



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.

NORTH AMERICAN DISMANTLING CORP.,

Respondent.

OSHRC Docket No. 10-1637

DECISION AND ORDER ON REMAND

This matter has been remanded to the undersigned, pursuant to the Commission's order dated February 8, 2011. In an order dated January 13, 2011, Former Chief Administrative Law Judge Irving Sommer denied Respondent's request for relief under Federal Rule of Civil Procedure 60(b) and granted the Secretary's motion to dismiss Respondent's late-filed notice of contest. The notice of decision was issued to the parties on January 3, 2011, and the case was docketed on January 13, 2011. These events took place after December 31, 2010, the date on which the judge retired. The Commission's order directed this case for review and remanded it to the undersigned "to address this discrepancy and to take any further action warranted under the circumstances."

Commission Rule 90(b)(3), 29 C.F.R. 2200.90(b)(3), provides for the correction of errors such as the one that has occurred in this case. In pertinent part, the rule states:

Until the Judge's report has been directed for review or, in the absence of a direction for review, until the decision has become a final order, the Judge may correct clerical errors and errors arising through oversight or inadvertence in decisions, orders or other parts of the record.

The undersigned concludes that the judge's decision in this case did not become a final order. This is so because the date the notice of decision was issued and the date the

case was docketed both occurred after the judge retired on December 31, 2010. The undersigned also concludes that the errors in this case, that is, the notice of decision being issued and the case being docketed after the date the judge had retired, were due to oversight or inadvertence on the part of administrative staff.

For the reasons above, the judge's decision is set aside and has no force or effect. After careful review of the entire record in this case and the judge's decision, however, I conclude that the judge's decision is legally and factually correct. The judge's decision is therefore adopted as my own, in its entirety, as follows.

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"), to determine whether the Secretary's motion to dismiss Respondent's late notice of contest should be granted. Respondent has filed a response to the Secretary's motion.

Background¹

North American Dismantling Corp. ("NADC") is a demolition contractor with its main office in Lapeer, Michigan. NADC owned a pulp mill in Berlin, New Hampshire, and, in September 2007, NADC was engaged in demolishing the pulp mill. Part of the project involved demolishing three large smokestacks at the mill. NADC hired Dykon Explosive Demolition ("Dykon") to do this work. On September 15, 2007, Dykon set explosives at the base of each smokestack. Dykon then detonated the smokestacks one at a time. The first two came down without incident. The third, however, failed to collapse. Five to ten minutes after the third smokestack was detonated, Greg Goscenski, NADC's site superintendent, entered the blast site along with an employee of Dykon. The two

¹The background that follows is taken from the affidavits of the OSHA Compliance Officer ("CO") who inspected the site and the Assistant Area Director ("AAD") of the OSHA office that issued the subject citation. Attached to the AAD's affidavit are copies of various documents. These include the citation and the certified mail receipt showing that NADC signed for the citation on January 23, 2008. They also include a notice from OSHA to NADC on March 17, 2008, stating that payment of the penalties was past due, and NADC's check to the U.S. Department of Labor, dated April 3, 2008, in payment of the penalties. Finally, they include letters from NADC's counsel dated July 30, 2010, and August 20, 2010.

individuals inspected the smokestack's condition, after which the Dykon employee set a new package of explosives at the base of the smokestack. They then left the area and the new charges were detonated. The smokestack again failed to collapse. After waiting five to ten minutes, Mr. Goscenski and another employee of NADC entered the blast site to inspect the smokestack. Mr. Goscenski saw that the previous detonations had exposed several strands of reinforcing steel rebar at the base of the smokestack. With the help of the second NADC employee, Mr. Goscenski used a cutting torch to cut the rebar in order to weaken the structure. After two or three of the rebar strands were cut, the smokestack began to collapse. The two employees fled the structure as it fell, and, fortunately, both escaped uninjured. The local news media covered the incident, which resulted in a referral to the Concord, New Hampshire OSHA office. A CO from that office inspected the site on September 17, 2007. The CO held an opening conference with Mr. Goscenski, and the two walked together through the project area. Mr. Goscenski described the circumstances of the incident to the CO, including how he had to flee from the area when the smokestack fell.

As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to NADC. Item 1 alleged a violation of section 5(a)(1) of the Act, for employee exposure to hazards from falling debris when they entered the blast site and attempted to weaken the damaged smokestack. Item 2 alleged a violation of 29 C.F.R. 1910.910(b), due to employees not waiting a sufficient amount of time before entering the blast area, which exposed them to smoke and fumes from the blasting work. Each item proposed a penalty of \$1,500.00. OSHA mailed the Citation to NADC at its Lapeer, Michigan address by certified mail. NADC received and signed for the Citation on January 23, 2008. The Act requires the 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 notice of contest ("NOC") results in the citation becoming a final order of the Commission by operation of law. Based upon the date it received the Citation, NADC was required to file its NOC by February 13, 2008. NADC did not file an NOC by that date. On March 17, 2008, the Concord OSHA office sent NADC a letter advising that the penalties assessed were past due. The letter was mailed to NADC's address in Lapeer, Michigan. On April

10, 2008, the Concord OSHA office received a check from NADC for the full amount due. The OSHA office closed the case shortly thereafter.

On July 30, 2010, NADC's counsel wrote to OSHA and requested a review of the "facts" set out in the letter. The letter stated that NADC had just discovered the Citation during an internet search. Among the allegations in the letter were the following: (1) that the cited offenses did not involve NADC, but Dykon, which had "complete control and performed the work on the subject property;" (2) that, unknown to NADC's management, an agent of OSHA had visited the site to investigate the September 15, 2007 incident; and (3) that, also unknown to NADC's management, a series of clerical errors by office staff caused the Citation to be misdirected and the delinquency notice from OSHA to be sent to an independent safety contractor on the project, who directed that the penalties be paid. The letter asserted that the Citation had been issued and the fines paid after a series of mistakes and requested that the Citation be reversed or withdrawn.

On August 20, 2010, NADC's counsel wrote to the Commission. The letter stated that NADC had directed him to contact OSHA in an effort to "rectify an error that was caused by a clerical mistake and resulted in final entry of a Citation" against NADC. The letter further stated that he (counsel) was attempting to "have the final entry of the Citation set aside and the case re-opened to permit my client the opportunity to present its case and prove they are not guilty of any violation." The letter enclosed a copy of the July 30, 2010 letter. It also requested advice on the most expeditious means to employ to permit reconsideration of the case.

The Commission docketed this matter on August 27, 2010. The Secretary filed her motion to dismiss on November 24, 2010. NADC filed its response on December 14, 2010.

Discussion

The record plainly shows that NADC's NOC letter was not filed within the 15-day contest period set out in the Act. An otherwise untimely NOC may be accepted, however, 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 under Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"). See *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981). Rule 60(b) sets out six potential grounds

for relief from the entry of a final order: “(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence ... ; (3) fraud ... , misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied ... ; or (6) any other reason that justifies relief.” For relief under (1), (2) or (3), the employer must file its motion within one year of the final order date. There is no specific time frame for motions filed under (4), (5) and (6), but such motions must be filed “within a reasonable time.” *See* Rule 60(c)(1). The moving party has the burden of proving it is entitled to Rule 60(b) relief.

NADC claims that it qualifies for relief under subsection 60(b)(6), which provides relief for “any other reason that justifies relief.” The Secretary points out, however, that that subsection is a catch-all provision and is only appropriate when subsections (1) through (5) do not apply. *Claremont Flock Corp. v. Alm*, 281 F.3d 297, 298-99 (1st Cir. 2002) (“*Claremont*”). To justify relief under 60(b)(6), a party must show “‘extraordinary circumstances’ suggesting that the party is faultless in the delay.” *Pioneer Inv. Serv. v. Brunswick Assoc.*, 507 U.S. 380, 393 (1993) (“*Pioneer*”). “If a party is ‘partly to blame,’ Rule 60(b)(6) relief is not available to that party; instead, ‘relief must be sought within one year under subsection (1) and the party’s neglect must be excusable.’” *Claremont* at 299, quoting *Pioneer* at 393. The Secretary notes that NADC by its own admission was to blame for the delay. Specifically, NADC states in its July 30, 2010 letter that the Citation was received by a clerk in NADC’s office in Lapeer, Michigan on January 23, 2008. It also states that the Citation was then sent to the project site, where it was apparently “boxed up” without any notice to or action by management. NADC further states that the delinquency notice from OSHA was received in the Lapeer office on March 24, 2008, and was sent to an independent safety contractor on the project, who directed the penalties to be paid. NADC asserts that this action was also taken without any notice to its management and that the contractor mistakenly identified the penalties as having to do with “some earlier project site testing.” *See* NADC’s July 30, 2010 letter, p. 2. In view of NADC’s statements in its letter, it does not qualify for relief under subsection 60(b)(6).

As the Secretary notes, even if the request for relief was not time-barred by Rule 60(c)(1), NADC’s neglect was not “excusable.” The Commission evaluates claims of

“excusable neglect” under the test set out in *Pioneer, supra*, at 395. Pursuant to that test, the Commission takes into account all relevant circumstances, including (1) the danger of prejudice to the opposing party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1950 (No. 97-0851, 1999). 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).

The two and one-half year delay in filing the NOC in this case was clearly unreasonable. Such a delay would obviously prejudice the Secretary and have an impact on judicial proceedings in this matter. Such a delay also renders NADC’s good faith questionable at the very least. As to the reason for the delay, including whether it was within the reasonable control of the movant, NADC blames the late filing on mishandled documents and errors by its clerical personnel. However, the Commission expects employers to maintain orderly procedures for handling important documents. *NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999) (quoting *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989)). The Commission has thus not granted relief when the negligent handling of the citation occurred in the employer’s own office. *J.F. Shea Co.*, 15 BNA OSHC 1092, 1094 (No. 89-0976, 1991). The Commission, in fact, “has consistently denied relief to employers whose procedures for handling documents were to blame for late filings.” *E.K. Constr.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991). *See also Stroudsburg Dyeing & Finishing*, 13 BNA OSHC 2058 (No. 88-1830, 1989). In light of the foregoing, NADC is not entitled to relief on the basis of “excusable neglect.”

Finally, I agree with the Secretary that NADC does not have a meritorious defense to the Citation. NADC claims that Dykon had control of the site and was responsible for the cited conditions. In support of this claim, NADC has included with its response an affidavit of Mr. Goscenski, NADC’s superintendent at the job site. The statements in Mr. Goscenski’s affidavit are in many respects contrary to those in the

affidavit of the CO who inspected the site. I find the CO's statements to be more trustworthy. The CO's affidavit was made with personal knowledge of what he saw at the site two days after the incident and what Mr. Goscenski told him at that time. And, the CO's job was to inspect the site to determine if violations had occurred, based on his observations and his interviews with employees. Mr. Goscenski's affidavit statements, on the other hand, were more than likely made in an effort to assist his employer in this matter.

Based on the above, there is no justification for the granting of Rule 60(b) relief in this case. NADC's request for relief is DENIED, the Secretary's motion is GRANTED, and the Citation is AFFIRMED in all respects.

SO ORDERED.

/s/

Covette Rooney
Acting Chief Judge

Dated: February 28, 2011
Washington, D.C.