



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

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| SECRETARY OF LABOR, | : | |
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| Complainant, | : | |
| | : | |
| v. | : | OSHRC DOCKET NO. 98-0093 |
| | : | |
| DDC INTERIORS, INC., | : | |
| | : | |
| Respondent. | : | |

APPEARANCES:

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| Kathleen Butterfield, Esquire Kansas City, Missouri For the Complainant. | Terrie L. Miller Englewood, Colorado For the Respondent, <i>pro se.</i> |
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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 DDC Interiors (“DDC”) 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 vacate DDC’s notice of contest on February 6, 1998, and DDC’s response to the motion was filed on February 23, 1998.

Background

The citation setting forth the alleged violations and proposed penalties was issued on November 3, 1997, and sent by certified mail to DDC. Pursuant to section 10(a) of the Act, DDC 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 DDC received the citation on November 5, 1997, and that, based on the 15-day filing requirement,

DDC's notice of contest had to be postmarked by November 28, 1997. On December 3, 1997, DDC filed a notice with OSHA certifying that it had abated the alleged violations, and on December 29, 1997, DDC filed a notice of contest of the citation and notification of penalty with the Commission.

Discussion

The record plainly shows that Respondent did not provide notice of its intent to the contest the citation and proposed penalties until well after the expiration of the 15-working-day period. The issue in this case is whether the untimely filing may be excused under the circumstances. An otherwise 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. Rather, DDC asserts the untimely filing should be excused due to the absence of its vice-president during November and December of 1997.

The reasons for the untimely filing in this case are set forth by Terrie Miller, DDC's vice-president, in both the notice of contest and the response to the motion to vacate. Specifically, Miller explains that both she and her assistant were absent during the first two weeks of November 1997, that she was also gone during the week of Thanksgiving, and that although the citation was placed on her desk there was no one to go through her paperwork in her absence and she herself overlooked it upon her return; Miller additionally explains that her father passed away suddenly and unexpectedly in December, occasioning her further absence for most of that month, and that the notice of contest was consequently not filed until the end of December 1997. Miller concedes her fault in this matter, but urges that consideration be given to her circumstances. Miller also points to her company's safety record, DDC's timely handling of a previous OSHA citation through an informal conference, and the prompt abatement of the citation items in this case, as set out in DDC's December 3 notice to OSHA which is signed by a company official.

The cover letter to the citation issued to DDC states, in the first paragraph, 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.

In addition, page 2 of the cover letter has a paragraph which provides as follows:

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 OSHA citation “plainly state(s) the requirement to file a notice of contest within the prescribed time period.” *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). *See also Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). The Commission has also held that a business must have orderly procedures for the handling of important documents and has denied relief where the employer claimed that the late filing was due to the illness and consequent absence of the individual responsible for attending to the OSHA citation. *See E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460), and cases cited therein. Finally, it is well settled 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, I am constrained to find that DDC is not entitled to relief in this matter. First, it is clear that DDC is a going concern and that it should have had office procedures in place which would have allowed it to timely attend to the OSHA citation, even in the absence of Miller. Second, despite Miller’s absence from the office during the first and last parts of November, it is clear that she was in the office during the third week of November; moreover, although Miller’s assistant was also absent during the first two weeks in November, that individual was evidently in the office during the second half of that month. Third, the record shows

that the DDC official who signed the abatement notice that was provided to OSHA within the prescribed period was well aware of the abatement dates set out in the citation, suggesting that with the proper care in this matter DDC could also have filed a timely notice of contest of the citation; in this regard, I note that Miller states on page 2 of DDC's response to the motion to vacate that "[a]ll important paperwork finds its way to the desk of my COO or Controller and unfortunately this issue slipped through the cracks, a costly error." Finally, I note that DDC had a prior OSHA citation in which it achieved a penalty reduction after timely attending an informal conference; consequently, this is not a case of an inexperienced employer having a first dealing with an OSHA citation. While I am sympathetic to DDC's plight, Commission precedent in this area is well settled and I have no choice but to deny DDC's request for relief and to grant the Secretary's motion to vacate.

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: