



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant
v.
Lucky Plastering Corporation,
Respondent.

OSHRC Docket No. **12-0995**

Appearances:

Brooke Werner McEckron, Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia
For Complainant

Carlos Riera, *pro se*, Lucky Plastering Corporation, Miami, Florida
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

On February 8, 2012, the Secretary cited Lucky Plastering Corporation (Lucky) for violations of four subsections of OSHA's scaffolding standard, found at 29 C.F.R. § 1926.451. The citation resulted from an inspection conducted by Angel Diaz, a compliance safety and health officer (CSHO) for the Occupational Safety and Health Administration (OSHA), on January 19, 2012, at a construction site in Hallandale, Florida. The Secretary proposed penalties in the total amount of \$12,000.00 for the alleged violations. On April 19, 2012, more than seven weeks past the expiration of the 15-working days contest period (February 28, 2012), Lucky filed its notice of contest to the citation.

The Secretary moves to dismiss as untimely Lucky's late notice of contest, under § 10(a) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. § 659(a). Lucky opposes the motion and seeks relief under Fed. R. Civ. P. 60(b). Lucky argues its late notice of contest should be excused because president Carlos Riera, who represented the company *pro se* at the hearing, had a family emergency that required him to travel out-of-state during the 15-day contest period. Lucky also contends Mr. Riera had difficulty understanding English, which is his second

language.

The undersigned held a hearing in this matter on September 13, 2012, in Miami, Florida. Lucky does not dispute that it is a covered business under the Act and that the Commission has jurisdiction over these proceedings. The parties have filed post-hearing briefs.

For the reasons discussed below, the undersigned determines Lucky is not entitled to Rule 60(b) relief and grants the Secretary's motion to dismiss Lucky's late notice of contest. Items 1 through 4 of the Citation are affirmed, and a total penalty of \$12,000.00 is assessed.

Background

On January 19, 2012, CSHO Angel Diaz was passing a construction site on West Hallandale Beach Boulevard in Hallandale, Florida, when he observed employees working on what he believed to be an unsafe scaffold. Diaz stopped and conducted an inspection of the worksite. The employees he observed worked for Lucky. Carlos Riera, president of Lucky, was not present at the site, but CSHO Diaz spoke with him by phone and held an opening and closing conference with him. Diaz spoke with Mr. Riera in Spanish. He informed Mr. Riera that the company would be receiving a citation from OSHA and that Lucky would have 15 working days to contest the citation (Tr. 28-38).

OSHA program assistant Judith Morales testified she issued a citation to Lucky on February 8, 2012, and mailed the citation on February 9, 2012, return receipt requested (Tr. 62). Mr. Riera received the citation and signed the receipt on February 13, 2012 (Exh. C-3). Reginald Benson, who was OSHA's acting assistant area director for its Miami office from November 2011 to March 2012, testified that OSHA calculates the 15-working-day contest period from the date a company representative signs the receipt (Tr. 19-20).¹ Mr. Riera did not file a notice of contest on behalf of Lucky until April 19, 2012.

On July 10, 2012, the Secretary filed a motion to dismiss this case and affirm the citation as a final order. The undersigned held the instant hearing on September 13, 2012. Mr. Riera represented Lucky *pro se*.

¹ At the hearing, the Secretary's counsel in her opening argument stated, "And the last day, therefore, for Mr. Riera to have filed his notice of contest was February 28, 2012" (Tr. 8). By the court's calculation, the last day for Lucky to file its notice of contest in a timely manner was March 6, 2012 (the 15-working day period begins the day after the employer receives the citation (February 14) and includes the 15th day from that date, excluding weekends and federal holidays. Presidents' Day was on February 20 in 2012, and so is not included in the count). Regardless, it is undisputed that Lucky filed its notice of contest on April 19, 2012, past the contest period.

Discussion

Section 10(a) of the Act provides that if an employer fails to file a notice of contest within 15 working days of receipt of the citation and assessment of penalty, “the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.” 29 C.F.R. § 659(a). Mr. Riera does not dispute that he received the citation on February 13, 2012, and that he was late filing his notice of contest.

Under Fed. R. Civ. P. 60(b)(1), the Commission may accept an otherwise untimely notice of contest if the employer can establish “mistake, inadvertence, surprise, or excusable neglect.” Mr. Riera testified CSHO Diaz did not tell him during their phone conversation that he had 15 days to contest the citation (Tr. 84). Mr. Riera stated he had trouble reading English, but that his daughter and grandchildren helped him when he needed to read a document. He stated one of his grandchildren helped him read the citation “[a] few days after having received it” (Tr. 85). The citation Mr. Riera concedes his grandchild read to him states:

Unless you inform the Area Director in writing that you intend to contest the citation(s) and/or proposed penalty(ies) within 15 working days after receipt, the citation(s) and the proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.

(Exh. C-2; emphasis in original).

Mr. Riera stated that Lucky had received a previous citation from OSHA (which he did not contest), so he was familiar with OSHA’s citation process (Tr. 86). Mr. Riera testified that during the 15-working-day period regarding the instant citation, he traveled to California for a family emergency. He did not call OSHA or write a letter to OSHA explaining his circumstances (Tr. 87-88). When he got back, he called CSHO Diaz, who informed him the contest period had elapsed and advised him to hire an attorney (Tr. 87). Mr. Riera admitted he had made a mistake in not contesting the citation within the specified period but that he did not have a justification for it (Tr. 89).

A key factor in determining whether a late filing was due to excusable neglect is the reason for the delay. The Commission has held that inexperience with OSHA and difficulties understanding written English do not constitute excusable neglect. *Mohegan Glass & Window Co.*, 18 BNA OSHC 2045 (No. 99-0483, 1999).

In his post-hearing brief, Mr. Riera takes responsibility for his failure to timely file the notice of contest. He writes:

I Carlos Riera accept and confirm that I failed to respond to my first citation within the necessary fifteen day period due to several factors. Those factors being the following, first and foremost due to a dramatic financial decrease I was required to reduce the amount of employees in my office down to one, that one person being me. The reason I am mentioning this is that time seems to have lost all track and blurred into one continuous stream due to I holding all accountability, management, supervision & labor required from the corporation. Within all of my new found and unexpected duties I lost track of time and committed a mistake which I know that should have not been committed but unfortunately it did.

(Lucky's brief, p.1).

The undersigned has great sympathy for Mr. Riera and great respect for his truthfulness and the manner in which he conducted himself at the hearing. I am, however, required to follow the rules and precedent of the Commission. Unfortunately, losing track of time is not recognized as the basis of excusable neglect under Rule 60(b). Lucky has not established that it is entitled to relief under Rule 60(b).

Accordingly, the Secretary's motion to dismiss Lucky's notice of contest as untimely is **GRANTED**. Items 1 through 4 of the Citation issued to Lucky on February 8, 2012, are affirmed and the total proposed penalties of \$12,000.00 are assessed.

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 Lucky's request for relief is **DENIED**. It is further **ORDERED** that

1. The notice of contest filed in OSHRC Docket No. 12-0995 is **DISMISSED**, and the Citation and Notification of Penalty is affirmed in all respects.

SO ORDERED.

/s/

Sharon D. Calhoun
Administrative Law Judge

Date: November 5, 2012