



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

SECRETARY OF LABOR,

Complainant,

v.

CUSTOM COPPER & SLATE, LTD.

Respondent.

OSHRC Docket No. 09-0022

APPEARANCES:

Michael P. Doyle, Counsel for Appellate Litigation; Charles F. James, Counsel for Appellate Litigation, U.S. Department of Labor, Washington, DC
For the Complainant

Sharon A. Green, Custom Copper & Slate, Ltd., Medfield, MA
For the Respondent

ORDER

Before: ROGERS, Chairman; and THOMPSON, Commissioner.

BY THE COMMISSION:

On August 27, 2008, the Occupational Safety and Health Administration (“OSHA”) issued Custom Copper & Slate, Ltd. (“Custom”) a fourteen-item serious citation, alleging various violations of the lead in construction standard, 29 C.F.R. § 1926.62, and proposing a total penalty of \$4,500. On September 22, 2008, the last day of the fifteen-day statutory contest period, an informal conference was held at the request of Custom between OSHA personnel and a Custom representative. At the conference, the parties signed an informal settlement agreement that affirmed all fourteen citation items and reduced the total penalty to \$750. On December 28, 2008, Custom filed a letter with the Commission that it characterized as a “Notification of Intent to Contest.” The case was docketed by the Executive Secretary on January 9, 2009, and assigned to Chief Judge Irving Sommer.

On March 9, 2009, the Secretary filed a Motion to Dismiss Contest with the judge. On March 20, 2009, Custom filed a timely response to the Secretary's motion that was received by the judge's office on March 24, 2009. In a decision dated April 6, 2009, the judge granted the Secretary's motion, noting in his decision that Custom had failed to file a response to the motion. On May 1, 2009, Custom filed a Petition for Review in Opposition to Administrative Law Judge's Decision with the Commission, noting among other factors, the judge's failure to consider its response to the Secretary's motion. The case was directed for review by Commissioner Thompson.

Having considered the record before us, including Custom's response to the Secretary's motion and its petition for review, we find no basis for disturbing the settlement agreement signed by the parties, or for granting relief from a final order under Federal Rule of Civil Procedure 60(b). Accordingly, the judge's decision is affirmed.¹
SO ORDERED.

/s/ _____
Thomasina V. Rogers
Chairman

/s/ _____
Horace A. Thompson III
Commissioner

Dated: May 20, 2009

¹ While not decisive in this case, Commissioner Thompson notes that Custom requested an informal conference on September 3, 2008, five days after receipt of the citation. However, the Area Office canceled an earlier scheduled informal conference and rescheduled it for the last day of the contest period. While the reasons for the rescheduling are unclear, holding an informal conference on the last day of the contest period is contrary to OSHA's recommendation in the Citation and Notification of Penalty, which reads:

If you are considering a request for an informal conference to discuss any issues related to this Citation and Notification of Penalty, you must take care to schedule it early enough to allow time to contest after the informal conference, should you decide to do so.

Commissioner Thompson cautions the Secretary that there is an appearance of gamesmanship where an employer follows OSHA's recommendation and requests an informal conference early enough to allow time to contest but OSHA apparently fails to heed its own recommendation when scheduling an informal conference.



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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 dismissed.

Background¹

The Concord, New Hampshire office of the Occupational Safety and Health Administration (“OSHA”) inspected a work site of Respondent, located in Concord, New Hampshire, on May 23, 2008.² As a result, OSHA issued to Respondent a Citation and Notification of Penalty (“Citation”) on August 27. OSHA mailed the Citation by certified mail to Respondent at its address in Medfield, Massachusetts, and Marc Green signed for the Citation on August 29.³ 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

¹The following is based upon the Secretary’s motion to dismiss, which is supported by affidavits of officials of the Concord OSHA office; it is also based on letters from the Respondent to OSHA and the Commission.

²All dates hereafter will refer to the year 2008 unless otherwise indicated.

³Mr. Green is an estimator for Respondent; he is also the spouse of Respondent’s owner and president, Sharon Green.

operation of law. Based upon the date it received the Citation, Respondent was required to file an NOC on or before September 22. Mr. Green requested an informal conference, and on September 22, the conference was held at the Concord OSHA office; the Assistant Area Director (“AAD”) of the office and the OSHA Compliance Officer (“CO”) who inspected the site were present. At the conference, the AAD and the CO reviewed the Citation with Mr. Green. The AAD offered to modify the serious items and reduce the total penalty from \$4,500.00 to \$750.00. The AAD indicated to Mr. Green that it was his choice whether to accept the offer or to file an NOC. Mr. Green chose to execute an informal settlement agreement (“agreement”), and the agreement was signed that day; it stated that Respondent, by signing, waived its right to contest the Citation, as amended.

On October 13, the OSHA office received a letter from Sharon Green. She indicated that after speaking with parties involved and obtaining all the facts, she believed her company was wrongly accused of the violations set out in the Citation. She also indicated that this would be the basis of her company’s claim as it “prepare[d] to contest all related bogus charges and rescind any informal agreement made between you and Mr. Marc Green.” On November 23, Ms. Green sent another letter to OSHA, wherein she stated that the agreement was made based on what the CO “had presented as the facts but was later found to be misleading evidence.” She indicated that despite claims that her employees had been working in a hazardous area at the time of the inspection, such was not the case. Upon receipt of the letter, the OSHA office advised Ms. Green that the agreement had become a final order and that she could file a late NOC with the Commission. On December 28, Ms. Green filed an NOC letter with the Commission. In that letter, she asserted that the Concord OSHA office had made “clumsy mistakes hidden by false accusations” at the informal hearing and that by presenting the charges in such a manner her representative was encouraged to sign the agreement. She urged the Commission to review all the documentation she had submitted and indicated her belief that if an appeals court were to hear the case it would be determined that the CO “had embellished the facts and [had] perjured himself in a careless and obvious manner.”

The Commission docketed this case on January 9, 2009, and on March 9, 2009, the Secretary filed her Motion to Dismiss Respondent’s NOC. Respondent has filed nothing in response to the Secretary’s motion.⁴

⁴The motion contains a statement that the Secretary’s counsel discussed the issues in this case with the Greens in January and February 2009, in an attempt to resolve this matter. The motion also states that counsel spoke to Mr. Green on March 4, 2009, and told him that

Discussion

The record in this case plainly shows 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.” See *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981) (citations omitted). The moving party has the burden of proving it is entitled to Rule 60(b) relief.

As a preliminary matter, I agree with the Secretary that, upon signing the agreement, Respondent waived its right to contest the Citation. As the Secretary notes, settlement agreements are binding and enforceable contracts not subject to unilateral rescission. See *Zantec Dev. Co.*, 1994 WL 590436, at *1, 16 BNA OSHC 2102 (No. 93-2614, 1994) (ALJ decision), citing to *Secretary of Labor v. Phillips 66 Co.*, 16 BNA OSHC 1332 (No. 90-1549, 1993); *Lewis v. S.S. Baume*, 534 F.2d 115 (5th Cir. 1979); *Pennsylvania Steel Foundry & Mach. Co. v. Secretary of Labor*, 831 F.2d 1211 (3d Cir. 1987). Further, there is no allegation that Respondent’s representative at the informal conference did not have authority to enter into the agreement; thus, the agreement was effective upon the date of signature, which was September 22. *Interstate Brands Corp. v. OSHRC*, 60 Fed Appx. 66, 20 BNA OSHC 1167 (9th Cir., 2003). Although Respondent apparently disagrees with the facts underlying the Citation, after having spoken to contractors and others after the agreement was executed, this information could have been discovered before the date the agreement was executed. Rule 60(b) does offer relief from judgments and orders in certain limited circumstances; however, Respondent has not shown that such circumstances exist. Ms. Green was not present at the conference Mr. Green attended. Moreover, in view of the affidavits of the AAD and CO who attended the conference, I am not persuaded that Mr. Green was induced to sign the agreement based upon “misleading evidence” and “false accusations”

a motion to dismiss would be filed. Finally, the motion states that Mr. Green was asked to have Ms. Green contact counsel but there was no response from Respondent. The motion concludes that Respondent would oppose the motion to dismiss.

presented at the conference.⁵ There is therefore no basis for concluding the Secretary has acted improperly in this matter.

As to whether the late filing was caused by “excusable neglect,” the Commission follows the Supreme Court’s test in *Pioneer Inv. Serv. v. Brunswick Assoc.*, 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).

I find the length of delay in filing here, which was over three months, to be unreasonable. Mr. Green, Respondent’s representative, was given the choice of accepting the AAD’s offer or filing an NOC on September 22, and he chose to sign the settlement agreement; in these circumstances, it is reasonable to infer that Respondent was aware that the final date for filing the NOC was September 22. I also find that accepting the late filing would prejudice the Secretary and have an impact on judicial proceedings. As to Respondent’s good faith, Ms. Green may well believe that the Citation was issued in error; however, the facts do not support her belief.

As to the reason for the delay, including whether it was within the reasonable control of the movant, Respondent’s NOC letter provides no reason at all for the late filing. The Citation clearly informed the company that it had 15 working days within which to file its contest after receipt of the Citation. See Exhibit 2, page 2, to the Secretary’s motion. Furthermore, as noted above, Mr. Green was aware of the final filing date in light of his presence at the conference and what the AAD told him. Finally, 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*

⁵Both of the affidavits state that while it is correct that none of Respondent’s employees was in the hazardous area at the time of the inspection, the CO spoke to a foreman and two employees of Respondent, who admitted that, “days earlier,” the employees had been working in the hazardous area.

Kay, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). Commission precedent 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.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991).

Based upon the circumstances in this case, and the Commission precedent set out above, I find that the reason for the delay in this matter lies with Respondent. I also find this factor dispositive. *See 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).

There is an additional reason for denying relief in this matter. Besides showing that the late filing was due to “excusable neglect,” the party seeking relief must also allege it has a meritorious defense to the citation. *See, e.g., Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1951 (No. 97-851, 1999). Although Respondent’s letters indicate the Citation was issued in error and that a court review of this case would result in a dismissal of the citation, the facts do not support such a conclusion. For this reason, and those set out above, the Secretary’s motion to dismiss Respondent’s late-filed NOC is GRANTED and the Citation and proposed penalty are AFFIRMED. SO ORDERED.

/s/

Irving Sommer
Chief Judge

Dated: April 6, 2009
Washington, D.C.