

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.
Garabar, Inc.,
Respondent.

OSHRC Docket No. 11-3105

Appearances: Melanie L. Paul, Esq., U. S. Department of Labor, Office of the Solicitor
Atlanta, Georgia
For the Complainant

John Pickerill, General Manager, Garabar
Lake Worth, Florida
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (Act), to determine whether relief should be granted pursuant to Federal Rule of Civil Procedure 60(b) (Rule 60(b)) from the final order in this case resulting from Garabar, Incorporated's (Garabar) failure to contest the Citation and Notification of Penalty within the prescribed time period.

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

Background

Garabar is a roofing and general contractor. On October 5, 2011, the Occupational Safety and Health Administration (OSHA) inspected Garabar's work site located at 501 North Ocean Boulevard, Boca Raton, Florida. The inspection was conducted by Compliance Officer Luis San Miguel (Tr. 17). As a result of the inspection, on November 10, 2011, OSHA issued a Citation and Notification of Penalty (Citation) to Garabar alleging two serious violations of the

Act and proposing penalties in the amount of \$5,400.00. OSHA mailed the Citation to Garabar at its business address located at 425 Industrial Street, Suite 2, Lake Worth, Florida. Garabar received the Citation on November 16, 2011, by certified mail (Tr. 98).¹ Garabar, however, did not submit anything in writing regarding the Citation until December 22, 2011, when it filed a letter with the Executive Secretary of the Commission requesting an extension to participate in an informal conference (Tr. 105; Dec. 22, 2011 Letter). Based on having received the Citation on November 16, 2011, the last date to contest the citation was December 8, 2011 (Tr. 37).

Thereafter, on February 13, 2012, the Secretary filed a Motion to Dismiss Respondent's Letter/Untimely Notice of Contest alleging that relief is not warranted and that Garabar's December 22, 2011, letter is not a contest letter (Secretary's Motion, pp. 4-10). Garabar did not file a response to the Secretary's motion. This matter is before the undersigned based on the December 22, 2011, purported contest filed by Garabar seeking relief from the final order. The undersigned held a hearing in this case on April 25, 2012, in Delray Beach, Florida.

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 15 working days of receipt of the citation. Failure to timely file a notice of contest results in the citation becoming a final order of the Commission by operation of law. The record in this case reveals Garabar did not file a notice of contest within the requisite 15-working 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, 1981) (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

¹ General Manager John Pickering testified that the Citation also had been received by Garabar by fax on November 14, 2011 (Tr. 98). For purposes of the final contest date, the November 16, 2011, date reflecting service by certified mail will be used.

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).

That Garabar did not contest the Citation within the requisite time period is not disputed. John Pickering, General Manager for Garabar, testified “[i]t was never our intention to actually contest the citation in the first place. We were strictly looking for a conference to work with OSHA and to explain what we considered to be significant efforts that we had put in place as far as safety was concerned” (Tr. 100). Pickering further testified:

Basically, what we want the Court to know is that we did indicate that every step of the way with communications from the time of the inspection up until the time of the December 21st or 28th letter² that we were interested in an informal conference. That’s what we were interested in, and we were not actually asking for a notice of contest. We didn’t understand the differences and the implications between the two.

(Tr. 101-102). Accordingly, the undersigned finds the December 22, 2011, letter to the Executive Secretary of the Commission is not a notice of contest. Since the December 22, 2011, letter to the Executive Secretary of the Commission, by Pickering’s own testimony, was not intended to be a contest, it is not necessary for the undersigned to determine whether its filing after the 15-working day contest period should be excused. The undersigned will address excusable neglect nonetheless in considering Garabar’s arguments regarding its late filing. Both in Garabar’s December 22, 2011, letter and at the hearing, Garabar argues that its late filing was due to confusion. Garabar asserts it was confused because it did not understand the procedures for contesting; because it believed the written documentation it had provided to OSHA was

² The undersigned understands from the context of the testimony, these dates refer to the December 22, 2011, letter sent to the Executive Secretary of the Commission.

sufficient to indicate its intention to contest; and it was confused by the difference between an informal conference and a notice of contest.

The undersigned understands Garabar might have been confused initially as to whether it had to do more than call OSHA to contest the citation because the compliance officer told Ricky Del Valle, supervisor with Garabar, during the closing conference “they have the right for an informal conference or to contest the citations and that they would have 15 working days from the date they received the citation to call to the office” (Tr. 20, 24). This statement understandably could lead one to believe that all they had to do to contest was call OSHA within 15 working days. However, once the Citation was received, the action required of Garabar was clarified, as the Citation contained specific instructions on the time period for contesting and requiring the contest to be in writing (Exh. C-1). The Citation issued to Garabar on November 10, 2011, included with it instructions in bold underlined type, of the right to contest within 15 working days and that said contest be in writing (Tr. 36; Exh. C-1). 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). The undersigned finds that Garabar’s assertion that it was confused after having received the Citation is disingenuous. Garabar took no action in writing, phone call or otherwise, during the 15-working day period to contest the citation.³

Garabar’s contention that it was confused because it believed the written documentation it had provided to OSHA was sufficient to indicate its intention to contest also is not compelling, and is directly contradictory to Pickering’s testimony. The information consisting of the company’s safety and health program and training records was provided on October 14, 2011, well before the citations were issued. Compliance officer San Miguel testified that on October 14th, he received a fax of 41 pages consisting of a summary of Garabar’s safety and health program, safety and training records, company safety policy, fall protection training and heat safety training (Tr. 25, 103). Since the Citation was issued a month later, Garabar’s assertion the documentation was submitted with intent to contest is not credible. Even Pickering testified that

³ Jaime Lopez, OSHA Assistant Area Director testified that Ari Garibian, President of Garabar, contacted him on December 21st to schedule an informal conference. During that phone call Lopez advised him that the time to contest had ended and the Citation had become a final order on December 8, 2011 (Tr. 38-42).

Garabar's focus was not on contesting, but instead was on demonstrating its safety posture (Tr. 100).

Finally, Garabar asserts it was confused by the differences between the informal conference and a notice of contest. The undersigned is not persuaded by this argument. The record evidence shows that Garabar previously, on March 18, 2010, was cited by OSHA (Tr. 62; Exh. C-4). Although the March 18, 2010, citation was resolved by an informal settlement agreement, the testimony reveals that the same language was provided regarding contest and informal conference procedures (Tr. 62-63, 71-72). This recent prior experience with OSHA citations suggests that Garabar had some familiarity with the contest procedure. Nonetheless, 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).

The undersigned finds the December 22, 2011, letter filed by Garabar was not intended by Garabar to be a notice of contest, nor was it filed within the required 15 working day time frame. Even if the December 22, 2011, letter were a notice of contest, Garabar'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. The undersigned accords no weight to Garabar's assertions it did not understand what was required to contest the violations.

Based on the facts of this case and Commission precedent, the undersigned finds Garabar is not entitled to relief pursuant to Rule 60(b).

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

The purported notice of contest filed in this case is DISMISSED and the Citation and Notification of Penalty is affirmed in all respects.

SO ORDERED.

_____/s/ Sharon D. Calhoun

SHARON D. CALHOUN

Judge

Date: May 30, 2012
Atlanta, Georgia