



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, :
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 Complainant, :
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 v. :
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 :
 AMERICAN SHOE CORPORATION, :
 :
 :
 Respondent. :

OSHRC DOCKET NO. 05-0014

Appearances:

Terrence Duncan, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

Christopher M. Gizzi
American Shoe Corporation
Bedford Hills, New York
For the Respondent, *pro se*.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) 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 (“NOC”) as untimely should be granted.

Background

On July 1, 2004, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of the facility of Respondent, American Shoe Corporation, located in Brooklyn, New York. As a result of the inspection, OSHA issued to Respondent a Citation and Notification of Penalty (“Citation”) alleging various violations of OSHA standards. OSHA mailed the Citation to Respondent by certified mail, return receipt requested, on September 21, 2004, and an employee of Respondent signed for it on September 23, 2004. Section 10(a) of the Act requires an employer to

notify the Secretary of its intent to contest a citation within 15 working days of receipt, and the failure to file a timely NOC results in the citation becoming a final order of the Commission by operation of law. Based on the date it received the Citation, Respondent was required to file an NOC by October 15, 2004. Respondent did not file an NOC by that date; however, it did file a letter on November 19, 2004, in response to OSHA's demand letter of November 15, 2004, that stated that the penalties were due and payable; in its letter of November 19, Respondent requested "an extension on the date for an Informal Conference" in regard to the Citation.¹ On December 6, 2004, OSHA wrote back to Respondent, advising that the Citation had become a final order and that any NOC should be sent to the Commission. On December 15, 2004, Respondent submitted a letter to the Commission, explaining the reason for the late filing and requesting "the opportunity to discuss the extent of the penalties." The Commission docketed this matter, and a hearing was held in New York, New York on April 20, 2005. Only the Secretary has filed a post-hearing brief.

Discussion

The record plainly shows that Respondent did not file an NOC within the requisite 15 working-day period. However, an otherwise untimely NOC may be accepted where the delay in filing was caused by deception on the part of the Secretary or her failure to follow proper procedures. A late filing may also be excused, pursuant to Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"), if the 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 *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no contention that the untimely filing in this case was caused by deception on the part of the Secretary or her failure to follow proper procedures. Based on the testimony of Respondent's representative at the hearing, as follows, Respondent is deemed to be requesting that its late filing be found "excusable neglect" pursuant to Rule 60(b).

Christopher Gizzi, Respondent's vice-president, testified that the late filing was due to the error of the accounts payable employee. He explained that he was aware the Citation would be issued and that he was expecting it. He further explained that he had to go to a convention in Florida from

¹Before writing his November 19 letter, Christopher Gizzi called OSHA and spoke to the Area Director about the Citation.

September 20 through 27, and that while he told the office personnel to put the Citation on his desk if it arrived, someone gave it to the accounts payable employee; that employee, thinking it had to do with a previous citation, filed it away with that paperwork.² When Mr. Gizzi returned, he spoke to the person who normally opened the mail and she said that nothing from OSHA had arrived. Mr. Gizzi believed the Citation would arrive shortly, but he became very busy at work and did not contact OSHA as it “slipped his mind.” Mr. Gizzi stated that the next thing he received from OSHA was the demand letter. He also stated that the company was three years old, that it had only about 30 employees, and that the penalties would be a great burden on the business. (Tr. 15-22).

Commission precedent is well settled that the OSHA citation clearly states the requirement to file an NOC within the prescribed period and that an employer “must bear the burden of its own lack of diligence in failing to carefully read and act upon the information contained in the citations.” *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). The Commission has further held that ignorance of procedural rules does not constitute “excusable neglect” and that mere carelessness or negligence does not justify relief. *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). Finally, the Commission has held that a business must maintain orderly procedures for the handling of important documents and that when the lack of such procedures results in an untimely NOC, the late filing will be deemed to be simple negligence and not excusable neglect. *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989). The Commission has thus denied Rule 60(b) relief in cases where the late filing was due to an employer’s misunderstanding or confusion about the 15-day filing period. *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). The Commission has also denied relief where the delay in filing was caused by absence, even if due to illness, of the person responsible for handling OSHA matters. *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991).

²Mr. Gizzi said his company had had both a safety and a health inspection; the safety inspection had settled about a month before, and the accounts payable employee apparently thought that the subject Citation had to do with the prior one and thus filed it away. Mr. Gizzi also said that the two inspections were his only experiences with OSHA. (Tr. 16-17).

The testimony of Mr. Gizzi establishes that the untimely filing in this matter was due to his being out of town and the lack of procedures in place in his office to ensure that important mail would be handled properly in his absence; the late filing was also due to his failure to follow up with OSHA after he returned from his trip out of town. I sympathize with Mr. Gizzi and am convinced of his sincerity and good faith. I have also noted his testimony that all of the cited conditions were corrected. (Tr. 21). Regardless, I am constrained to follow the Commission precedent set out above. Based upon that precedent, and the circumstances of this case, Respondent's failure to file the NOC in a timely manner was due to simple negligence and there is no justification for the granting of Rule 60(b) relief.³ The Secretary's motion to dismiss Respondent's NOC as untimely is accordingly GRANTED, and the Citation is AFFIRMED in all respects.

/s/
Irving Sommer
Chief Judge

Dated: July 15, 2005
Washington, D.C.

³In deciding this case in this manner, I am aware of the Second Circuit's decision, *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002), holding that the Commission does not have authority to accept a late-filed NOC pursuant to Rule 60(b). However, the Commission at this time continues to follow its precedent, set out *supra*, with respect to the applicability of Rule 60(b) in NOC cases. See *HRH Constr. Corp.*, 19 BNA OSHC 2042 (No. 99-1614, 2002); *Villa Marina Yacht Harbour, Inc.*, 19 BNA OSHC 2185 (No. 01-0830, 2003). Regardless, the result is the same for this Respondent; under either precedent, no relief is available.