

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

J B Distributing Co.,

Respondent.

OSHRC Docket No. **04-2178**

Appearances:

Amy R. Walker, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

John C. Burnette, *Pro Se*, Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER DISMISSING LATE NOTICE OF CONTEST

J. B. Distributing of Madison, Inc. (JBD),¹ operates a chemical compounding facility in Atlanta, Georgia. On July 14, 2004, Occupational Safety and Health Administration (OSHA) compliance officer Rose Matthews inspected its worksite located at 95 Milton Avenue S.E. in Atlanta, Georgia. Matthews's supervisor assigned the case to her based on a formal complaint lodged by an employee working for JBD. Matthews returned to the site twice. The third time she returned she met with John Burnette, president of JBD, and held a closing conference with him. As a result of the inspection, the Secretary issued two citations addressed to "J B Distributing Co. and its successors" on October 29, 2004.

As set out in § 10(a) of the Occupational Safety and Health Act of 1970 (Act), and as noted on the first page of the Citation and Notification of Penalty issued to the company, an employer has 15 working days after it receives a citation to file a notice of contest. Burnette, acting *pro se* for

¹ The employer claims the Secretary improperly served it because she addressed the citation to "J B Distributing Co" rather than "J. B. Distributing of Madison, Inc." The undersigned addresses this issue *infra*. For convenience, the decision will refer to the employer as JBD.

JBD, contested the citations by letter dated December 3, 2004, 23 working days after receiving the citations.

On January 11, 2005, the Secretary moved to vacate JBD's late notice of contest. On March 11, 2005, the undersigned held a hearing in Atlanta, Georgia. The parties have filed post-hearing briefs. For the reasons set out below, the undersigned concludes that JBD's notice of contest was untimely filed. The notice of contest is vacated.

ISSUES

(1) Did the Secretary fail to serve the correct party by addressing the citations to "JB Distributing Co. and its successors"?

(2) Did the Secretary fail to serve the correct party when it accepted the certified mail receipt signed by employee Jessie Mitchell as proof of service?

(3) Did JBD establish that its failure to file a timely notice of contest was due to a misrepresentation, mistake, inadvertence, surprise or excusable neglect?

FINDINGS OF FACT

Responding to an employee complaint, compliance officer Matthews arrived at 95 Milton Avenue S.E. in Atlanta, Georgia, on July 14, 2004. The employee complaint named the company located at that address as "J B Distributing Company," and stated the contact person for the company was John Burnette. Matthews found the front door locked. She looked through her file for the name and telephone number of a JBD representative to call. As she was searching, JDB employee Jessie Mitchell exited the building. He identified himself as a supervisor of J B Distributing and said he was leaving work for the day. He instructed Matthews to go around back to a second building to talk to employee Dale Buchanan. Matthews met with Buchanan and asked if JBD president John Burnette was there. Buchanan told her Burnette was not present and that he infrequently visited the premises. Matthews asked for permission to inspect the rear building, where employees compounded chemicals. Buchanan consented and accompanied her on the walkaround inspection (Tr. 28-31, 41).

Matthews returned to the worksite on a later date, but the buildings were locked and no one was present. After numerous attempts to contact Burnette, Matthews finally reached him and arranged to meet him at his office on August 3, 2004. At that meeting, Matthews held a closing

conference with Burnette and explained in detail the inspection process and OSHA's policy. She gave Burnette a copy of the formal complaint. Matthews told Burnette that he would likely be cited by the Secretary for violating several OSHA standards and that the citations would arrive via certified mail. Matthews stated at no time during the closing conference did Burnette inform Matthews the name of his company was anything other than J B Distributing Company (Tr. 32-41).

The citations arrived at the office address on November 1, 2004. Jessie Mitchell signed the certified mail receipt (Exh. C-4). On December 3, 2004, Burnette sent a letter headed "NOTICE OF INTENT TO CONTEST," contesting the two citations. Underneath the signature line, the following is printed:

JOHN C. BURNETTE, C.E.O.
J. B. DISTRIBUTING CO., INC.
95 MILTON AVE., S.E.
ATLANTA, GEORGIA 30315

OSHA returned the letter to Burnette, informing him it had been received past the deadline for contesting the citations. OSHA forwarded a copy of Burnette's letter to the Review Commission. On January 11, 2005, the Secretary filed her motion to dismiss the notice of contest. In the prehearing statement, JBD claims the name of the company is "J B Distributing of Madison, Inc.," and not "J B Distributing Company."

At the hearing JBD produced documentation showing that it was incorporated in Florida in 1979 as "J. B. Distributing Company of Madison, Inc." (Exh R-1).² The corporation's business and mailing address is the same Milton Avenue address where Matthews conducted her inspection. Burnette testified he told Matthews during the closing conference the correct name of his company is J. B. Distributing of Madison, Inc. (Tr. 54).

Principles of Law

Section 10(a) of the Occupational Safety and Health Act of 1970 (Act) provides in pertinent part:

If within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, . . . within such time, the citation and assessment,

² The Secretary's attorney presented no evidence of incorporations in the State of Georgia.

as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

Despite this language, the Commission has held since 1981 that it could exercise jurisdiction to excuse some inadvertent late filings under Federal Rule of Civil Procedure 60(b). *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981).

Federal Rule of Civil Procedure 60(b) provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . .(3) fraud . . . misrepresentation, or other misconduct of an adverse party; . . .or (6) any other reason justifying relief from the operation of the judgment.

It is the employer's burden to show that it is entitled to relief under Rule 60(b). *Craig Mechanical Inc.*, 16 BNA OSHC 1763 (No. 92-372, 1994), *aff'd without opinion*, 55 F.3d 633 (5th Cir. 1995).

ANALYSIS

Name of the Employer

JBD is correct that the registered name of the company is J. B. Distributing of Madison, Inc. This in no way invalidates the citations or renders their service improper. Burnette does not dispute that the employee who filed the complaint worked at his facility on Milton Avenue or that he owns and operates the business located there. Addressing the citation to "J B Distributing Company" instead of "J. B. Distributing of Madison, Inc." confused no one. Burnette knew Matthews inspected his facility and he knew citations were likely to follow. He signed his own notice of contest over the name "J B Distributing Company." Leaving out the phrase "of Madison, Inc." was a "mere technical misnomer which did not affect the nature of the proceeding or the allegations against the employer." *John Hill, d/b/a Leisure Resources Corp.*, 7 BNA OSHC 1485, 1486 (No. 78-0047, 1979).

Certified Mail Receipt Signed by Employee

The undersigned also rejects JBD's argument that only Burnette could sign for certified mail. Mitchell had worked for JBD for 24 years at the time of the hearing. Matthews testified Mitchell told her he was a supervisor. Aside from Mitchell and Buchanan, JBD claims the rest of the workers at the site are contract labor. Burnette stated he is usually only on site three days a week and sometimes

he travels. Despite Mitchell's seniority and Burnette's frequent absences, JBD denied Mitchell had any supervisory authority.

The postal carrier drops JBD's mail through a chute in the front door. Burnette usually collects it. On the days he is not there, Burnette stated, the mail "just stacks up. Sometimes it could be placed on my desk" (Tr. 53). As for certified mail, Burnette testified, "Nobody can sign for anything but me. UPS, let me make an exception, UPS, anybody can sign for" (Tr. 51-52). He claimed Mitchell's signing for the citations was a "mistake" (Tr. 52).

In *B. J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474 (No. 76-2165, 1979), the Commission held "the test to be applied in determining whether service is proper is whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest." The Commission ruled explicitly the Secretary need not serve the president of the company or some other designated official (*Id.*): "[S]ervice upon an employee who will know to whom in the corporate hierarchy to forward the documents will satisfy this test. Accordingly, we accept as valid service upon an employee at a local worksite who will know to whom the documents should be forwarded."

Mitchell, a longtime JBD employee, and one of only two permanent employees at the facility, signed for the citations. He knew to leave the certified letter on Burnette's desk. The Secretary properly served the citations.

Relief under Rule 60(b)

At the hearing, JBD focused on the issues of the incorrect name and improper service. Rule 60(b)(3) incorporates the equitable tolling principles expressed by the United States Court of Appeals for the Fifth Circuit in *Atlantic Marine, Inc. v. OSHRC*, 524 F. 2d 476, 478 (5th Cir. 1975). An untimely filing of a notice of contest may be excused where the delay was caused by "the Secretary's deception or failure to follow proper procedures." JBD contends the Secretary engaged in misconduct by using the technically incorrect name and by using a delivery date based on Mitchell's signature. For the reasons discussed above, these actions cannot be considered misconduct under Rule 60(b)(3).

JBD offered little evidence in support of Rule 60(b)(1) relief. Burnette's testimony hints at a defense of excusable neglect. He stated, "[T]he moment I got the citation, I looked at it. I picked

up the phone and made a call. . . . But I did not sign for it and I didn't know it was on my desk. You follow me? I don't know if it was on my desk or not or how I retrieved it, to be sure" (Tr. 55). Assistant Area Director Harold Gill recalled a different statement. Gill testified he made notes of the telephone call placed to him by Burnette before JBD filed its late notice of contest. Gill stated Burnette "said that he had received the citations and set it aside on his desk and had not looked at it again until, you know, until he called me" (Tr. 23).

The key factor in evaluating whether an employer's delay in filing its notice of contest was due to excusable neglect is "the reason for the delay, including whether it was within the reasonable control of the movant." *Pioneer Inv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993). Even if Gill's testimony is discounted, Burnette's reason seems to be he just did not get around to opening his mail. There is no doubt, however, that the citations were present in his office since the date of their arrival.

The Commission expects employers to "maintain orderly procedures for handling important documents." *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 1987-90 CCH OSHD ¶ 28,409 (No. 86-1266, 1989). "The Commission has consistently denied relief to employers whose procedures for handling documents were to blame for untimely filings" of NOC's. *E. K. Construction Co.*, 15 BNA OSHC 1165, 1166, 1991-93 CCH OSHD ¶29,412, p. 39,637 (No. 90-2460, 1991).

NYNEX, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999). JBD, without evidence of a mistake, inadvertence, surprise, or excusable neglect, is not entitled to Rule 60(b)(1) relief.

Conclusion

JDB has offered no compelling reason for the undersigned to provide Rule 60(b) relief. Accordingly, the Secretary's motion to vacate the late notice of contest of JBD is GRANTED. The citations issued on October 29, 2004, are affirmed in their entirety, and a total penalty of \$11,850.00 is assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: September 26, 2005

