

SECRETARY OF LABOR,

Complainant,

v.

WELL RISE FASHION,

Respondent.

Docket No. 03-1363

APPEARANCES:

Jennifer Marciano, Esq.
For the Secretary

Daphne Fu
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 of the Occupational Safety and Health Act of 1970, 29 U.S.C. sec. 651 et seq. (the Act) for the sole purpose of determining whether the Secretary's motion to dismiss the Respondent's notice of contest as untimely should be granted.

BACKGROUND

The Occupational Safety and Health Administration (OSHA) conducted an inspection of a work site of Respondent located in New York, N.Y. on March 20, 2003. As a result of the inspection OSHA issued Respondent two citations alleging serious and non-serious violations of the Act. Section 10(a) of the Act requires an employer to notify OSHA of the intent to contest a citation within 15 working days of receiving it and the failure to file a timely notice of contest results in the citation and penalty becoming a final judgment of the Commission by operation of law. The record shows that OSHA sent the citations to the Respondent which were received on April 9, 2003 and that the 15 day notice of contest period expired on April 30, 2003. The Respondent did not reply to the citations until July 7, 2003 at which time it merely asked for reconsideration of the case.

DISCUSSION

The record plainly shows that the Respondent did not file its notice of contest until well after the 15 day contest period had already ended. An otherwise untimely notice of contest may be accepted where the Secretary's deception or failure to follow proper procedures caused the delay in filing. An employer is also entitled to relief if it shows that the Commission's 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 illness or a disability which would prevent a person from protecting its interests. There is no evidence and no contention that the Secretary was deceptive or failed to follow proper procedures. There is no evidence that the failure to file in a timely manner was to "excusable neglect" or any other reason justifying relief. The record shows that the Respondent has been in business as a garment contractor for close to three years and 20 to 25 people are employed. While he alleges that he cannot understand English, he does have an employee under him who is conversant in English and assists him. He hires the help, keeps payroll records and as a garment subcontractor deals with his customers. His message at the hearing was he was interested in settling this matter if the penalties were reduced. This was not satisfactory to the Secretary who proceeded with its motion.

The Commission has held the OSHA citation plainly states the requirement to file a notice of contest within the prescribed time period. The Commission has further held that a business must have orderly procedures for handling of important documents. Here the Respondent did not follow through after receipt of the citations, and is here not contesting its lateness in filing, but asking for a lesser penalty. Although I am sympathetic to Respondent's plight, I am constrained by the circumstances and Commission precedent to conclude that the failure to file a timely notice of contest was not due to excusable neglect or any other reason justifying relief pursuant to Rule 60(b).

ORDER

For the reasons set forth above, the Secretary's motion to dismiss the notice of contest is **GRANTED**, and the citations and notification of penalties are **AFFIRMED** in all respects.

/s/
IRVING SOMMER
Chief Judge

DATED: March 4, 2004
Washington, D.C.