

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Dandelion Inn,

Respondent.

OSHRC Docket Nos.
10-2298 and 10-2647

Appearances:

Yasmin K. Yanthis-Bailey, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

Huascar Kim, *pro se*, Commerce, Georgia
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

These matters are 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”), to determine whether relief should be granted pursuant to Federal Rule of Civil Procedure 60(b) (“Rule 60(b)”) from the final orders in each case resulting from Respondent’s failure to contest the Citations and Notifications of Penalty within the prescribed time period.

For the reasons that follow, Respondent has not shown sufficient basis to warrant relief pursuant to Rule 60(b).

Background

Dandelion Inn (“Dandelion”) is a hotel establishment. On February 3, 2010, the Occupational Safety and Health Administration (“OSHA”) inspected Respondent’s work site located at 30747 Highway 441 in Commerce, Georgia. The inspection was conducted by Compliance Officer Matthew Munson. (Docket No. 10-2298; Tr. 17, 66, 70). As a result of the

inspection, on July 28, 2010, OSHA issued a Citation and Notification of Penalty (“Citation”) to Dandelion alleging five serious violations of the Occupational Safety and Health Act of 1970 and proposing penalties in the amount of \$4,000. OSHA mailed the citations to Dandelion at its business address at 30747 Highway 441 Commerce, Georgia. Dandelion received the Citation on July 30, 2010, and on August 10, 2010, requested an informal conference which was held on August 13, 2010. Dandelion however did not submit a written contest of the Citation until November 4, 2010. Based on having received the Citation on July 30, 2010, the last date to contest the citations was August 20, 2010. The Secretary of Labor filed a Complaint on November 12, 2010. Thereafter, on December 16, 2010, the Secretary filed a Motion to Dismiss Respondent’s Notice of contest alleging that relief is not warranted and that Respondent failed to seek Rule 60(b) relief within a reasonable time following the final order. Respondent filed a Response to the Secretary’s Motion to Dismiss asserting its delay in filing a timely notice of contest was due to excusable neglect, misrepresentation and or misconduct by the Secretary.

On March 25, 2010, OSHA again inspected Dandelion at its work site located at 30747 Highway 441 Commerce, Georgia. As a result of that inspection, on May 5, 2010, OSHA issued a Citation and Notification of Penalty to Dandelion alleging one serious violation of the Occupational Safety and Health Act of 1970 and proposing a \$450 penalty. OSHA mailed the Citation to Dandelion at its business address at 30747 Highway 441 Commerce, Georgia. The Citation was delivered and signed for on May 8, 2010. Based on this receipt date, the last date to contest the citations was May 28, 2010. (Docket No. 10-2647; Tr. 17; Exh. C-1). Dandelion did not request an informal conference and did not contest the Citation until November 4, 2010. (Docket No. 10-2647; Tr. 11-12, 17; Exh. C-2). Thereafter, on January 7, 2011, The Secretary of Labor filed a Motion to Dismiss Respondent’s Notice of contest alleging that relief is not warranted and that Respondent failed to seek Rule 60(b) relief within a reasonable time following the final order.

These matters are before the undersigned based on the November 4, 2010 purported contests filed by Respondent seeking relief from the final orders in each case. The undersigned held hearings in both cases on March 17, 2011, in Athens, Georgia.

Discussion

Pursuant to the requirements of the Act, an employer is required to notify the Secretary of its intent to contest (“notice of contest”) a citation within fifteen (15) working days of receipt. Failure to timely file a notice of contest results in the citation becoming a final order of the Commission by operation of law. The records in both cases reveal that Respondent did not file its notices of contest within the requisite fifteen-day period set out in the Act. A late notice of contest may be accepted, however, where it is established that the delay in filing was due to deception by the Secretary, or where the delay was caused by the Secretary’s failure to follow proper procedures. A late notice of contest also may be excused under 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)(citations omitted). The moving party has the burden of proving it is entitled to relief under Rule 60(b).

The determination of excusable neglect pursuant to Rule 60 (b)(1) is an equitable one, taking account of all relevant circumstances surrounding Respondent’s failure to file a timely notice of contest, including the danger of prejudice to the Secretary, the length of delay and its potential impact on the judicial proceedings, the reason for the delay and whether Respondent acted in good faith. *Pioneer Investment Servs. v. Brunswick Assoc.*, 507 U.S. 380, 395 (1993); *Secretary of Labor v. Craig Mechanical, Inc.*, 16 BNA OSHC 1763 (No. 92-0372) (1994); *Merritt Electric Company*, 9 BNA OSHC 2088 (No. 77-3772)(1981); *Henry C. Beck Co.*, 8 BNA OSHC 1395 (No. 11864)(1980). However, neither a lack of prejudice to the Secretary nor good faith on the part of Respondent in attempting to comply with the statutory filing requirement alone will excuse a late filing. *Fitchburg Foundry Inc.*, 7 BNA OSHC 1516 (Nos.77-520 & 76-1073)(1979). The Commission has held that whether the reason for the delay was within the control of the Respondent is a “key factor” in determining the presence of “excusable neglect.” *A. S. Ross, Inc.*, 19 BNA OSHC 1147 (No. 99-0945) (2000); *See also Calhar Constr., Inc.*, 18 BNA OSHC 2151 (No. 98-0367)(2000).

In the instant cases, the undersigned must first determine whether the November 4, 2010, letters sent to the OSHA Area Office were valid notices of contest. Then, the undersigned must determine whether Respondent should be granted relief from judgment for filing the notices

of contest several months beyond the final contest dates in each case. Respondent's November 4, 2010, letter for each case will be considered a request for Rule 60(b) relief.

OSHRC Docket No. 10-2298

The record here plainly shows that Dandelion did not contest the Citation within the requisite time period. Dandelion asserts that its late filing was due to confusion. Specifically, Dandelion asserts that it was confused because it did not understand the procedures for contesting; that it was confused because it believed that the written documentation of abatement it had provided to OSHA was sufficient to indicate its intention to contest; that it was confused because it had to deal with multiple OSHA Area Directors or Acting Area Directors could not get clear information on what was required; and that it was confused by the purpose of the Informal Conference.

Regarding Dandelion's assertion that it was confused regarding the procedures for contesting, the undersigned finds Respondent's argument to be disingenuous. The Citation issued to Respondent on July 28, 2010, included with it instructions in bold type, of the right to contest within 15 working days and that said contest must be in writing. (Docket No. 10-2298; Tr. 48). The Commission has held that the OSHA citation clearly states the requirement to file a notice of contest 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*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991).

Moreover, here, prior to issuance of the citations, during the closing conference on the day of the inspection, Compliance Officer Munson advised Dandelion that the notice of contest needed to be in writing, received by OSHA within 15 working days and that it could bring it to the informal conference. (Docket No. 10-2298; Tr. 68-69). In addition, Assistant Area Director Keith Hass testified that during the informal conference he advised Huascar Kim of Dandelion of the contest period and also discussed abatement. (Docket No. 10-2298; Tr. 15-16).

Significantly, Huascar Kim testified on cross examination he understood what "contest" means in that "it means to disagree with the inspection." (Docket No. 10-2298; Tr. 105-107). Further, Huascar Kim testified he read the Citation and understood that it needed to be responded to within 15 days. (Docket No. 10-2298; Tr. 114-115, 116). At the hearing, both Huascar Kim

and Reina Kim principals with Dandelion, appeared to be very intelligent individuals and there was no indication they would have had difficulty comprehending the requirement to contest the citation in writing within 15 working days. Accordingly, the undersigned finds Respondent's argument that it did not understand what was required to contest the violations to lack credibility. The Commission has 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).

Dandelion's contention that it was confused because it believed that the written documentation of abatement it had provided to OSHA was sufficient to indicate its intention to contest, also is not compelling. Respondent argues that the abatement certification it provided to OSHA on or about August 3, 2010, should have indicated to OSHA it was contesting the Citation. Assistant Area Director Hass testified that those documents did not state an intention to contest the citation. (Docket No. 10-2298; Tr. 43-44; Exh. R-2). A review of the abatement documentation provided to OSHA and admitted into evidence reflects corrective action, but fails to include any language which could reasonably be construed as indicating an intention to contest. (Docket No. 10-2298, Exh. R-2). Even Huascar Kim's testimony "if you are providing abatement information, you are essentially affirming or agreeing with what has been found," contradicts Respondent's assertion that the abatement documentation it provided to OSHA constituted a contest. (Docket No. 10-2298; Tr. 114-115, 116).

Although Huascar Kim testified that when Dandelion submitted the abatement documentation he believed that to be sufficient in terms of contesting the violations, the undersigned finds this not credible, as Huascar Kim testified that Dandelion's focus was not on contesting within the 15 days, but instead was on correcting the violations timely. (Docket No. 10-2298; Tr. 105). The Commission has held that a business must have orderly procedures in place for handling important documents and that if the lack of such procedures caused the late filing, Rule 60(b) relief will not be granted. *NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999); *E.K. Constr.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991); *Stroudsburg Dyeing & Finishing*, 13 BNA OSHC 2058 (No. 88-1830, 1989).

Respondent's contention that it was confused because it had to deal with multiple OSHA Area Directors or Acting Area Directors regarding the Citation and could not get clear information on what was required is understandable, however, the record does not show that OSHA engaged in any deception or failed to follow proper procedures. Although Huascar Kim asserts that he dealt with five people during an eight month period serving as Area Director or Acting Area Director he admitted that his efforts to contact the Area Director were not to contest the citation, but instead to get training and to get an understanding of what Dandelion needed to do. (Docket No. 10-2298; Tr. 100).

Respondent also asserts that OSHA's unresponsiveness to its telephone communications contributed to its failure to timely file. Huascar Kim contends he made 10 telephone calls to OSHA between July 30, 2010 and August 20, 2010. (Docket No. 10-2298; Tr. 28). However, Huascar Kim testified that the messages he left when he contacted OSHA were essentially to "please give us a call back regarding the OSHA violations." (Docket No. 10-2298; Tr. 100, 101). Assistant Area Director Hass testified that he never received any messages from Respondent. (Docket No. 10-2298; Tr. 25, 28). The evidence substantiates Respondent's assertion that it made several telephone calls to OSHA, however, there is no evidence that OSHA deceived Respondent or failed to follow proper procedures. Also, there is no evidence that the telephone calls to OSHA were in an effort to contest the citations.

Finally, Respondent asserts that it was confused by the Informal Conference process. On August 10, 2010, Dandelion requested an Informal Conference with OSHA. The Informal Conference was held on August 13, 2010, before the contest period expired. Huascar Kim, Michael Chang and Hasong Kim participated in the Informal Conference on behalf of Dandelion and Assistant Area Director Hass participated on behalf of OSHA. (Docket No. 10-2298; Tr. 14-15, 28). The evidence fails to substantiate Respondent's assertion that it was confused by the Informal Conference process. Assistant Area Director Hass testified that during the informal conference with Dandelion he advised its representatives that their questions could be answered, they would attempt to resolve any issues, would discuss the penalty and advised that they would need to come to an agreement during the conference. Hass testified the informal conference lasted approximately thirty minutes, however they were not able finish because it became clear that the necessary parties were not present, including Reina Kim, Chief Operating Officer for

Dandelion and Matt Munson, Compliance Officer. Therefore, Hass ended the informal conference and advised Dandelion to contact him to reschedule the Informal Conference prior to the final contest date when Reina Kim could be available. Dandelion did not object to rescheduling the Informal Conference. However, it did not contact OSHA to reschedule prior to the final contest date. (Docket No. 10-2298; Tr. 105-107).

The undersigned finds the November 4, 2010, contest filed by Respondent is not a valid contest, as it was not filed within the required time frame. Further, Respondent's request for Rule 60(b) relief was not filed in a reasonable time following entry of the final order. Respondent's explanations for its late filing fail to show deception or a failure to follow proper procedures on behalf of the Secretary and also fail to rise to the level of excusable neglect. Respondent was advised on several occasions of the contest procedure. Respondent waited approximately three months to contest the Citation and did not do so until after it received default letters from OSHA. (Docket No. 10-2298; Tr. 61; Exh. C-3). This suggests Respondent did not act in good faith. The undersigned finds this delay to be unreasonable and could likely prejudice the Secretary and adversely impact judicial proceedings. Based on the facts of this case and Commission precedent, the undersigned finds the delay in filing was within the reasonable control of Respondent and Respondent is not entitled to relief pursuant to Rule 60(b).

OSHRC Docket No. 10-2647

The record in this case clearly shows that Dandelion failed to timely contest the Citation issued to it on May 5, 2010. Assistant Area Director Hass testified, as evidenced by the OSHA Diary Sheets which reflect contacts between the employer and OSHA, Respondent made no contact with the Area Office regarding the citations issued on May 5, 2010, during the fifteen-day contest period. (Docket No. 10-2647; Tr. 13).

Respondent contends that its delay in filing a notice of contest was due to misrepresentation by the Secretary of Labor (Docket No. 10-2647; Tr. 9). Respondent also argues it was confused by OSHA's mailings and communications regarding the citations issued to it. (Docket No 10-2647; Tr. 27). In its post-hearing submission, Respondent asserts OSHA and its representatives acted in a manner that made due diligence very difficult due to OSHA's multiple instances of neglect regarding written and phone call inquiries in this matter, contrary to OSHA's mission statement. (Dandelion Brief, p. 1).

At the hearing, Dandelion did not elicit testimony from any witnesses. The only evidence Respondent put forward in support of its positions was the Motion to Dismiss filed by the Secretary, arguing that the motion erroneously provided that the contest period ended on July 30, 2010, rather than May 28, 2010. (Exh. R-1). During the hearing, the parties stipulated that the Secretary's Motion erroneously provided July 30, 2010, as the last date for contest and that the correct date should have been May 28, 2010. (Docket No. 10-2647; Tr. 22-23). The error in the Secretary's Motion to Dismiss fails to support Respondent's position since the Motion was filed and prepared by the Solicitor's Office not OSHA well after the contest period had ended.

The undersigned finds the November 4, 2010, contest filed by Respondent is not a valid contest, as it was not filed within the required time frame. Further, Respondent's request for Rule 60(b) relief was not filed in a reasonable time following entry of the final order. Respondent's reasons for the late filing cannot be construed as excusable neglect. Indeed, the delay was within the reasonable control of Respondent. Dandelion did not file a contest in this case until five months after the final contest date. This delay is substantial and is likely to have prejudiced the Secretary and is likely to have adversely affected the judicial proceedings. Respondent also did not contest until it received a demand letter from OSHA, thereby suggesting a lack of good faith. The undersigned finds, contrary to Respondent's assertion, that OSHA did not engage in deception or other misconduct resulting in the delayed filing of the notice of contest by Respondent. Rule 60 (b) does not provide a basis for granting the relief sought by Respondent. Respondent had the ability and knowledge necessary to file a timely notice of contest.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is HEREBY ORDERED that Respondent's requests for relief are DENIED. It is further ORDERED that

1. The notice of contest filed in OSHRC Docket No. 10-2298 is DISMISSED and the Citation and Notification of Penalty is affirmed in all respects; and

2. The notice of contest filed in OSHRC Docket No. 10-2647 is DISMISSED and the Citation and Notification of Penalty is affirmed in all respects.

SO ORDERED.

/s/
SHARON D. CALHOUN
Judge

Date: May 17, 2011
Atlanta, Georgia