



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.	:	OSHRC DOCKET NO. 98-1574
	:	
WINDWARD ROOFING & CONSTRUCTION, INC.,	:	
	:	
Respondent.	:	
	:	

APPEARANCES:

Helen J. Schuitmaker, Esquire  
 Chicago, Illinois  
 For the Complainant.

John Cherachi  
 Chicago, Illinois  
 For the Respondent, *pro se.*

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”), for the sole purpose of determining whether the Secretary’s motion to dismiss Respondent’s notice of contest as untimely should be granted. The hearing in this matter was held in Chicago, Illinois on February 19, 1999.

Background

The Occupational Safety and Health Administration (“OSHA”) inspected a work site of Respondent in Park Ridge, Illinois, on June 1 and 2, 1998. As a result of the inspection, OSHA issued Respondent a one-item serious citation and notification of penalty. Section 10(a) of the Act requires an employer to notify OSHA of the intent to contest a citation within 15 days of receiving it, and the 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 record shows that on June 22, 1998, OSHA sent two copies of the citation by certified mail, one to Respondent's place of business and one to the company's safety consultant.<sup>1</sup> On July 10, 1998, the safety consultant contacted OSHA by phone to advise that the company had not received the citation, and OSHA, on that same day, mailed another copy of the citation by certified mail to Respondent. The company received the first copy of the citation on July 13, 1998, and the second copy on July 15, 1998. On the basis of the July 15 date, the 15-day notice of contest period expired on August 5, 1998.

The record further shows that on August 26, 1998, OSHA held an informal conference with representatives of Respondent in regard to an inspection of a different work site of the company that had resulted in the issuance of a second citation. At the conference, Respondent's representatives asked about the first citation, and OSHA, after checking into the matter, advised the company that the notice of contest period had expired, that the citation had already become a final order of the Commission, and that OSHA no longer had the authority to make any changes with respect to the citation or the penalty. Respondent filed a late notice of contest on September 4, 1998. The Secretary filed her initial motion to dismiss on November 5, 1998, and an amended motion to dismiss on December 7, 1998.

#### Discussion

The record shows that Respondent did not file its notice of contest until well after the 15-day contest period had ended. An otherwise untimely notice of contest may be accepted where the Secretary's deception or failure to follow proper procedures caused the delay in filing. An employer is also entitled to relief if it shows 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). There is no evidence and no contention that the Secretary was deceptive or failed to follow proper procedures in this matter; rather, Respondent's letter states that circumstances beyond its control caused the untimely filing and asks that the late filing be accepted.

---

<sup>1</sup>During the closing conference following the inspection, Respondent's safety consultant had requested that a copy of the citation be mailed to him.

At the hearing, John Cherachi, Respondent's controller, testified that the company had been in business for ten years, that the number of employees ranged from 50 to 100, and that there were approximately eight employees in the company office. He further testified that upon receiving the citation, office personnel had put both copies on the desk of the accounting manager, the person who was responsible for OSHA matters and for dealing with the company's safety consultant. Cherachi said that the accounting manager went on vacation the week after the citation was received and that instead of returning at the end of the month, as expected, she called the office to advise she was resigning; he also said that no one had reviewed the mail on the accounting manager's desk in her absence because she was expected back at the office at the end of the month. (Tr. 16-19).

The citation issued to Respondent, and the cover letter accompanying it, explain the 15-day contest period. The cover letter states, in the first paragraph on page 1, that:

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 also states, on page 2, the following:

**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). The Commission has also held that Rule 60(b), noted above, 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." *Id.* Finally, the Commission has held that a business must have orderly procedures for the handling of important documents and has denied relief where the employer asserted that the late filing was caused by events such as a change

in management, the improper handling of the citation by company personnel, and the absence, even if due to illness, of the person responsible for OSHA matters. *See Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989); *J.F. Shea Co.*, 15 BNA OSHC 1092, 1094 (No. 89-976, 1991); *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460), and cases cited therein.

Based on the testimony of Respondent's controller, the untimely filing in this case was due to the accounting manager's vacation and subsequent resignation and the company's failure to review the mail on her desk in her absence. However, in light of the foregoing, this reason does not constitute excusable neglect or "any other reason justifying relief." I have considered the unfortunate timing of the accounting manager's vacation and resignation, and I am sympathetic to Respondent's plight. Regardless, I am constrained by the Commission precedent set out above to conclude that the circumstances in this case do not warrant Rule 60(b) relief. The Secretary's motion to dismiss is accordingly GRANTED, the notice of contest is DISMISSED, and the citation and notification of penalty is AFFIRMED in all respects. So ORDERED.

---

Irving Sommer  
Chief Judge

Date: