



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, | : | |
| | : | |
| Complainant, | : | |
| | : | |
| v. | : | OSHRC DOCKET NO. 98-0536 |
| | : | |
| BCB CONSTRUCTION, INC., | : | |
| | : | |
| 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 BCB Construction (“BCB”) filed a timely notice of contest of a citation and notification of penalty issued by the Occupational Safety and Health Administration (“OSHA”). A hearing was held on July 23, 1998, for the sole purpose of deciding whether the Secretary’s motion to dismiss BCB’s notice of contest should be granted.

Background

OSHA conducted an inspection of a multi-employer construction site in the District of Columbia after an accident that caused the death of one employee and the serious injury of another. An OSHA compliance officer (“CO”) began the inspection on August 17, 1997; there were attorneys at the site representing various parties, and on several occasions the CO spoke with an associate attorney from a Maryland law firm who told him she was representing BCB and its insurer. After concluding his inspection, the CO phoned the associate and left a message that he needed to hold a closing conference with BCB; a partner from the firm returned his call, and the CO discussed with him the fact that a citation would be issued to BCB. On February 17, 1998, OSHA issued a two-item serious citation and mailed it by certified mail to BCB’s address in Baltimore, Maryland; however,

after three delivery attempts, the U.S. Postal Service returned the citation package to OSHA.¹ Shortly after February 17, 1998, the associate called the CO and told him she understood a citation had been issued but that BCB had not received it, and the CO advised her to call his area director. The associate spoke to the area director on February 26, 1998, explaining that she represented BCB and its insurer and that BCB had not received the citation; she then requested a copy of the citation, and the area director faxed it to her the same day.² On March 11, 1998, the associate called the CO and informed him that BCB still had not received the citation; the CO told her he would check into the matter, and, in so doing, learned of the unsuccessful delivery attempts. On March 24, 1998, the CO received a letter from the partner, dated March 23, 1998, advising that he was representing BCB and that BCB was contesting the citation and penalties.³ The CO called the law firm and spoke with the associate, telling her what he had learned and that the contest period was already over.⁴

Whether Service of the Citation was Valid

Section 10(a) of the Act requires an employer to notify OSHA of its intent to contest a citation within 15 working days of its receipt of the citation, and the employer's failure to file a timely notice of contest results in the citation and penalty becoming a final judgment of the Commission by operation of law. The Secretary contends that BCB received the citation on February 26, 1998, when it was faxed to the law firm representing BCB, and that the notice of contest was not timely because

¹The attempted deliveries took place on February 19, February 24 and March 7, 1998, and although the Postal Service on each occasion left a yellow "pick-up notice" on the secured front door of BCB's address of record, no one ever retrieved the citation package.

²The associate recalled telling the OSHA officials that she represented BCB and its insurer in the personal injury case and that BCB also had corporate counsel; however, both OSHA officials recalled her saying only that she represented BCB and its insurer.

³The law firm sent two letters to OSHA on behalf of BCB before the notice of contest. The first, dated October 27, 1997, and addressed to the CO, stated that the partner represented BCB in claims arising out of the accident and requested an opportunity to view certain physical evidence and notice of any tests to be performed; the second, dated January 13, 1998, and addressed to an OSHA supervisor, asked for an extension to provide documents in response to a subpoena. *See* C-3. The record indicates that the associate prepared and signed all three letters at the partner's request.

⁴Although the associate recalled her March 11 and 24 conversations as having been with the area director, the record as a whole indicates that they were with the CO.

it was not filed within 15 working days of that date. BCB, on the other hand, contends that there was no valid service of the citation because it was not served by certified mail as required by the Act and because the law firm had no authority to accept service.

With respect to BCB's first contention, the record shows that the Secretary mailed the citation by certified mail to the address the CO obtained during the inspection, that the Postal Service left a pick-up notice on the secured door at that address on each of its three attempts to deliver the citation, and that no one ever retrieved the citation. (Tr. 7-10 ; 49-51; 55-56; C-2; R-1). There is testimony in the record suggesting that BCB may have moved. (Tr. 50-51). However, as the Secretary points out, BCB does not assert that the address on C-2, the envelope the citation was mailed in, is incorrect. Moreover, even assuming *arguendo* that BCB did move, that the Postal Service attempted delivery at that address indicates that BCB did not file a change of address to ensure it would receive its mail. Regardless, given the Postal Service's three attempts to deliver the citation by certified mail at BCB's address of record, the company cannot now complain that it did not receive the citation by certified mail. BCB's contention is accordingly rejected.

With respect to BCB's second contention, the record shows, and BCB does not dispute, that OSHA faxed the citation to the law firm on February 26, 1998. (Tr. 34; C-4). BCB contends, rather, that the law firm had no authority to accept service of the citation. BCB notes that it is involved in four proceedings arising from the accident, that the law firm was not representing it in the OSHA investigation until March 23, 1998, the date of the notice of contest letter, and that up until that time the only claim the law firm was handling was the personal injury case relating to BCB and its insurer; BCB also notes that the law firm had never represented it previously, that a different law firm is representing it in the two other proceedings, and that it also has corporate counsel.

In support of its contention, BCB points out that service cannot be made on an attorney unless that attorney has been authorized to receive service, citing to *Santos v. State Farm Fire & Casualty Co.*, 902 F.2d 1092, 1094 (2d Cir. 1990). However, according to Wright & Miller, the authority to accept process need not be explicit but may be implied from the relationship between the defendant and the alleged agent; there must be evidence that the defendant intended to confer such authority upon the agent, and the requisite intent may be implied from the circumstances surrounding the service upon the agent. 4A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*

§ 1097, at 84-87 (2d ed. 1987). *See also United States v. Bosurgi*, 343 F. Supp. 815, 817-18 (S.D.N.Y. 1972); *Automatic Merchandising Corp. v. Zenga*, 159 F. Supp. 489, 490 (D. Mass. 1958). Consequently, whether service was valid in this case depends upon whether the requisite intent to confer authority may be implied from the circumstances.

Although the background sets out the basic facts in this case *supra*, there is one key point that requires further elaboration. When the CO called the associate and left a message that he needed to hold a closing conference with BCB, a partner from the law firm returned the call. The CO testified he advised the partner that the purpose of his call was to hold a closing conference and that a citation would be issued to BCB; the CO also testified that he discussed BCB's rights and responsibilities in regard to the citation, and that the partner disputed several aspects of the alleged violations. (Tr. 25-28). BCB did not rebut this testimony, which, in my opinion, resolves the issue of the service of the citation. As I see it, if the law firm was not representing BCB in the OSHA matter, the partner would have so advised the CO upon learning the purpose of the call, and that he did not convince me that the law firm was in fact representing BCB at the time of the closing conference, if not before. I find, therefore, that BCB's intent to confer authority upon the law firm to accept service of the citation is implicit from the circumstances in this case and that OSHA's faxing of the citation to the law firm on February 26, 1998, was valid service.⁵ BCB's contention is accordingly rejected.

Whether BCB is Entitled to Rule 60(b) Relief

The record clearly shows that BCB did not file its notice of contest until after the expiration of the required 15-day period. 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 if it establishes that the Commission's final order was entered as a result of "mistake, inadvertence, surprise, or excusable neglect" or "any other reason justifying relief," including mitigating circumstances such as absence, illness or a disability which would prevent a party from protecting its interests. *See Fed. R. Civ. P. 60(b); Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). The Secretary contends that there are no reasons justifying Rule 60(b) relief in this case. I agree.

⁵In so finding, I have considered the testimony suggesting that the decision to have the law firm represent BCB in the OSHA matter was made on March 23, 1998. (Tr. 54-55).

There is no evidence that the Secretary failed to follow proper procedures or was deceptive in this matter. OSHA mailed the citation by certified mail to BCB's address of record, and BCB did not retrieve it despite three notices left on its front door. OSHA then faxed the citation to the attorney who requested it and who said she was representing BCB, and BCB did not contest the citation within the required period of time after its receipt by facsimile. BCB notes that the area director never advised that the facsimile transmission effectuated service and that the CO told the associate attorney on March 24 that the contest period was over because the citation was delivered as of the Postal Service's first attempt. Regardless, I find that OSHA had no obligation to advise that its faxing of the citation constituted service, under the facts of this case; further, it is clear that the CO's March 24 statement did not influence BCB's filing of the notice of contest because it was already filed. *See, e.g., Keefe Earth Boring Co.*, 14 BNA OSHC 2187 (No. 88-2521, 1991).

There is likewise no evidence of excusable neglect in this case. The CO testified that he discussed BCB's rights and responsibilities with respect to the citation during his telephone closing conference with the partner. (Tr. 25-28). In addition, both the citation issued to BCB and its cover letter explain the 15-day contest period. The cover letter 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.

The cover letter further states, on page 2, 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 a business must have orderly procedures in place for the receipt and handling of important documents. *See, e.g., E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991), and cases cited therein. The Commission has additionally 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). Finally, the Commission has held that an employer “must bear the burden of its own lack of diligence in failing to carefully read and act upon the information contained in the citations,” that lack of knowledge of procedural rules does not constitute excusable neglect for purposes of Rule 60(b) relief, and that the rule 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.” *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

Based on the record, there are no reasons justifying Rule 60(b) relief in this case. The Secretary’s motion to dismiss the notice of contest is granted, and the citation and notification of penalty is affirmed in all respects.

Irving Sommer
Chief Judge

Date: