

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, :
:
Complainant, :
:
v. :
:
RADCO CONSTRUCTION CORP., :
:
Respondent. :

OSHRC DOCKET NO. 97-1495

APPEARANCES:

Esther D. Curtwright, Esquire
New York, New York
For the Complainant.

Dennis A. Durkin, Esquire
West Caldwell, New Jersey
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”), to determine whether Respondent Radco Construction Corporation (“Radco”) filed a timely notice of contest of a citation and notification of penalty issued by the Occupational Safety and Health Administration (“OSHA”). The Secretary filed a motion to dismiss Radco’s notice of contest, and the hearing in this matter was held on January 6, 1998.

Background

The citation setting forth the alleged violations and proposed penalties was issued on July 28, 1997, and sent by certified mail to Radco. Pursuant to section 10(a) of the Act, Radco was required to notify OSHA of its intent to contest the citation within 15 working days of its receipt of the citation, and failure to file a timely notice of contest would result in the citation and proposed penalties becoming a final judgment of the Commission by operation of law. It is undisputed that Radco received the citation on July 29, 1997, and that, based on the 15-day filing requirement,

Radco's notice of contest had to be postmarked by August 19, 1997. It is also undisputed that Radco filed a letter with the Commission on August 25, 1997, in which it stated it had sent a letter to OSHA on July 29, 1997, that it had been waiting to be contacted for an informal conference, and that it was now "asking for a late informal conference to substitute for the mix-up." Attached to the August 25 letter was a copy of the July 29 letter, in which Radco requested "an informal conference at your earliest convenience" and also asked to be notified of the date and time of the conference. The Secretary contends that OSHA never received the July 29 letter, that the August 25 letter was filed after the notice of contest due date, and that neither letter constituted a notice of contest in any case.

Discussion

The record shows that on August 25, 1997, the OSHA compliance officer ("CO") who had inspected the site called Radco to find out if the alleged violations had been abated; Timothy Sias, the Radco representative who was present during the inspection and the closing conference, told the CO that the conditions had been taken care of and asked about having an informal conference, but the CO advised Sias it was too late for such a conference. Sias then called the CO's supervisor, telling him that Radco had requested an informal conference in its July 29, 1997, letter; Sias was informed the letter had not been received, that the period for filing a notice of contest had elapsed, and that Radco would have to write the Commission. (Tr. 12-16; 27-32; 37-49). Sias specifically testified that he had written both the July 29 and the August 25 letters; however, he also testified that he had signed only the August 25 letter, that he had written out and then had a secretary type up the July 29 letter for the signature of his brother, Eric Sias, Radco's vice-president, and that he had no personal knowledge of what was done with the letter after that point. (Tr. 47-49).

The first issue to be addressed is whether Radco filed a timely notice of contest. It is clear from the foregoing that OSHA had no record of having received the July 29 letter, and although Timothy Sias indicated his belief that the letter was sent to OSHA his testimony shows he did not actually know this was the case. (Tr. 49). Further, Radco could have offered additional evidence in this regard, such as the testimony of Eric Sias or the individual who might have faxed or mailed the July 29 letter. Since no such evidence was presented, I conclude that Radco has not established that it sent the July 29 letter to OSHA; accordingly, only the August 25 letter, which was plainly filed after the expiration of the 15-day period, can be considered as a notice of contest in this case.

An untimely notice of contest may be accepted where the delay in filing was caused by deception on the part of the Secretary or by the Secretary's failure to follow proper procedures. An employer is also entitled to relief under Federal Rule of Civil Procedure 60(b)(1) if it demonstrates that the Commission's final order was entered as a result of "mistake, inadvertence, surprise, or excusable neglect," or under Federal Rule of Civil Procedure 60(b)(6) for mitigating circumstances such as absence, illness, or a disability which would prevent a party from protecting its interests. *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no contention and no evidence that the Secretary acted improperly in this matter. To the contrary, the record shows that the CO advised Radco of its rights at the closing conference and that the documents sent to the company with the citation included an invoice/debt collection notice setting out the full amount of the proposed penalties as well as an OSHA 3000 booklet, which advises an employer of its rights and responsibilities after an OSHA inspection. (Tr. 6-16; 20-27). In addition, pages 1 and 2 of the cover letter of the citation issued to Radco include paragraphs that state, respectively, as follows:

You must abate the violations referred to in this Citation by the dates listed and pay the penalties proposed, unless within 15 working days ... from your receipt of this Citation and Notification of Penalty you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above. Please refer to the enclosed booklet (OSHA 3000) which outlines your rights and responsibilities and which should be read in conjunction with this form.

Right to Contest - You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates without contesting the underlying violations. **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.**

The Commission has held that the citation "plainly state(s) the requirement to file a notice of contest within the prescribed time period." *Roy Kay, Inc.*, 13 BNA 2021, 2022 (No. 88-1748, 1989). The Commission has also held that neither ignorance of procedural rules nor carelessness or negligence, even by a layman, constitutes "excusable neglect" pursuant to Rule 60(b). *Id.* at 2022; *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). Finally, the Commission has held that Rule 60(b) cannot be invoked "to give relief to a party who has chosen a course of

action which in retrospect appears unfortunate or where error or miscalculation is traceable really to a lack of care.” *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

Applying the foregoing to the facts of this case, Radco is not entitled to Rule 60(b) relief. First, there is no evidence to support a finding that the failure to file a timely notice of contest in this matter was due to “excusable neglect” or any other reason pursuant to Rule 60(b) such that Radco is entitled to relief. Second, the company has never, either at the hearing or in its letters, made any contention in this regard.¹ Third, Radco has never expressed a clear intent to contest the citation. As noted above, the July 29 and August 25 letters requested only an informal conference, and there was nothing in the testimony of Timothy Sias to indicate that Radco desired anything else. Although the Commission has held that an employer’s letter should be “liberally construed” when considering whether it adequately expresses an intent to contest the citation, the Commission has also indicated that statements in the employer’s letter must “exhibit a clear intent to dispute the citations” to serve as a notice of contest. *See Herasco Contractors, Inc.*, 16 BNA OSHC 1401, 1402 (No. 93-1412, 1993). Based on the record and the foregoing Commission precedent, I am constrained to grant the Secretary’s motion to dismiss the notice of contest in this matter.

Order

For the reasons set out above, the Secretary’s motion to vacate is GRANTED, and the citation and notification of penalty is AFFIRMED.

Irving Sommer
Chief Judge

Date:

¹Only the Secretary has filed a post-hearing submission in this case.