranted in this case.

First, the letter to which Respondent refers in its NOC letter, that is, the letter written by its engineer, is dated June 18, 2002, which was a full seven days before OSHA even issued the Citation; moreover, the engineer’s letter addresses the responsibility of the engineering company at the work site and has nothing to do with the contesting of a citation. *See* Exhibit D to the Secretary’s motion. On the basis of Exhibit D, Respondent’s suggestion that it was confused about its responsibility to contest the Citation and that it believed that its engineer would do so is not persuasive.

Second, 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 accordingly 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).

Although I am sympathetic to Respondent's plight in this matter, I am constrained to decide cases based on Commission precedent and the circumstances that are presented in each particular case. In view of that precedent, set out *supra*, and Respondent's asserted reason for the untimely filing, there is no justification for the granting of Rule 60(b) relief in this case.¹ The Secretary's motion to dismiss Respondent's NOC as untimely is accordingly GRANTED, and the Citation is AFFIRMED in all respects.

So ORDERED.

/s/

Irving Sommer
Chief Judge

Date: January 13, 2003
Washington, D.C.

¹In deciding this case in this manner, I am aware of the Second Circuit's decision, *Chao v. Russell P. Le Frois Builder, Inc.*, No. 00-4057 (2d Cir. May 10, 2002), holding that the Commission does not have authority to accept a late-filed NOC pursuant to Rule 60(b). I am also aware that this case could be appealed to the Second Circuit. However, it is unlikely that Respondent would do so, in light of the Second Circuit's decision, and, for this reason, I have decided this matter pursuant to Rule 60(b). See *HRH Constr. Corp.*, 19 BNA OSHC 2042, 2044-45 (No. 99-1614, 2002). In any case, the end result for Respondent is the same whether this matter is decided under Commission precedent or the Second Circuit's decision.