



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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 :
 NEW BLUE SHIELD CONSTRUCTION, :
 INC., :
 :
 :
 Respondent. :

OSHRC DOCKET NO. 07-0455

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This matter 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 Respondent’s late-filed notice of contest (“NOC”) should be accepted pursuant to Federal Rule of Civil Procedure 60(b).

Background

The Occupational Safety and Health Administration (“OSHA”) inspected a work site of Respondent, New Blue Shield Construction, Inc., located in the Bronx, New York, from February to June 2006. As a result, OSHA issued to Respondent a Citation and Notification of Penalty (“Citation”) on August 8, 2006. On August 8, 2006, the OSHA compliance officer (“CO”) who had inspected the site hand-delivered the Citation to Respondent’s vice-president, David Snir, and Mr. Snir signed a certification he had received the Citation. 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 an NOC on or before August 29, 2006. However, Respondent did not file an NOC by that date. On September

6, 2006, the OSHA CO contacted Mr. Snir and John Aburus, Respondent's president, and requested that the company submit documentation of abatement of the violations set out in the Citation. On September 18, 2006, OSHA received a letter verifying abatement of the cited conditions. On September 29, 2006, OSHA contacted Mr. Aburus to set up a payment plan in regard to the penalty due; OSHA also advised Mr. Aburus of the procedure to file a late NOC directly with the Commission. A copy of the payment plan was faxed to Mr. Aburus. On March 9, 2007, Respondent filed an NOC letter with the Commission that set out the reasons for the late filing and requested an appeal of this matter. On May 25, the Secretary filed a motion to dismiss Respondent's late notice of contest. On July 13, 2007, Respondent filed an affidavit and an affirmation in opposition to the motion to dismiss, and on July 24, 2007, the Secretary filed a reply.

Discussion

The record in this case plainly shows that Respondent did not file its NOC within the requisite 15-day period set out in the Act. 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 "circumstances such as absence, illness, or a similar disability [that would] prevent a party from acting to protect its interests." See *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981) (citations omitted). The moving party has the burden of proving that it is entitled to Rule 60(b) relief.

There is no allegation, and no evidence, that the delay in filing in this case was due to deception on the part of the Secretary or her failure to follow proper procedures. However, Respondent's letter of March 9, 2007, will be construed to be a request for relief pursuant to Rule 60(b) on the basis that its failure to file a timely NOC was due to excusable neglect.

In determining whether an employer's failure to file a timely NOC was due to excusable neglect, the Commission follows the Supreme Court's test in *Pioneer Inv. Serv. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380 (1993). See *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1950 (No. 97-851, 1999). Under that test, the Commission takes into account all relevant circumstances, including the danger of prejudice to the opposing party, the length of the delay and its potential

impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Id.* at 1950, quoting 507 U.S. at 395. The Commission has held that the “reason for the delay, including whether it was within the reasonable control of the movant,” is a “key factor” and, in appropriate circumstances, the dispositive factor. *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148 (No. 99-0945, 2000); *Calhar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-0367, 2000).

In this case, Respondent did not file an NOC until nearly six months after OSHA advised it of the procedure to file an NOC directly with the Commission. I agree with the Secretary that this delay is patently unreasonable, and I further agree that accepting the late-filed NOC in these circumstances would prejudice the Secretary, given the extended period of time that has elapsed. While I find no particular impact on judicial proceedings, I do question Respondent’s good faith, in light of the amount of time that passed before Respondent sent its letter to the Commission.

As to the reason for the delay, Respondent’s counsel states in the March 9, 2007 letter that her client did not file the NOC within the 15-day period because he was negotiating with OSHA in an attempt to resolve this matter.¹ The Secretary disputes this statement, pointing out that OSHA contacted Respondent in September 2006, after the Citation was already a final order. The March 9 letter also states that Respondent was buying new equipment and educating its workers in regard to the cited conditions. Respondent did certify that it had abated the cited conditions, based on the letter OSHA received on September 18, 2006. However, this fact does not explain or excuse the almost six-month delay in filing the NOC. Finally, the March 9 letter states that while Respondent had contacted counsel in September or October of 2006, counsel was only recently retained due to “miscommunication.” Again, this circumstance does not excuse a nearly six-month delay in filing.

As to whether the delay was within the reasonable control of Respondent, I find that it was. The Citation itself, on page 2 and in bold letters, advised Respondent the NOC was required to be filed within 15 working days of receipt. The Commission has held 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

¹The circumstances set out in the March 9 letter also appear in the affidavit submitted by Respondent.

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 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 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).

Based on the foregoing precedent and the circumstances of this case, I find that the failure to file a timely NOC was due to simple negligence and not to excusable neglect within the meaning of Rule 60(b). There is accordingly no justification for the granting of relief in this matter. The Secretary’s motion to dismiss is GRANTED, the request for relief is DENIED, and the Citation is AFFIRMED in all respects.² SO ORDERED.

/s/

Irving Sommer
Chief Judge

Dated: August 10, 2008
Washington, D.C.

²In support of its claim it is entitled to relief, Respondent contends the citations in this matter were not willful and repeated as it had not been previously cited by OSHA. However, as the Secretary notes, this contention is at best a meritorious partial defense; having a meritorious defense to a Citation is an additional element an employer must show after it has shown its late filing was excusable neglect. As found here, the late filing was not excusable neglect.