

SECRETARY OF LABOR,

Complainant,

v.

ERICKSON HALL CONSTRUCTION
COMPANY, and its successors,

Respondent.

OSHRC DOCKET NO. 02-1694

APPEARANCES:

For the Complainant:

Susan Seletsky, Esq., U.S. Department of Labor, Office of the Solicitor, Los Angeles, California

For the Respondent:

Robert D. Peterson, Esq., Robert D. Peterson Law Corporation, Rocklin, California

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the “Act”).

Respondent, Erickson Hall Construction Company, and its successors, Erickson, at all times relevant to this action maintained a place of business at Miramar MCAS, San Diego, California, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

June 4-5, 2002, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Erickson’s Miramar work site. As a result of that inspection, on July 16, 2002, OSHA issued citations alleging violations of the Act to Erickson. The citations were sent to Erickson via certified mail. An Erickson employee representative signed for the certified mail on July 19, 2002. Erickson, however, failed to file a timely notice of contest. On October 8, 2002, Erickson notified OSHA of its intent to file a late notice of contest. On October 28, 2002, Complainant filed a motion to dismiss Erickson’s late filing. A hearing was held in San Diego, California on December 10, 2002 on the sole issue of whether Erickson’s failure to file a timely notice was justified. The parties have submitted briefs on the issues and this matter is ready for disposition.

Facts

Misty Ramos, Erickson’s receptionist, testified that it is her job to open the mail and distribute it to the appropriate party (Tr. 31). Ms. Ramos identified her signature on the return receipt for the OSHA citation (Tr. 32). Ms. Ramos stated that she had been instructed to pass any legal documents on to Dave

Erickson, the Chief Executive Officer, all financial and confidential correspondence to Sandy Horne, head of the Accounting Department (Tr. 32). Ramos had no memory of having received the OSHA citations she signed for, and had no idea what she did with the citations (Tr. 33). The documents should have gone to Dave Erickson, but Ms. Ramos admitted that she could have accidentally thrown the document away, or erroneously passed it on to Ms. Horne (Tr. 35, 38).

Dave Erickson testified that any legal documents directed to the company should have been forwarded to him (Tr. 18). After Erickson received a dunning letter dated September 12, 2002, he asked his accounting manager, Ms. Horne, and his project manager about the citations. Neither had any knowledge of the original citations (Tr. 18-19).

Lynn Reisinger, Erickson's construction superintendent, testified that the OSHA Compliance Officer (CO) Tama Satele, told him that Erickson had a clean slate, and would not be receiving any citations (Tr. 43). Reisinger admitted, however, that Satele told them his area director had the sole authority to issue citations (Tr. 67-68).

Jeff Betts, a safety consultant for Erickson, also testified. Betts stated that he was led to believe, from CO Satele's "body language and, you know, my interpretation of what he said," that no citations would be issued to Erickson. Betts admitted that Satele told them at the closing conference that he had no authority to say whether any citations would be issued (Tr. 52-53).

CO Satele testified that he told everyone at the closing conference that he would write up his report and turn it in to the area director. Satele stated that it was up to the area director to decide whether citations would be issued (Tr. 60).

Discussion

A citation which is not contested within 15 days automatically becomes a final order of the Commission pursuant to §10(a) of the Act. The Commission is without jurisdiction to review that final order except in limited circumstances. Where the late filing has resulted from a deception or a failure to follow proper procedures the party is entitled to a hearing on any allegations of misconduct. *B.J. Hughes Inc.* 7 BNA OSHC 1471 (No. 76-2165, 1979); *Atlantic Marine Inc. and Atlantic Dry Dock Corp.*, 524 F.2d 476 (5th Cir. 1975).

In this case, Respondent was afforded a hearing, but failed to make any showing of any misconduct on the part of the Secretary's representative. The testimony establishes that at the closing conference CO Satele told the parties that the final authority to issue citations lay with the area director. Satele did not assure Erickson that it would not be cited, and Erickson could not have reasonably relied on the *impression* Reisinger and Betts drew from Satele's demeanor. In any event, whatever Erickson may have believed prior to July 19, 2002, it did, in fact, receive the July 17, 2002 citations. That the citations were lost and the appropriate Erickson personnel

were not made aware of their receipt cannot be attributed to any misconduct of Complainant; rather it resulted from Erickson's mishandling of its own mail.

While a party filing a late notice of contest may relief from judgment or order under F.R.C.P. 60(b), the burden is on the respondent to show sufficient basis for relief, *i.e.*, "mistake, inadvertence, surprise, or excusable neglect." *Branciforte Builders Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). *Keefe Earth Boring Company, Inc.*, 14 BNA OSHC 2187, 1991-93 CCH OSHD ¶29,277 (No. 88-2521, 1991). It is well established that mere negligence is insufficient to justify relief. Holding that a business must maintain orderly procedures for handling important documents, the Commission has repeatedly denied relief in cases where important legal documents, *i.e.*, citations were mislaid after the employer received the documents and the documents were under its sole control. *See; Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 1989 CCH OSHD ¶28,409 (No. 86-1266, 1989); *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830,1989).¹ Respondent failed to show that its loss of the citation was beyond its control, or in any other way excusable. Because Erickson failed to carry its burden of proof, the late notice of contest is dismissed.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: February 12, 2003

¹ Respondent relies on a single case, *Russell B. Le Frois Builder, Inc.*, 18 BNA OSHC 1978 (No. 98-1099, 1999), in which the Commission found the loss of certified mail by the employer's office manager excusable. That case, however, was overturned by the Second Circuit in *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2nd Cir. 2002).