

SECRETARY OF LABOR,

Complainant,

v.

SIMON ROOFING AND SHEET

METAL, INC

Respondent.

OSHRC Docket NO. 03-0640

Appearances:

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

Samuel J. Samaro, Esquire
Pashman Stein
Hackensack, New Jersey
For the Respondent.

Before: Chief Judge Irving Sommer

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”), for the purpose of determining whether the Secretary’s motion to dismiss Respondent’s notice of contest as untimely should be granted. A hearing in this regard was held on October 9, 2003, in New York, New York. Only Respondent has filed a post-hearing brief.

Background

The Occupational Safety and Health Administration (“OSHA”) inspected a work site of Respondent, Simon Roofing and Sheet Metal, Inc. (“Simon”), on November 19, 2002. On November 29, 2002, OSHA issued to Simon a Citation and Notification of Penalty (“Citation”). OSHA mailed the Citation to Simon by certified mail, return receipt requested, and, on December 4, 2002, a temporary employee of Simon signed for the Citation. Section 10(a) of the 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 notice of contest (“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, Simon was required to file its NOC by December 26, 2002. However, Simon did not file an NOC by that date, due to the fact that the Citation had been misplaced after it was received. On March 19, 2003, Simon’s

corporate safety and health manager called OSHA and spoke with the assistant area director (“AAD”), explaining that she had just become aware of the Citation. The AAD advised her that the Citation was already a final order and provided her the Commission’s address. The safety manager sent a letter to the Commission on March 21, 2003, requesting, in effect, that Simon’s late NOC be accepted under the circumstances. The Secretary filed her motion to dismiss on June 6, 2003, and Simon filed its opposition to the motion on June 16, 2003. (Tr. 4-16; C-1-3).

Discussion

The record plainly shows that Simon did not file an NOC within the requisite 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, pursuant to Federal Rule of Civil Procedure 60(b) (“Rule 60(b)”), 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).

At the hearing, Benita Thompson, Simon’s corporate safety and health manager, testified that she is the person who would receive matters such as the Citation in this case. She recognized the signature on the certified mail return receipt card as that of the temporary employee who was working for Simon at the time the Citation was issued, and she surmised that Simon’s receptionist had been away from her desk for some reason and that the temporary employee had signed for the Citation, after which it was misplaced.¹ Ms. Thompson said the practice then was for the receptionist to sign for certified mail and to distribute it accordingly. She also said the receptionist would have known to give her the Citation and that although she (Thompson) was in Simon’s Baton Rouge office at that time, the Citation would have been brought to her attention if it had not been misplaced. She explained that the practice was for the office manager to call her once or twice a week when she was out of the office in order to go over all of the mail that was in her box; she further explained that she would then tell the office manager what to do with any correspondence she had received. Ms. Thompson noted that after this incident, Simon had put a new procedure in place for handling

¹Ms. Thompson said she had discovered the Citation about mid-March; she was reviewing the mail in her box, and the Citation was there among the current mail. (Tr. 14).

certified mail; certain designated full-time employees in the office are the only ones who are allowed to sign for certified mail, and, after the certified mail is signed for, it is taken directly to the person for whom it is intended, and that person also signs for it. (Tr. 11-16).

As indicated above, the issue here is whether the misplacing of the Citation, which resulted in the late-filed NOC, may be deemed “excusable neglect” under Rule (60)(b) such that Simon may be granted relief from the Citation’s having become a final order. The Commission has held that a key factor in determining whether a late filing was due to excusable neglect is “the reason for the delay, including whether it was within the reasonable control of the movant.” *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-367, 2000), citing to *Pioneer Inv. Serv. v. Brunswick Assoc.*, 507 U.S. 380, 395 (1993). The Commission has also held that a business must maintain orderly procedures for the handling of 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 an employee’s mishandling or misplacing the citation or the failure of the employee who received the citation to bring it to the attention of proper company officials. *J.F. Shea Co.*, 15 BNA OSHC 1092, 1094 (No.89-976, 1991); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989); *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830, 1989).

Based on the evidence and the foregoing Commission precedent, I conclude that the late filing here was due to Simon’s lack of proper procedures for the handling of important documents. Although Ms. Thompson testified that the temporary employee was assisting with Simon’s accounts and was not working as a receptionist, it is clear that she signed for the subject Citation, and she may well have done so on a number of occasions. (Tr. 13). Further, Simon should have known that other individuals, including the temporary employee, would accept mail in the absence of the receptionist and should have had a procedure geared towards preventing what happened here. Finally, that Simon instituted a new procedure after this incident indicates that the previous procedure was deficient. I am sympathetic to Simon’s plight, and I am well aware of the large penalty involved in this matter. However, I am constrained to decide cases based upon the facts and circumstances presented and upon Commission precedent. The employer has the burden of showing it is entitled to relief, and Simon, in my opinion, has not established a reason that would justify the granting of Rule 60(b)

relief in this case. The Secretary's motion to dismiss Simon's NOC as untimely is therefore GRANTED, and the Citation is AFFIRMED in all respects.²

So ORDERED.

/s/
Irving Sommer
Chief Judge

Date: November 24, 2003
Washington, D.C.

²In deciding this matter, I have noted Simon's citing to *J.I. Hass Co. v. OSHRC*, 648 F.2d 190 (3d Cir. 1981), and to *Pioneer Inv. Serv. Co. v. Brunswick Assoc.*, 507 U.S. 380 (1993). However, as I read it, *J.I. Hass* holds only that the Commission has the authority to consider a late NOC under Rule 60(b). 648 F.2d at 195. Further, in reaching my decision, I have used that portion of the test for "excusable neglect" set out in *Pioneer* that the Commission considers key, that is, whether the reason for the late filing was within the reasonable control of the movant.