

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. :
 :
MOHEGAN GLASS & WINDOW :
COMPANY, INC., :
 :
Respondent. :

OSHRC DOCKET NO. 99-0483

Appearances:

Margaret A. Temple, Esquire
New York, New York
For the Secretary.

Constantine Pietris
Mohegan Lake, New York
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.

Background

The Occupational Safety and Health Administration ("OSHA") inspected Respondent's facility in Mohegan Lake, New York, in August of 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 working 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 mailed the citation by certified mail, that Respondent received it on January 2, 1999, and that the notice of contest period ended on January 25, 1999. The record also shows that Respondent did not

file a notice of contest until February 11, 1999, after OSHA had advised it that the citation and penalty had become a final order of the Commission. The Secretary filed her motion to dismiss on May 11, 1999, and the hearing in this matter was held on August 13, 1999.

Discussion

The record plainly shows that Respondent did not file its notice of contest until 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 that 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 is requesting, in essence, that the late filing be excused under the circumstances.

At the hearing, Constantine Pietris, Respondent's president, testified that he had been in the business of installing windows, doors and mirrors for about 30 years; he indicated that his company was very small, with only one helper and an office clerk, and that he had an accountant and another individual with whom he consulted about his business affairs. Mr. Pietris said he had corrected the conditions the OSHA compliance officer had pointed out and that he had "thought [he] was done with it." He also said that both of his business consultants were out of town when he received the citation, that he could not read English very well, and that he had not understood the importance of the citation. Mr. Pietris noted that his wife had been hospitalized during this period, that he also had two small children, and that he had had his "hands full." Mr. Pietris further noted that when an official from OSHA had called him about the citation on February 1, 1999, he had gone into the OSHA office personally the next day to discuss it. (Tr. 25-32).

The citation issued to Respondent explains the 15-day contest period, in the first paragraph on the first page, 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 citation further explains the contest period, on page 2, as follow:

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 states the requirement to file a notice of contest within the prescribed period and that ignorance of procedural rules does not constitute "excusable neglect" for purposes of Rule 60(b). *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1127 (No. 88-2291, 1991). The Commission has also held that a business must have orderly procedures for handling important documents and has denied Rule 60(b) relief where the employer has asserted the late filing was due to events such as changes in management, misplacing the citation, or the absence 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, 1991). Finally, the Commission has 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." *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

The testimony of Constantine Pietris indicates that his failure to file a timely notice of contest was due primarily to his inexperience with OSHA, his limited understanding of written English, and the absence of his business consultants.¹ However, based on the foregoing Commission precedent, these reasons do not constitute excusable neglect or "any other reason justifying relief" pursuant to Rule 60(b). The citation clearly gave notice of the filing requirement, and the record shows that Mr.

¹Pietris' testimony also indicates that another factor was his wife's hospitalization.

Pietris has been in business for 30 years and that he enters into contracts and takes care of other important documents relating to his business as a matter of course. (Tr. 26-28). Moreover, the employer has the burden of showing that Rule 60(b) relief is justified, and the testimony of Mr. Pietris did not explain why, in the absence of his usual business consultants, he could not have asked someone else to assist him with the citation.² *See E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991).

In finding that Respondent has not established that its late filing was due to excusable neglect, I have noted the testimony of Mr. Pietris indicating that all of the cited conditions were abated as required. I have also noted the correspondence in the record indicating the financial difficulties of Mr. Pietris. Although I sympathize with Respondent's plight in this matter, I am constrained by Commission precedent and the circumstances of this case to conclude that Respondent is not entitled to 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: 19 OCT 1999

²In this regard, I note that Mr. Pietris could simply have called OSHA; the address and phone number of the OSHA office that issued the citation are at the very top of the first page of the citation.