

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.

G. Santos Masonry, Inc. d/b/a Roberto Santos,

Respondent.

OSHRC Docket No. **13-1886**

Appearances:

Charna C. Hollingsworth-Malone, Esquire,
U.S. Department of Labor, Office of the Solicitor,
Atlanta, Georgia
For the Secretary

Roberto Santos, *pro se*,
G. Santos Masonry, Inc.
Griffin, Georgia
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission on the Secretary's Motion to Dismiss Respondent's Late Notice of Contest pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act). Respondent opposes the motion and is seeking relief under Federal Rule of Civil Procedure 60(b) (Rule 60(b)).

For the reasons that follow, I find Respondent is not entitled to relief pursuant to Rule 60(b), and GRANT the Secretary's Motion to Dismiss Respondent's Late Notice of Contest.

Background

This matter arises out of an inspection of a construction worksite by the Atlanta West Area Office of the Occupational Safety and Health Administration (OSHA) in June of 2013. As a result of that inspection, OSHA issued citations for safety violations in September of 2013.

Respondent subsequently attempted to contest those citations, but failed to do so in the required timeframe.

Respondent is a small masonry contractor, with four to seven employees at any given time (Tr. 34). Roberto Santos is the owner of the company. Santos, who represented the company *pro se*, speaks Spanish as a first language, but has some limited English speaking skills. He testified he does not read or write English (Tr. 39).

In June of 2013, Respondent had employees performing work at 1203 Blairwood Court in Atlanta, Georgia. Hector Julian Camacho, a compliance safety and health specialists with the Atlanta West Area Office of OSHA, conducted an inspection of that worksite. Camacho testified he initiated the inspection after driving past the worksite and observing masonry workers climbing a scaffold (Tr. 12). These workers were later identified to Camacho as employees of Respondent (Tr. 13).

Camacho began the inspection by holding an opening conference with various individuals onsite, including Santos (Tr. 12). Camacho is fluent in English, Spanish, and Portuguese, and frequently uses Spanish in his work as an inspector when speaking with Spanish speaking workers (Tr. 11). He testified that, in this instance, he held the opening conference in both English and Spanish (Tr. 13). After completing his inspection, Camacho conducted a closing conference onsite with Santos (Tr. 16). He testified he informed Santos about the violations he had observed and provided Santos a 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 (Exh. C-1; Tr. 16). Although Camacho testified this document is available in Spanish, he did not recall whether he had a Spanish version with him and did not provide a Spanish version to Santos (Tr. 19). He testified that he did explain to Santos his right to contest the citations, as well as the procedures and time limits for doing so in Spanish (Tr. 16).

On September 16, 2013, the Secretary issued Respondent a Citation for alleged violations of the Act that Camacho had observed during his June inspection (Exh. C-2). The Citation alleged ten serious violations of the Act and proposed \$13,600 in penalties. OSHA mailed the Citation to the address provided by Santos. On September 20, 2013, Santos's wife signed for the Citation (Exh. C-3; Tr. 35). The Citation informed Respondent it had 15 working days from the

date of receipt to contest the citations therein (Exh. C-2). Excluding weekends and Federal holidays, the 15-day period expired on October 11, 2013. Respondent did not file a notice of contest by the October 11 deadline. Accordingly, the Citation became a Final Order of the Commission under § 10(a) of the Act.

Santos testified that upon receiving the Citation, he reviewed the alleged violations and took action to abate them, including removing equipment and providing training to his employees (Tr. 35). He further testified he did not read the remainder of the document because he does not read and write English well (Tr. 39). He testified he initiated no further contact with OSHA regarding the Citation because he turned his attention to operating his business (Tr. 40).

Although Santos testified he had no recollection of scheduling an informal conference, OSHA records indicated an informal conference between the OSHA Area Office and Respondent had been scheduled for October 8, 2013 (Tr. 30). On October 1, 2013, however, the Federal Government shut down due to a lack of funding and OSHA was required to cease normal business operations. Accordingly, the Atlanta West Assistant Area Director Teresa Coleman called Respondent to cancel the informal conference. Coleman testified she could not recall whether she spoke with Santos or simply left a message, but did recall conveying the information that the informal conference was cancelled (Tr. 31). She also advised him he would have additional time in which to contest the Citation and to watch the news to find out when the OSHA office would reopen (Tr. 31). At that time, Coleman did not provide a new contest deadline because she did not know when the Government-wide shutdown would end. On October 17, 2013, the Federal Government reopened, and OSHA resumed its normal operations.¹ As a result of the shutdown, OSHA extended Respondent's time to file its notice of contest to November 4, 2013 (Tr. 31). OSHA did not notify Respondent of this extension.

Santos could not recall with certainty the date of his next contact with OSHA. Camacho testified he called Santos on November 5, 2013 (Tr. 19). During this conversation, Camacho testified, he explained to Santos his notice of contest was late and how to file a late notice of contest (Tr. 20). Santos had only a vague recollection of this conversation.²

¹ I take judicial notice that the 2013 government-wide shut down ended on October 17, 2013.

² Santos's testimony regarding his contact with OSHA was vague and inconsistent. He initially testified he did not contact OSHA until November 14, but later conceded that he may have had earlier contact. He denied any memory

On November 14, 2013, Camacho again contacted Santos (Tr. 21). Prior to that, Respondent had not had any contact with OSHA since November 5. On November 14, 2013, Santos went to the OSHA Atlanta West Area Office and met with Camacho, who assisted him in writing and submitting his Late Notice of Contest (Tr. 21, 35).

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 Respondent 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 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-s, 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

of having scheduled an informal conference in October. On this I credit the testimony of Coleman that an informal conference was scheduled and cancelled. Coleman's testimony was straightforward and consistent. Moreover, whether or not Respondent had an informal conference scheduled is not dispositive of the issues in this matter such that Coleman would have an incentive to provide false information. Similarly, I credit the testimony of Camacho who also was a consistent and credible witness. On this basis, I find Camacho and Santos were in contact on November 5 and that Camacho provided Santos with the information about which he testified.

(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 Respondent did not contest the Citation within the requisite time period is not disputed. The record reveals Respondent sent a letter to OSHA on November 14, 2013, almost four weeks after the original contest due date, and more than one week after OSHA notified Santos that he had missed the extension OSHA had afforded him. Therefore, by operation of law, the citation and proposed penalty must be deemed a final order of the Commission, unless Respondent can demonstrate that it is entitled to relief.

In his letter, Santos stated he is requesting relief due to “confusion during the government shutdown period.” At the hearing, Santos also testified that he does not read or write English well and, therefore, was not able to fully comprehend the content of the Citation. Neither, the record evidence nor Respondent’s explanations for its late filing show deception or a failure to follow proper procedures on behalf of the Secretary. It is undisputed Respondent received the Citation. Both the Citation and the pamphlet provided to Santos explain in several locations the time limit for filing a notice of contest. The Citation unambiguously stated in conspicuous typeface that Respondent had 15 working days after receipt within which to file a notice of contest. Most of the oral communication between OSHA and Santos was done in Spanish. Therefore, I find the Secretary did not engage in deception and followed proper procedures in this matter.

I note the Government-wide shutdown does pose a unique circumstance in this case. However, 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. Therefore, I am not persuaded that, even under these unique circumstances, the Secretary failed to follow proper procedures or in any way deceived Respondent.

Where, as here, 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. 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 as a whole, I find the delayed filing was within the control of Respondent and could have been avoided if Respondent had exercised reasonable diligence. It may have been understandable under the unique circumstances of the Government-wide shutdown and cancelation of the informal conference for Respondent to have been confused about when he was obligated to file a notice of contest. However, due diligence required Respondent to seek clarification. *Secretary v. Barretto Granite Corporation*, 830 F.2d 396, 400 (1st Cir. 1987). By his own admission, Santos initiated no contact with OSHA after receiving the Citation. Respondent's failure to engage in any follow-up with OSHA was mere negligence on his part, not warranting relief under Rule 60(b).

In making this finding, I have considered that Santos has limited English language skills. Nevertheless, I find the record is insufficient to establish Santos exercised the necessary due diligence. Even where 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). Santos testified upon receiving the Citation, he reviewed the violations and took action to abate them, suggesting he was able to either have the citations read to him, or was able to read the citations sufficiently himself to understand what needed correcting. I also find Santos was well aware he could obtain information from OSHA in Spanish, as he conversed with Camacho in Spanish from their initial contact. Because Santos failed to ensure he understood the whole of the Citation, I find Respondent did not exercise due diligence.

I find it significant Santos did not act when first contacted by OSHA after the Government-wide shutdown. Camacho credibly testified he made Santos aware Respondent had missed the deadline for filing a notice of contact on November 5. Camacho also explained the procedures for filing a late notice of contest to Santos. Nevertheless, Santos did nothing until OSHA again contacted him about abatement verification. It was only then, over one week later, that Santos acted. Santos's only explanation for this inaction was that he had turned his attention to managing his business. I find Santos was simply negligent in failing to act after the November 5 contact with Camacho. 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).

Santos’s testimony that he did not schedule an informal conference or contact OSHA until sometime in early or mid-November is more harmful than helpful to his request for relief. If, in fact, Santos made no effort to contact OSHA until after being contacted about abatement, he failed to show any evidence of due diligence or a good faith effort to comply with the requirements of the Act. Therefore, I find Respondent has not established entitlement to relief under Rule 60(b).

Finally, I have 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 Respondent’s burden when, as here, Respondent 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 Respondent’s Late Notice of Contest 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/ _____

HEATHER A. JOYS
Judge

Date: April 1, 2014
Atlanta, Georgia