



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, :
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 Complainant, :
 :
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 v. :
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 :
 CONSTRUCTION 2000, INC., :
 :
 :
 Respondent. :

OSHRC DOCKET NO. 03-1994

Appearances:

Stacy M. Wolf, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

Anthony E. Patire, President
Construction 2000, Inc.
Clifton, New Jersey
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”) in order to determine whether the Secretary’s motion to dismiss Respondent’s notice of contest (“NOC”) as untimely should be granted. A hearing in this regard was held on May 5, 2004, in New York, New York. Both parties have filed post-hearing submissions.

Background

The Occupational Safety and Health Administration (“OSHA”) inspected a construction site in Norwood, New Jersey on September 9, 2003. As a result of the inspection, OSHA issued to Respondent a Citation and Notification of Penalty (“Citation”) on September 26, 2003. OSHA

mailed the Citation to Respondent by certified mail, return receipt requested, and Respondent received the Citation on October 2, 2003. Section 10(a) of the Act requires an employer to notify the Secretary of its 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 it received the Citation, Respondent was required to file its NOC in this case by October 24, 2003. Respondent did not file an NOC by that date, but Respondent's president called OSHA on October 29, 2003, and spoke to the compliance officer ("CO") who had conducted the inspection. The CO advised Respondent's president that the time for filing the NOC had expired, and he also advised that Respondent could file a late NOC with the Commission. Respondent filed an NOC letter with the Commission on October 29, 2003; in that letter, Respondent's president explained that he had been unable to file a timely NOC because he had been out of state.

Discussion

The record plainly shows that Respondent did not file its NOC by the required date. However, an otherwise untimely NOC may be accepted if 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 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). It is the burden of the employer to establish that it is entitled to relief.

There is no evidence and no contention that the late filing in this case was due to deception or the failure to follow proper procedures on the part of the Secretary. Rather, Respondent is requesting, in essence, that its late filing be excused under the circumstances. At the hearing, Anthony Patire, Respondent's president, testified that he had been in business for five years, that his business was very small, with only four employees besides himself, and that he conducted his business out of his home. He further testified that he was out of state when the Citation arrived, because of an elderly uncle being sick, and that his fiancé had signed for it and had then passed it on along with other mail to one of his sons, who kept it until his return home. Mr. Patire noted that he had no clerical help, that he himself did all the billing and contracting, and that there was no one

to take care of things when he was out of town; he also noted that his employees were masons and laborers, that two of his employees were his sons, and that the son who had kept the Citation and other mail for him was one of his employees. (Tr. 20-24).

Commission precedent is well settled that the OSHA citation clearly 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 further 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 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 thus denied Rule 60(b) relief in cases where the late filing was due to an employer’s misunderstanding or confusion about the 15-day filing period. *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). The Commission has also denied relief where the delay in filing was caused by absence, even if due to illness, of the person responsible for handling OSHA matters. *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991).

The testimony of Mr. Patire makes it clear that the reason for the late filing in this matter was the fact that he was out of town and that he had no procedures in place for another employee, such as one of his sons, to handle matters of importance in his absence. While I sympathize with Mr. Patire’s situation and am convinced of his sincerity, I am constrained to follow Commission precedent. Based on that precedent and the circumstances of this case, Respondent’s failure to file the NOC in a timely manner was due to simple negligence, and there is no justification for the granting of Rule 60(b) relief. 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

Dated: June 14, 2004
Washington, D.C.