

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. 96-1093
	:	
M.B. WATERPROOFING, INC.,	:	
	:	
Respondent.	:	

APPEARANCES:

Sabina Rezza
New York, New York
For the Complainant.

Matthew R. Newborn, Esquire
New York, New York
For the 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”). The Occupational Safety and Health Administration (“OSHA”) inspected a construction work site of Respondent in the Bronx, New York, on October 12, 1994, resulting in the issuance of a three-item serious citation and a six-item “other” citation on January 11, 1995. Respondent filed a notice of contest on May 10, 1996, which the Secretary moved to dismiss as untimely, and a hearing was held on December 5, 1996, for the purpose of addressing the Secretary’s motion to dismiss.¹ Both parties have filed post-hearing briefs in this matter.

¹The undersigned heard another case on December 5, 1996, captioned *M.B. Construction Company*, No. 96-1092, which involved the same company principals and the same issue but a different OSHA inspection. A decision in that case is also being issued on this date.

Background

The citations in this case were issued January 11, 1995, and mailed to Respondent the same day by certified mail, return receipt requested. Respondent received the citations January 14, 1995, and on January 20, 1995, Sanjay Shah, the company's manager and bookkeeper, called OSHA and requested a reduction of the proposed penalties and assistance in developing a hazard communication program.² Shah and OSHA arrived at an informal settlement agreement ("ISA") which was faxed to Shah that same day, and Shah signed the ISA on February 4, 1995, and faxed it back to OSHA. The ISA became a final order of the Commission on February 27, 1995, and on May 1, 1995, OSHA sent a demand letter to the company as to the penalties and interest owed. On May 3, 1995, Masood Bhutta, Respondent's president, called OSHA and requested a repayment plan, resulting in Bhutta and OSHA agreeing on an installment plan and OSHA waiving all interest and costs relating to the penalties. The repayment plan was mailed to Bhutta on May 4, 1995, but it was never returned to OSHA. On May 10, 1996, Respondent filed a notice of contest, stating it had just recently retained counsel and was requesting relief on the grounds that it had been previously unable to effectively represent itself. The Secretary moved to dismiss the notice of contest as untimely, asserting there was no basis for relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The company's response, an affidavit of Shah, was that he and Bhutta were native Hindi speakers who had no experience with OSHA, that he had not realized he was waiving the right to contest the citations by signing the ISA, and that after signing the ISA he learned from industry colleagues that the company might have had grounds to contest the citations.

Discussion

The record here plainly shows that Respondent did not file a notice of contest within fifteen working days of its receipt of the citation, as required by section 10(a) of the Act, that the ISA it signed became a final order of the Commission on February 27, 1995, and that the notice of contest it filed was dated May 10, 1996. The issue in this case is whether the untimely filing of the notice of contest may be excused under the circumstances. Rule 60(b) provides for relief from a final judgment

²Although Shah evidently identified himself as the company's controller when he called OSHA, in the affidavit he signed in response to the Secretary's motion to dismiss he identified himself as Respondent's manager and bookkeeper.

for various reasons, including mistake, inadvertence, surprise or excusable neglect; fraud, misrepresentation or other misconduct; or any other reason justifying relief. The moving party has the burden of showing it is entitled to 60(b) relief, and ignorance of procedural rules does not constitute excusable neglect for purposes of such relief. *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). Carelessness or negligence likewise does not constitute excusable neglect, and an employer who does not read the OSHA materials carefully is not entitled to relief. *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991); *Jackson Assoc.*, 16 BNA OSHC 1261, 1266 (No. 91-0438, 1993). A party claiming misconduct on the part of the Secretary must show clear and convincing evidence of material misrepresentations. *Jackson Assoc.*, 16 BNA OSHC 1261, 1267 n.10 (No. 91-0438, 1993).

Respondent does not contest the authority of Sanjay Shah with respect to his signing of the ISA, and its contentions are essentially the same as those set out in its affidavit. (Tr. 42). Shah, the only witness appearing on behalf of Respondent, testified that the citations were his first experience with OSHA and that he agreed to the ISA on January 20 and then signed it on February 4 and faxed it back to OSHA because he thought it was the right thing to do due to the significant penalty reduction. He further testified he did not discuss the ISA with Bhutta until after he had sent it back to OSHA, and that Bhutta told him it was not a good decision because the work at the site had been subcontracted to another company. Shah said he had not known until this point that the work had been subcontracted and that he had nothing to do with that aspect of the business. He also said he did not read the contents of the citation package, that he did not know he had the right to contest the citations, and that he did not understand the ISA before signing it; however, he remembered the OSHA employee he spoke with telling him to call if he had any questions and that he had called to speak with that person two or three more times that day. (Tr. 35-45).

Ernest Hinrichsen is the compliance officer in the Bayside area OSHA office who spoke to Shah on January 20. He testified he did not specifically tell Shah he would be waiving the right to contest the citations by signing the ISA but that he did tell him to read the ISA carefully when he got it, to not sign it until he was sure it was accurate and that he fully understood it, and that if he had any questions to not sign it without calling back and speaking to him; he also testified he had no problem understanding Shah's English and that Shah at no time indicated he could not understand

him. Hinrichsen stated he had been performing this work for three years, that these were the procedures he always followed, and that C-7, the case file diary sheet showing OSHA's transactions with the company, set out everything Shah discussed with him. (Tr. 21-31).

Based on the record, Respondent is not entitled to Rule 60(b) relief. First, although Shah evidently did not read it, page 2 of C-1, the citation package, states the following in the "Right to Contest" section:

If you decide to contest, please keep in mind that a written letter of intent to contest must be submitted to the Area Director at the U.S. Department of Labor Area Office, at the address above, within 15 working days (excluding weekends and Federal Holidays) of your receipt of this citation. **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.**

Second, this admonition is repeated in C-2, the "OSHA 3000" pamphlet enclosed with all citations which fully explains the employer's rights and responsibilities. Third, paragraph 5 on page 2 of C-4, the ISA, states that in signing the ISA the employer "waives its right to contest the above citation(s) and penalties." Fourth, while Hinrichsen did not specifically tell Shah this he did tell him to not sign the ISA without being sure he understood it and to call him if he had any questions, and Shah's own testimony indicates he called Hinrichsen back two to three times on January 20 after their initial conversation. Fifth, Hinrichsen had no trouble understanding Shah, who never testified he had any problems comprehending or expressing himself in English, and I myself observed no difficulties in this regard during the hearing. It is clear from the record that Shah had ample information to be aware of the company's right to file a notice of contest, the fifteen-day filing requirement, and the fact that signing the ISA waived the right to contest the citations and penalties, and that any questions Shah might have had could have been answered by Hinrichsen during one of their phone conversations. It is also clear that the failure to file a timely notice of contest in this case was caused by Respondent's own negligence and not by excusable neglect or any misconduct on the part of the Secretary. *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991); *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1127 (No. 88-2291, 1991).

A conclusion that Respondent is not entitled to relief is also supported by other evidence. Shah testified he did not tell Bhutta about the ISA until after he sent it back to OSHA, and despite his further testimony that Bhutta disagreed with what he had done there is no evidence he or Bhutta ever contacted OSHA to explain the subcontracting arrangement. In fact, according to the testimony of Diana Cortez, the safety supervisor of the Bayside OSHA office, and C-7, the OSHA case file diary sheet, Bhutta called the Bayside office on May 3, 1995, resulting in OSHA agreeing to an installment payment plan and waiving the interest and other costs relating to the penalties; however, C-6, the installment plan sent to Bhutta May 4, 1995, was never returned to OSHA. (Tr. 4; 13-18). In addition, as noted *supra*, Respondent waited another year, until May 10, 1996, to obtain counsel and file a notice of contest. Respondent's request for relief is denied.

Order

The Secretary's motion to dismiss is granted, and the citations and notifications of penalty are affirmed in all respects.

Irving Sommer
Chief Judge

Date: