

SECRETARY OF LABOR,

Complainant,

v.

BELROSE FIRE SUPPRESSION, INC.,

Respondent.

OSHRC DOCKET NO. 03-0416

APPEARANCES:

Jennifer Marciano, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

Michael Vukovich
Belrose Fire Suppression, Inc.
Freeport, New York
For the Respondent, *pro se*.

BEFORE: Irving Sommer
Chief Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (“the Act”). The Secretary of Labor (“the Secretary”) filed a motion to dismiss as untimely the notice of contest (“NOC”) of Respondent, Belrose Fire Suppression, Inc. (“Belrose”). A hearing in this regard was held on August 19, 2003, in New York, New York. Both parties have filed post-hearing submissions.

Background

The Occupational Safety and Health Administration (“OSHA”) inspected a work site of Belrose located in New York, New York, in August of 2002. As a result, OSHA issued Belrose a Citation and Notification of Penalty on November 21, 2002. OSHA mailed the citation by certified mail, return receipt requested, and Belrose received the citation on November 25, 2002. Section 10(a) of Act requires an employer to notify the Secretary of the intent to contest a 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. Based on the date that it received the citation, Belrose was required to file its NOC by December 17, 2002. Belrose, however, did not file an NOC by that date, and, on January 15, 2003, OSHA issued a second citation to Belrose because the company had failed to submit an abatement certification with respect to the first citation. A representative of Belrose called OSHA and asked why the company had received the second citation, and, after first disputing the receipt of the first citation, the representative acknowledged that the person who had signed the certified mail return receipt card worked in Belrose's office. On January 23, 2003, OSHA sent Belrose a demand letter advising that the penalties as to the first citation were due and payable, and, on January 28, 2003, Belrose filed its NOC letter. (Tr. 5-14; C-1-6).

Discussion

The record clearly shows that Belrose 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)").

At the hearing, Michael Vukovich, Belrose's Secretary/Treasurer, testified that although the OSHA compliance officer ("CO") who had conducted the inspection had called him to tell him why the citation was being issued, the CO had not told him that the citation would be sent by certified mail and that the company would have to respond within 15 days. Mr. Vukovich further testified that Belrose was a small business, that he and his partner, the company president, were both out of town when the citation arrived, and that while his secretary had signed for the citation he had not become aware of it until after he returned, by which time the 15 days had already passed. Mr. Vukovich said that the CO should have advised him, when he called to tell him about the citation, that Belrose would be receiving a letter and that he would have 15 days to respond to it. (Tr. 17-18).

Based on the foregoing and its post-hearing filing, Belrose's position will be deemed to be an assertion that the Secretary failed to follow proper procedures and that the late filing should be excused under the circumstances. Kay Gee, the assistant area director ("AAD") of the OSHA office that issued the citation, testified that the normal procedure is for the CO to inform the employer of its rights and responsibilities, including the 15-day filing period, at the closing conference after the inspection. She further testified that the procedure her office follows in regard to sending out a citation is to mail it by certified mail, return receipt requested, and to include with the citation an OSHA-3000 pamphlet. The AAD noted that the OSHA citation itself and the OSHA-3000 pamphlet both advise the employer about the 15-day NOC filing requirement. (Tr. 5-8; 16).

As to whether the Secretary followed proper procedures, Commission precedent is well settled that serving the citation by certified mail at the employer's proper address "is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest." *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474 (No. 76-2165, 1979). In addition, Mr. Vukovich admitted that he had not been present for the OSHA inspection and that he did not know if the CO had held a closing conference with the Belrose foreman who had accompanied the CO during the inspection. (Tr. 19). In view of this testimony, and that of the AAD set out *supra*, I find that Belrose has not shown that the late filing was due to the Secretary's failure to follow proper procedures. I further find that there is no basis for concluding that the late filing should be excused, for the following reasons.

First, Mr. Vukovich himself admitted that the citation contained the 15-day NOC filing requirement. (Tr. 20). 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 Kqy, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). Third, 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 thus denied Rule 60(b) relief in cases where the late filing was due to the absence of the person responsible for handling the citation or the failure of the person who received the citation to bring it to the attention of proper company officials. *See, e.g., E.K Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991); *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830, 1989).

Although I am sympathetic to the plight of Belrose in this matter, I am constrained to decide cases based upon the circumstances presented and upon Commission precedent. The employer has the burden of demonstrating that it is entitled to relief, and Belrose has not established any reason under Rule 60(b) or Commission precedent that would warrant the acceptance of the late-filed NOC. There is, therefore, no justification for the granting of Rule 60(b) relief in this case.¹ *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). The Secretary’s motion to dismiss Belrose’s NOC as untimely is accordingly GRANTED, and the Citation is AFFIRMED in all respects.

So ORDERED.

/s/
Irving Sommer
Chief Judge

Date: October 3, 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.*, 291 F.3d 219 (2d Cir. 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 Belrose 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 Belrose is the same whether this case is decided under Commission precedent or the Second Circuit’s decision.

