

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.

Alcides Avelar,
Respondent.

OSHRC Docket No. **13-1757**

Appearances:

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

Alcides Avelar, *pro se*, Norcross, Georgia
For the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission on the Secretary's Motion to Dismiss pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act) and pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (Rule 60(b)). Alcides Avelar (Avelar) seeks relief under Rule 60(b). A hearing in this matter was held on April 10, 2014, in Atlanta, Georgia.

For the reasons that follow, the undersigned finds Avelar is not entitled to relief pursuant to Rule 60(b), and the Secretary's Motion to Dismiss Avelar's Late Notice of Contest is GRANTED.

Background

This matter arises out of an inspection of a construction worksite located at 600 Concord Lake Lane, Smyrna, Georgia by Occupational Safety and Health Administration (OSHA) Safety and Health Compliance Officer (CSHO) Frank Silva on August 2, 2013. As a result of that inspection, on September 4, 2013, OSHA issued a two item Citation for alleged safety violations

at the worksite. The Citation was received by Avelar on September 7, 2013. Accordingly, the last date to contest the Citation was September 27, 2013. By letter dated October 30, 2013, Avelar contested the Citation.¹

Avelar is a small company, named after its owner who represented the company *pro se* at the hearing. Mr. Avelar has some limited English skills, but speaks Spanish as his first language (Tr. 27). He testified at the hearing through an interpreter.

Avelar was engaged in new residential construction at a worksite located at 600 Concord Lake Lane, Smyrna, Georgia on August 2, 2013. CSHO Silva conducted an inspection of the worksite. When Silva arrived at the worksite, he introduced himself and presented his business card to Mr. Avelar and then began the opening conference (Tr. 15). Silva spoke to Mr. Avelar in English and testified Mr. Avelar did not ask for an interpreter (Tr. 16). Silva conducted a walk around inspection of the worksite with Mr. Avelar. During the walk around, Silva explained in English the violative conditions he observed and Mr. Avelar responded to him in English (Tr. 16-17). According to Silva, Mr. Avelar appeared to understand the words being spoken to him in English because he pointed to the areas in violation and stated that he was going to remove the scaffold and work from a ladder (Tr. 22; Exh. C-1). Mr. Avelar testified he understood the questions asked of him by Silva in English during the inspection, but Silva did not tell him he had 15 days to respond to the documents he received (Tr. 94).

Silva did not discuss the contest deadline with Mr. Avelar during the walk around (Tr. 17). However, after the walk around, Silva discussed the violations with Mr. Avelar and explained the process to be followed when he received the citations (Tr. 18). Silva testified he told Mr. Avelar the same thing he tells contractors at every inspection:

that they have 15 days to contest. They can go for an informal conference, and they can also pay the violations in full, which I don't recommend. I recommend that they do the informal conference, and if they can't come to an agreement, then [they] can contest it. But once they receive the citations in the mail, they have 15 days to contact our office, or we can't do anything with those.

¹ On October 23, 2013, Avelar also sent a letter dated October 22, 2013, to OSHA by facsimile which requested an informal conference. The October 22, 2013, letter did not state that Avelar contested the Citation (Exhs. C-3; C-6). Avelar was advised to file a notice of contest, which was done by letter dated October 30, 2013, and faxed to OSHA on October 31, 2013 (Tr. 43-44; Exh. C-7).

(Tr.18). Silva provided Mr. Avelar with a business card belonging to OSHA colleague Julian Camacho and informed Mr. Avelar that if he needed more assistance, there was someone in the office who spoke Spanish, since that was his first language (Tr. 22-23).

According to OSHA Safety and Health Clerk, Carla Smith, the Citation was issued to Avelar on September 4, 2013, and she mailed it on September 6, 2013 (Tr. 35). When she mailed the Citation, she included a Spanish copy of OSHA's pamphlet, *Employer Rights and Responsibilities Following a Federal OSHA Inspection*, which informs employers they have 15 working days to contest a citation once they receive it (Tr. 35; Exh. C-4). This Citation packet was received by Avelar on September 7, 2013 (Tr. 39; Exhs. C-3 and C-5).

The Citation alleged two serious violations of the Act relating to use of an alleged improper scaffold, and proposed \$5,900.00 in penalties. OSHA mailed the Citation to the address provided by Mr. Avelar, which was his home address (Tr. 100; Exh. C-1). The certified return receipt shows the Citation was signed for by Mr. Avelar's wife as being received on September 7, 2013 (Exh. C-5; Tr. 39, 74, 101). The Citation informed Avelar it had 15 working days from the date of receipt to contest the citations therein (Exh. C-1). Excluding weekends and Federal holidays, the 15-day period expired on September 27, 2013. Avelar did not file a notice of contest by the September 27, 2013, deadline. Accordingly, the Citation became a Final Order of the Commission under § 10(a) of the Act.

On October, 22, 2013, Smith received a telephone call from Melissa Carbajal regarding the Citation issued to Avelar (Tr. 41). Carbajal speaks Spanish as well as English and provides secretarial services to contractors including Avelar (Tr. 74, 78). According to Carbajal, Mr. Avelar had come to her office for assistance with the Citation, which he received from OSHA while he was out of town (Tr. 73). Smith advised Carbajal the final contest date had passed and the final contest date was September 27, and Avelar's only option was to file a late notice of contest (Tr. 41).

Carbajal testified that when she called on Avelar's behalf, she advised OSHA that during the Federal government shutdown,² Mr. Avelar called OSHA requesting someone who spoke Spanish, but he never received a return call from OSHA (Tr. 41, 96-97). Carbajal testified Mr.

² The undersigned takes judicial notice that the 2013 Federal government-wide shut down was from October 1, 2013, through October 16, 2013, and that the Federal government resumed normal operations on October 17, 2013.

Avelar initially called her while he was in Alabama, requesting her assistance regarding the letter he received from OSHA. She believed this telephone call was made before the Federal government shutdown. He came to her office a few days after the telephone call to her (Tr. 81-84). During her meeting with Mr. Avelar, Carbajal asserted she called OSHA. She testified this was during the Federal government shutdown, on October 3, 2013. According to Carbajal, she was told during the telephone call OSHA was not conducting any formal business, to leave a message and they would have to call Avelar back after the government was running again (Tr. 75, 88). Specifically Carbajal testified:

They said that we would have to leave a message for the person that was handling the case, that it was past the date of contest and that they couldn't do anything with it at that time. I would have to leave a message and when the government was up and running again, then they would call me back to tell me what it was that we could do from there.

In a few weeks, I did receive a phone call on my cell phone, me personally, and they told me that it was past the time of contest . . . She gave me the address. She told me what to write in the letter, where to send it, and that we would have to contest the late answer to the original citation.

(Tr. 75-77).

Smith testified that her notes indicated Carbajal said Mr. Avelar called OSHA before the government shutdown, but that no one had returned his call (Tr. 53-54). According to Smith, procedures were in place to handle telephone calls received during the government shutdown (Tr. 54). Assistant Area Director Therese Coleman confirmed procedures were in place and testified she worked during the government shutdown, but did not receive any phone calls from Avelar during that time period (Tr. 61).

Smith testified that on October 23, 2013, the day after she spoke with Carbajal, OSHA received a letter from Avelar, but that letter did not state Avelar wanted to file a late notice of contest. Instead, it stated Avelar wanted an informal conference (Tr. 42; Exh. C-6). After conferring with the Area Director about the letter, Smith, on October 24, 2013, called Carbajal and "left a voicemail that the letter must say that they are contesting the violations and penalties" (Tr. 46).

Assistant Area Director Coleman spoke by telephone with Carbajal on October 30, 2013, regarding the letter dated October 22, 2013, received from Avelar (Tr. 59). Coleman testified

she explained to Carbajal an informal conference was not possible and the time for filing a contest had passed and Avelar needed to send in a new letter requesting a late notice of contest (Tr. 59). On October 31, 2013, OSHA received a letter by facsimile dated October 30, 2013, from Avelar contesting the Citation (Tr. 47; Exhs. C-3, C-7).

Mr. Avelar testified he was out of town when the Citation was received (Tr. 94-95). He did not see the Citation until he returned home. When he went to see Carbajal about the documents, it was past the due date and Carbajal helped him write a letter and she told him to wait for an answer from OSHA (Tr. 95). Although he was not certain, Mr. Avelar testified he went to Carbajal's office on October 22, 2013, for the first time (Tr. 96). Prior to that, Mr. Avelar called the number on the business card provided by Silva and was told the person he needed to speak to was busy and in a meeting (Tr. 96). According to Mr. Avelar he made this telephone call around the end of September (Tr. 97-98). Mr. Avelar testified the reason he was late in contesting the Citation was because he was out of town and everything had become late. He was not able to take care of it in due time (Tr. 98-99). He had no procedure in place for handling the mail when he was out of town (Tr. 103).

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. 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 reveals that Avelar did not file its notice of contest within the requisite 15-day period set out in the Act. A late notice of contest may be accepted, however, where it is established 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 into account 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. W. Ross, Inc.*, 19 BNA OSHC 1147 (No. 99-0945, 2000).

That Avelar did not contest the Citation within the requisite time period is not disputed. The record reveals Avelar sent a letter to OSHA dated October 30, 2013, which was received by OSHA on October 31, 2013, approximately four weeks after the final contest due date. Even assuming the previous letter dated October 22, 2013, qualifies as a notice of contest, that letter also is late, having been sent approximately three weeks after the final contest date. Therefore, by operation of law, the Citation and proposed penalty must be deemed a final order of the Commission, unless Avelar can demonstrate that it is entitled to relief. The undersigned finds that it cannot.

In both letters, Mr. Avelar states he is requesting relief because “I did call before the government shutdown in September before my contest date and requested a phone call with an interpreter as I do not speak English but never got a return phone call” (Exhs. C-6, C-7). At the hearing, Mr. Avelar testified that the reason he was late in contesting the Citation was because he was out of town and everything became late and he was not able to take care of it in due time (Tr. 98-99). Neither the record evidence nor Avelar’s explanations for its late filing show deception or a failure to follow proper procedures on behalf of the Secretary. It is undisputed Avelar received the Citation. Both the Citation and the pamphlet provided to Avelar explain in several locations the time limit for filing a notice of contest. The Citation unambiguously stated in conspicuous typeface that Avelar had 15 working days after receipt within which to file a notice of contest. Although most of the oral communication between OSHA and Avelar was done in English, Mr. Avelar testified that he understood what Silva said to him in English.

Further, Silva provided a business card to Mr. Avelar of someone he could communicate with in Spanish at OSHA if he needed to. When Mr. Avelar was unsuccessful in contacting the Spanish speaking person at OSHA because that person was in a meeting, he sought the assistance of Carbajal who communicated with OSHA in English on his behalf and translated for him. Therefore, the undersigned finds the Secretary did not engage in deception and followed proper procedures in this matter.

Although the issue of the Federal government-wide shutdown was raised in this matter, the undersigned finds that it is not determinative because the final contest date in this matter was September 27, 2013, four days before the shutdown, and Avelar had not filed its contest by that deadline.³

Where a party is partly to blame for the delayed filing, relief from the final order must be sought under Rule 60(b)(1) and the party's neglect must be excusable. *See Pioneer Investment Serv.*, 507 U.S. at 393. Here, Avelar was totally to blame for the delayed filing. The Commission requires an employer to exercise due diligence before it will find excusable neglect. *Keefe Earth Boring Company, Inc.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991); *Craig Mechanical*, 16 BNA OSHC at 1763. Based upon the record in this matter, the undersigned finds the delayed filing was within the control of Avelar and could have been avoided if Avelar had exercised reasonable diligence. Mr. Avelar's failure to have procedures in place to handle mail when he was out of town, knowing that he was expecting a Citation from OSHA, was mere negligence on his part, not warranting relief under Rule 60(b).

In making this finding, the undersigned has considered that Mr. Avelar has limited English language skills. Nevertheless, the record is insufficient to establish Mr. Avelar exercised the necessary due diligence. Even finding it credible that Mr. Avelar called OSHA before the end of the contest period, the Act requires that the notice of contest be in writing. Avelar put nothing in writing until three to four weeks after the final contest date. He did not seek assistance in Spanish with putting something in writing until this same time period. Even where

³ Had the contest period expired during the Federal government shutdown, the record does not establish the existence of any standard procedures for extending notice of contest deadlines or any other change in a cited employer's obligations in the event of a shutdown. Indeed, the 15-day filing period is imposed by statute and the Act does not provide for extensions under any circumstances.

the employer's principal has limited English proficiency, the Commission has found that failure to take the necessary actions to fully understand the contents of the citation shows a lack of due diligence. *Mohegan Glass & Window Co.*, 18 BNA OSHC 2045 (No. 99-0483, 1999). Although the Citation was received and signed for at his address of record on September 7, 2013, the record reveals Mr. Avelar did not see the Citation until he returned from Alabama, which was after the contest date, and he had no procedures in place for handling mail when he was out of town. Therefore, the undersigned finds that Avelar failed to exercise due diligence, and was simply negligent in failing to file a notice of contest before the expiration of the contest period. The Commission has long held an employer's mere carelessness or negligence, even by a layperson, in failing to timely file a notice of contest does not amount to "excusable neglect" that would justify relief under Rule 60(b). *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). Avelar has not established entitlement to relief under Rule 60(b).

Finally, the undersigned has considered the lack of evidence of prejudice to the Secretary. The Secretary presented no evidence that the delay in filing imposed an impediment to litigation of the merits of the Citation. Such a lack of prejudice is insufficient to meet Avelar's burden when, as here, it failed to show more than simple negligence or good faith.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusion 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 the Secretary's Motion to Dismiss is **GRANTED**.

It is further ORDERED that the notice of contest filed in this case is **DISMISSED** and the Citation and Notification of Penalty is **AFFIRMED** in all respects.

/s/ _____

SHARON D. CALHOUN
Judge

Date: May 20, 2014
Atlanta, Georgia