



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. 99-0103
	:	
BEST STRUCTURES, INC.,	:	
	:	
Respondent.	:	
	:	

APPEARANCES:

Susan J. Willer, Esquire
 Kansas City, Missouri
 For the Complainant.

Tom Tuohy
 Rancho Cordova, California
 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 vacate Respondent’s notice of contest as untimely should be granted.

Background

The Occupational Safety and Health Administration (“OSHA”) inspected a work site of Respondent in Denver, Colorado, on July 6, 1998. As a result, OSHA issued Respondent a citation and notification of penalty alleging serious violations of the Act. 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 OSHA sent the citation by certified mail, that Respondent received it on July 27, 1998, and that the notice of contest period ended on August 17, 1998. The record also shows that Respondent did not file a notice of contest until January 10, 1999, when it sent a letter to the Commission explaining the circumstances surrounding the

alleged violations and requesting that the penalties be “removed.”¹ The Secretary filed her motion to vacate Respondent’s notice of contest as untimely on March 9, 1999.

Discussion

The record clearly shows 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 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 as follows:

To be quite honest I have been so busy trying to keep my doors open and have not had anyone to assist me in filing a response. Having just recently employed an office manager I was able to free some time to respond and to further investigate the circumstances surrounding these violations.

In view of this statement, Respondent’s letter is construed to be a request for relief pursuant to Rule 60(b) on the basis of excusable neglect. However, Respondent’s request for relief in this matter must be denied. 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

¹On August 24, 1994, Respondent’s president called OSHA and stated that he wanted to file a notice of contest. In a letter issued that same day, OSHA advised the company it would need to file its notice of contest directly with the Commission because the contest period had already expired.

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) 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 Rule 60(b) 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).

Based on Respondent’s letter, the untimely filing was due to the demands of its business and the fact that it did not have anyone to assist it with administrative matters. However, in light of the foregoing, this reason does not constitute excusable neglect. I have noted the statements in Respondent’s letter that the violative conditions were abated as soon as the company became aware of them, that this is its first OSHA citation, and that the penalty is an expense it cannot afford. Although I sympathize with Respondent’s plight, 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 vacate is consequently 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: