

Secretary of Labor,

Complainant,

v.

Hill Brothers Construction, Inc.

Respondent.

OSHRC Docket No. **02-1893**

Appearances:

Kathleen Butterfield, Esq., Office of the Solicitor, U. S. Department of Labor, Kansas City, Missouri
For Complainant

Christopher Harlan, Collins, Fairfield, Fowler, Harlan & Breen, Kansas City, Missouri
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER ON LATE NOTICE OF CONTEST

On July 18 and 19, 2002, compliance officers from the Occupational Safety and Health Administration (OSHA) inspected a worksite in Weston, Missouri, where Hill Brothers Contractors, Inc. (HBC), was excavating a trench (Tr. 9-10, 17, 19-20). As a result of the inspection, the Secretary issued two citations to HBC on August 9, 2002.

Citation no. 1 alleges serious violations of 29 C.F.R. § 1926.651(c)(2)(item 1) for failure to provide a stairway, ladder, ramp, or other means of egress from an excavation; and 29 C.F.R. § 1926.651(j)(2)(item 2) for failure to keep excavated material at least 2 feet from the edge of the excavation. The alleged serious violations propose total penalties of \$1,800.

Citation no. 2 alleges a willful violation of 29 C.F.R. § 1926.652(a)(1)(item 1) for failure to protect employees in an excavation from cave-ins by providing adequate protective systems and proposes a penalty of \$7,000.

As set out in § 10(a) of the Occupational Safety and Health Act of 1970 (Act), and as noted on the first page of the Citation and Notification of Penalty issued to HBC, the company had 15 working days to file a notice of contest. HBC, however, contested the citations by letter dated October 9, 2002, more than 40 days past the notice of contest deadline. HBC filed a petition for review on October 29, 2002, asserting that the Commission had jurisdiction to consider whether

there was sufficient evidence to support a finding of inadvertence or excusable neglect for the late filing.

On November 15, 2002, the Secretary moved to vacate HBC's late notice of contest. The Secretary of Labor deemed the Citation and Notice of Penalty to be a final order of the Commission in accordance with § 10(a) of the Act.

On December 20, 2002, the court held a hearing in Kansas City, Missouri, on the jurisdictional issue. The parties have filed post-hearing briefs. For the reasons set out below, the court concludes that HBC's notice of contest was untimely filed and the citations are affirmed.

Background

The facts are not in dispute. HBC is a small, family-owned excavation company that has been in business for 32 years. HBC primarily excavates basements and grades yards for residential construction projects. The company operates from the Hill family home. Rick Hill is the president of the company and his wife Cindy Hill is the company's bookkeeper and corporate secretary. HBC has four employees: Rick Hill, Hill's son Jason, and two non-family members (Tr. 7-8, 11, 15-16, 27, 29).

Prior to the OSHA inspection at issue, OSHA had never inspected HBC. HBC does not have a corporate general counsel, nor does it employ an outside attorney. The company does hire an accountant to prepare quarterly and income tax returns. The procedure for handling company mail, which is delivered to the Hill residence, is for Cindy Hill to sort through it and to put HBC's mail on Rick Hill's desk for review (Tr. 8, 10-11).

In July 2002 HBC was working in Weston, Missouri, on a subdivision project that required it to excavate basements, grade for streets, and excavate for water and sewer lines. HBC had been on the site for approximately 2 months. Two OSHA compliance officers arrived at HBC's site on July 17, 2002. HBC's crew left for lunch, and when they returned the compliance officers were gone. The compliance officers returned the next day and completed their inspection (Tr. 9, 19-21).

The Secretary issued two citations to HBC on August 9, 2002. Cindy Hill received the envelope containing the citations at the Hill residence on August 12. Thus, the deadline for the notice of contest was September 3, 2002, the Tuesday after Labor Day. Cindy Hill did not open the envelope, but placed it on Rick Hill's desk. Rick Hill was out of town that day. He returned 2 to

4 days later, well before the September 3 deadline, and opened the envelope at that time (Tr. 10-11). Rick Hill stated (Tr. 11):

I guess I opened it and my first thing was to thumb through it to the part that shows the fines. . . . I was kind of astonished. I thought maybe I would receive a warning or phone call stating that what I needed to do to correct it. Then I got involved with trying to find somebody to handle the case.

Rick Hill went on to consult with four separate attorneys before he found an attorney who would take the case (Tr. 11-15). The second attorney he consulted informed Hill that there was a deadline to file the notice of contest, which had recently passed at that point (Tr. 12). From August 12 until October 9, Rick Hill made no attempt to contact OSHA (Tr. 32-33). Hill's explanation for his failure to contact OSHA was, "[Y]ou hear the word OSHA and they are this big bad word and I was scared to call them. I mean, I'm just a little guy" (Tr. 33).

Jurisdiction

Section 10(a) of the Act provides that if an employer fails to file a notice of contest within 15 working days, the citation and proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency." Despite this language, the Commission has held since 1981 that it could exercise jurisdiction to excuse some inadvertent late filings under Federal Rule of Civil Procedure 60(b)(1).¹ *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981).

Rule 60(b)(1) permits an adjudicator to excuse a party "from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect."²

¹ HBC is not asking for equitable tolling, a doctrine that permits courts to extend a statute of limitations on a case-by-case basis to prevent inequity due to fraud or deception by the adverse party. Equitable tolling does not "extend to what is at best a garden variety claim of excusable neglect." *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 96 (1990).

² The Court of Appeals for the Second Circuit has recently held that the Commission may not exercise jurisdiction based on Rule 60(b)(1). *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002). Responding to this case, the Commission in footnote 4 of *HRH Construction Corp.*, 19 BNA OSHC 2042, 2045, stated:

Commissioner Rogers believes *Le Frois* calls into question the continued viability of our precedent and notes that the Commission will have the opportunity to examine this issue comprehensively in a non-Second Circuit 60(b) case currently under review, *Villa Marina Yacht Harbor, Inc.*, No. 01-0830, (ALJ, July 15, 2002), *directed for review* (August 14, 2002).

In the instant case, HBC has failed to establish its late notice of contest resulted from “mistake, inadvertence, surprise, or excusable neglect.” Rick Hill conceded that he personally opened the envelope and looked at the citation and notification of penalty. He read the penalty amount. It was his choice not to read the first page of the notice, which states unambiguously in the first paragraph:

You must abate the violations referred to in this Citation by the dates listed and pay the penalties proposed, unless within 15 working days (excluding weekends and Federal holidays) from your receipt of this Citation and Notification of Penalty you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above.

The second page of the notice contains a paragraph that is even more emphatic (boldface and underline in original):

Right to Contest- You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates without contesting the underlying violations. **Unless you inform the Area Director in writing that you intend to contest the citation(s) and /or proposed penalty(ies) within 15 working days after receipt, the citation(s) and proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.**

It is difficult to see how the Secretary could make it any plainer that an employer has only 15 days within which to file a notice of contest. Although Rick Hill appears unsophisticated in handling business matters, it is noted that he has owned and operated his own business for 32 years. As such, Hill is required to enter into contracts, file tax documents, meet payroll, and handle all the other attendant paperwork. Hill’s failure to give even a cursory reading to a legal document that was delivered to his house by certified mail is not excusable neglect. It was a deliberate choice.

The court is not unsympathetic to HBC’s situation. But without evidence of excusable neglect, the court has no jurisdiction. HBC is not entitled to Rule 60(b)(1) relief.

Despite the uncertainty of the Commission’s future position on this issue, at this time the Commission has not departed from its 1981 precedent, and the court may exercise jurisdiction based on Rule 60(b)(1).

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

The Secretary's motion to vacate HBC's late notice of contest is GRANTED and the citations are affirmed in their entirety.

Citation No. 1

_____ Item 1, alleged serious violation of § 1926.651(c)(2), is affirmed and a penalty of \$750 is assessed.

Item 2, alleged serious violation of § 1926.651(j)(2) is affirmed and a penalty of \$1,050 is assessed.

Citation No. 2

Item 1, alleged willful violation of § 1926.652(a)(1), is affirmed as willful and a penalty of \$7,000 is assessed.

/s/
KEN S. WELSCH
Judge

Date: February 3, 2003