

SECRETARY OF LABOR,

Complainant,

v.

EXTREME BUILDING SERVICES CORP.,

Respondent.

OSHRC Docket No. 02-1802

DECISION AND ORDER

The Secretary has filed a Motion to dismiss (“Motion”) Respondent’s notice of contest (“NOC”) as untimely. Respondent has not filed a response to the Motion.¹

Background

The Occupational Safety and Health Administration (“OSHA”) inspected a work site of Respondent, Extreme Building Services Corp., located in the Bronx, New York, on May 15, 2002. As a result of the inspection, OSHA issued Respondent a Citation and Notification of Penalty (“Citation”) on August 5, 2002. OSHA mailed the Citation by certified mail, return receipt requested, to Respondent’s business address in Great Neck, New York, on August 7, 2002. The U.S. Postal Service provided notice to Respondent on August 8, 24 and 30, 2002, that it had a certified mail package; however, Respondent never picked up the package, and the package was returned to OSHA as unclaimed. *See* Exhibit B to the Secretary’s Brief. On September 11, 2002, OSHA again sent the Citation to Respondent, this time by Federal Express; the Citation was delivered to Respondent’s

¹This case was designated for E-Z Trial under Commission Rule 203(a) on November 21, 2002. However, in light of the Secretary’s subsequent filing of her Motion, and upon review of the record in this case, it is concluded that this matter is inappropriate for E-Z Trial. E-Z Trial is accordingly discontinued, and this case is returned to conventional proceedings. It is further concluded that no hearing in this matter is required and that a decision based on the documentation in the record is appropriate, for the following reasons. My office called both the Secretary and Respondent on December 11, 2002, to offer the opportunity for a phone conference in this case. The Secretary’s counsel was available but Respondent’s representative was not, and, although a message was left for Respondent’s representative to contact my office, no such contact occurred. That Respondent responded to neither the Secretary’s Motion nor the message my office left persuades me that Respondent is not interested in pursuing this matter. Moreover, it is clear from the record that the NOC was untimely and that, as explained *infra*, there is no basis for accepting the late filing.

place of business on September 12, 2002, and an individual named “L. Gelb” signed for it. *See* Exhibits C and D to the Secretary’s Brief. On October 7, 2002, Respondent mailed an NOC letter to OSHA.² *See* Exhibit E to the Secretary’s Brief. In addition to contesting the Citation, Respondent asserted in its letter that the issuance of the Citation “4 months after the inspection, and 24 hours after we obtained subpoenas for your inspectors, their records, and yourself leads one to suspect a fraud being perpetrated in the interest of defending regulatory abuse and conspiracy with organized labor.” The Secretary filed her Motion to Dismiss the NOC on November 22, 2002, and, as noted above, Respondent has filed no response to the Motion.

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 Secretary contends the NOC filing period ended on August 29, 2002, which was 15 working days after the August 8, 2002 notice, and that Respondent did not file an NOC on or before August 29, 2002. The Secretary further contends that, even discounting the August 8 notice, Respondent failed to file a timely NOC after actual receipt of the Citation on September 12, 2002. The Secretary points out that it is Respondent’s burden to show that it qualifies for relief from the late filing; she also points out that there is no basis for excusing the untimely NOC that was mailed on October 7, 2002.³ I agree.

The record here plainly shows that the company did not file its NOC within 15 working days of September 12, 2002, the date that it actually received the Citation.⁴ However, according to long-

²Although Respondent’s NOC letter is dated October 3, 2002, the postmark on the envelope is dated October 7, 2002. *See* Exhibit E to the Secretary’s Brief.

³As the Secretary notes, the Commission has held that where the postmark date of an NOC conflicts with the date on the letter itself, the postmark date is presumed to be the date of mailing unless there is persuasive evidence to the contrary. *Kerr-McGee Chem. Corp.*, 4 BNA OSHC 1739 (No. 9890, 1976).

⁴I have noted that Respondent failed to retrieve the certified mail package containing the Citation, despite three notices from the U.S. Postal Service. I have also noted that Respondent did
(continued...)

standing Commission precedent, 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)”). The date the NOC was filed was not in issue when Respondent submitted its NOC letter, and there is nothing in Respondent’s letter, including the statement set out *supra*, that addresses this matter. Regardless, Respondent was clearly put on notice that the NOC filing date was in issue once the Secretary filed her Motion, but, despite this notice, Respondent has not responded to the Secretary’s Motion or submitted anything at all to support a conclusion that its NOC should be accepted notwithstanding the late filing. I find, therefore, that there is no basis for concluding that the late filing was caused by deception on the Secretary’s part or her failure to follow proper procedures. There is likewise no basis for finding that Respondent’s untimely filing should be excused pursuant to Rule 60(b), 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

⁴(...continued)

not retrieve a prior certified mail package that contained a notice of complaint as to an alleged violation; the package was sent by an OSHA CO in May of 2002 and was returned as unclaimed. Finally, I have noted that Respondent did not retrieve the certified mail package containing the Secretary’s motion for an extension of time, dated October 25, 2002, and that that package was returned as unclaimed. *See* Exhibits F through I to the Secretary’s Motion. Regardless, giving the benefit of the doubt to Respondent, I find the NOC filing period in this case ended October 3, 2002.

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 thus 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).

Upon considering the circumstances of this case, and in light of the Commission precedent set out *supra*, which I am constrained to follow, Respondent is not entitled to Rule 60(b) relief.⁵ 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: December 30, 2002
Washington, D.C.

⁵In deciding this case in this manner, I am aware of the Secretary’s argument that the Commission does not have authority to accept a late-filed NOC under Rule 60(b), based on *Chao v. Russell P. Le Frois Builder, Inc.*, No. 00-4057 (2d Cir. May 10, 2002). 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). Regardless, the end result for Respondent is the same whether this matter is decided under Commission precedent or the Second Circuit’s decision.