

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

O'CONNOR & TAYLOR, INC.,

Respondent.

Docket No. 98-822

DECISION AND ORDER

The Secretary filed a motion to dismiss the Respondent's notice of contest on June 12, 1998. There was no response to the motion.

BACKGROUND

The citation setting forth the alleged violations and the accompanying notification of proposed penalty was issued by certified mail on April 16, 1998 and received by the Respondent on April 20, 1998. Pursuant to Section 10(a) of the Act, 29 U.S.C. sec. 659(a), the Respondent was required to notify the Secretary of any intent to contest within 15 working days of receipt of the citation and notification of proposed penalty, or May 11, 1998. In the absence of a timely contest, the citation and proposed penalty would be deemed a final judgment of the Commission by operation of law. Section 10(a) of the Act. In a letter dated May 18, 1998, received on May 28, 1998 by the Occupational Safety and Health Administration the Respondent explained that the citation was received on April 20, 1998, ``however, due to a clerical error, it was my understanding that we received this notice on April 22, 1998." Because of this error, the notice of contest was filed after the 15 working day period.

DISCUSSION

The record plainly shows that the Respondent did not file a notice of contest within the 15 working day period. His explanation is that a clerical error on their part was the cause of the delay in filing the notice of contest.

An otherwise untimely notice of contest may be accepted where the delay in filing was caused by deception on the part of the Secretary to follow proper procedures. An employer is entitled to relief under Fed. R. Civ. Proc. 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 Rule 60(b)(6) for such mitigating circumstances as absence, illness or a disability which prevents a party from protecting his interests. See *Branciforte Builders, Inc.*, 9 BNA OSHC 2113. Here, there is no showing that the Secretary acted improperly or that the factors mentioned in Rule 60 are present. The Respondent as stated that the delay was due to a clerical error in ascribing the date of receipt of the citations. It was incumbent upon the Respondent in the carrying out of its business activity to maintain orderly procedures for handling important mail. The Commission has held that employers whose improper business procedures has led to failure to file in a timely manner are not entitled to relief. See *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020; *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058.

Simple negligence will not provide entitlement to relief. *E.K. Construction Co.*, 15 BNA OSHC 1165.

While I am sympathetic to the Respondent's plight, I have no alternative but to hold it responsible for failing to file in a timely manner as required.

The motion of the Secretary to dismiss is GRANTED.

ORDER

The citation issued to the Respondent on April 16, 1998 and proposed penalty is AFFIRMED in all respects.

IRVING SOMMER
Chief Judge

DATED:

Washington, D.C.