

SECRETARY OF LABOR,

Complainant,

v.

CIR ELECTRICAL CONSTRUCTION  
CORP.,

Respondent.

OSHRC Docket No. 02-1678

### **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 CIR Electrical Construction Corp. ("CIR") on August 12, 2002. As a result, OSHA issued CIR a Citation and Notification of Penalty ("Citation") on August 26, 2002. OSHA mailed the Citation by certified mail, return receipt requested, and CIR received the Citation on August 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 it received the Citation, CIR was required to file its NOC by September 18, 2002. CIR did not file an NOC by that date, but, on September 26, 2002, it submitted a letter to OSHA indicating its desire for an informal conference and to contest the Citation. In its letter, CIR admitted that it had not filed its NOC within the requisite 15 days. CIR explained that the late filing was due to the Citation being put on the desk of the company controller, who was out due to a brief illness, and that the Citation was not discovered until the controller's return to the office. In a letter

to the Commission dated September 30, 2002, CIR asked that its NOC be accepted, noting that OSHA had not accepted the NOC and had denied its request for an informal conference.

### Discussion

The record clearly shows that CIR did not file an NOC within the required 15 working day period. However, 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. Rather, CIR is in essence requesting that the untimely filing, which was due to the Citation being placed on the controller’s desk and not being discovered until the controller returned to the office after a brief illness, be excused. These circumstances do not justify Rule 60(b) relief, 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 accordingly denied Rule 60(b) relief in cases where the late filing was due to mishandling the citation, changes in management, or illness 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).

While I am sympathetic to CIR's plight in this matter, I am constrained to follow Commission precedent. On the basis of that precedent, set out *supra*, and in view of the circumstances of this case, CIR is not entitled to Rule 60(b) relief.<sup>1</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>1</sup>In 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 CIR 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). Regardless, the end result for Respondent CIR is the same whether this case is decided under Commission precedent or the Second Circuit's decision.