



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

Secretary of Labor,
Complainant

v.

Prime Pak Foods, Inc.,
Respondent.

OSHRC Docket No.: **17-2230**

DECISION AND ORDER

This matter is before the Commission on Respondent's Notice of Contest, dated December 19, 2017, received by the Commission December 21, 2017. On April 4, 2018, the Secretary filed a motion to dismiss Respondent's Notice of Contest on the grounds it was not filed within the time period prescribed by § 10(a) of the Occupational Safety and Health Act, 29 U.S.C. § 651- 678 (the Act). Respondent filed a response in opposition to the Secretary's motion, or in the alternative a motion for relief under Fed. R. Civ. P. 60(b).¹ For the reasons that follow, Respondent's request for relief pursuant to Fed. R. Civ. P. 60(b) is **DENIED**; the Secretary's motion to dismiss is **GRANTED**; and the citation issued to Respondent on November 1, 2017, pursuant to Inspection No. 1245972 is **AFFIRMED** in its entirety and the penalty **ASSESSED**.

BACKGROUND

Beginning on July 11, 2017, Compliance Safety and Health Officer (CSHO) Caliestro Spencer of the Atlanta East Area Office of the Occupational Safety and Health Administration (OSHA) conducted an inspection (No. 1245972) of Respondent's facility at 2076 Memorial Park Drive in Gainesville, Georgia. Participating in the inspection (among others) were Respondent's Safety Coordinator, Kathy Harris, and Respondent's counsel, Mark Waschak. According to CSHO Spencer, he held an opening and closing conference during his inspection. During the closing conference, he confirmed Respondent's mailing address. Safety Coordinator Harris has

¹ The Secretary filed a motion to dismiss Respondent's motion for relief on the ground it did not comply with Commission Rule 40(a). Based upon my disposition of this matter, I find that motion moot, as is the Secretary's motion for an extension of time to respond to Respondent's motion for relief.

no recollection of a closing conference. She also contends during the inspection she asked the Secretary to contact Respondent through counsel.

Following the inspection, on November 1, 2017, the Secretary issued Respondent a single-item serious citation and notification of penalty. The citation and notification of penalty were mailed to Respondent's Memorial Park Drive mailing address via certified mail. It was received and signed for by Respondent on November 6, 2017. Respondent does not deny receipt of the citation and notification of penalty on that date.

Under § 10(a) of the Act, Respondent had until November 29, 2017, to file a timely notice of contest of the citation. Respondent did not do so.

On December 15, 2017, Assistant Area Director (AAD) Kia McCullough contacted Larry Stine, an attorney with the law firm retained by Respondent, and requested abatement information. Mr. Stine was unaware Respondent had been issued a citation. On December 21, 2017, ADD McCullough received an email from Mr. Stine with a letter of contest attached.

On December 19, 2017, Respondent filed a notice of contest with the Commission. In it, Respondent indicates its intent to contest the citation issued to it November 1, 2017. The Commission received the notice of contest December 21, 2017. The notice of contest provided no explanation for Respondent's failure to file by November 29, 2107. The Commission docketed the matter December 28, 2017. On April 4, 2018, the Secretary sought dismissal of Respondent's late notice of contest. Respondent filed a response in opposition and motion for relief from the final order under Fed. R. Civ. P. 60(b).

ANALYSIS

The Secretary's Motion to Dismiss

Under § 10(a) of the Act, after the Secretary has issued a citation to an employer and notified it by certified mail of the penalty, if any proposed to be assessed, an employer has "fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty." 29 U.S.C. § 659(a). If the Secretary is not notified within this time period, the "citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency." 29 U.S.C. § 659(a).

The Secretary contends Respondent's notice of contest should be dismissed as untimely. It is undisputed Respondent did not timely file its notice of contest. The Secretary served Respondent with the citation by certified mail as required under § 10(a) of the Act. The

Secretary provided sufficient proof the citation was delivered and signed for at Respondent's worksite on November 6, 2017 (Exhs. C and D to the Secretary's Motion to Dismiss).

Respondent's notice of contest was due November 29, 2017. It did not file its notice of contest until December 19, 2017. As a result of Respondent's failure to file a timely notice of contest, the citation issued pursuant to Inspection 1245972 became a final order of the Commission by operation of law. 29 U.S.C. § 659(a).

Absent a showing Respondent is entitled to relief from this final order, the Commission has no jurisdiction to review the merits of the citation and proposed penalty assessment. The Secretary has met his burden to establish the notice of contest should be dismissed.

Respondent's Motion for Relief

The Commission has held an employer may obtain relief from a final order of the Commission under Fed. R. Civ. P. 60(b). *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1949 (No. 97-851, 1999). The party seeking relief under Rule 60(b) has the burden of showing it is entitled to such relief. *NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999). Relief may be granted if the judgment was entered as a result of "mistake, inadvertence, surprise or excusable neglect." Fed. R. Civ. P. 60(b)(1). In addition, the Commission requires a party seeking relief under Rule 60(b) show it had a meritorious defense that might have affected the outcome. *Northwest Conduit*, 18 BNA OSHC at 1949.²

Respondent contends its failure to timely file was the result of excusable neglect. Respondent maintains the Secretary failed to hold a closing conference and mailed the citation directly to Respondent, rather than its counsel as requested during the inspection. This conduct on the part of the Secretary, Respondent argues, resulted in inadequate notice to it of the issuance of the citation, excusing its failure to timely file its notice of contest.³ Nowhere in its motion does Respondent address whether it had a meritorious defense. This deficiency alone merits denial of Respondent's request for relief from the Commission's final order. Assuming *arguendo* Respondent had established it had a meritorious defense, Respondent's other grounds for relief lack merit.

² The Eleventh Circuit, the circuit in which this matter arises, imposes the same requirement. See *Safari Programs, Inc. v. CollectA Int'l Ltc.*, 686 F. App'x 737, 743 (11th Cir. 2017).

³ Respondent makes a passing reference to its own "mail room procedures" being one of "multiple errors." (Respondent's Opposition and Motion for Relief at p. 6). It provided no further detail.

Failure to Provide Notice

Neither the failure to hold a closing conference nor the mailing of the citation to Respondent provide a basis for finding lack of notice. The Secretary's actions were in conformance with the Act's requirements. To the extent the Secretary failed to follow his own procedures, Respondent has shown no prejudice as a result of that conduct.

Failure to Hold a Closing Conference

Nothing in the Act requires the Secretary or his representative to hold a closing conference. Rather, the requirement is found in the regulation at 29 C.F.R. § 1903.7(e) which reads:

At the conclusion of an inspection, the Compliance Safety and Health Officer shall confer with the employer or his representative and informally advise him of any apparent safety or health violations disclosed by the inspection. During such conference, the employer shall be afforded an opportunity to bring to the attention of the Compliance Safety and Health Officer any pertinent information regarding conditions in the workplace.

In addressing the failure to hold a closing conference, the Commission noted the purpose of the procedural regulation is to "promote the orderly conduct of safety inspections." *Kast Metals Corporation*, 5 BNA OSHC 1861, 1862 (No. 76-657, 1977). The Commission went on to hold

Unless prejudicial, the relaxation or modification of such a procedural regulation does not warrant an invalidation of an agency's action. Moreover, technical and harmless violations of inspection procedures should not be allowed to deter the Act's primary purpose to assure safe and healthful working conditions.

Id. at 1862-63 (citations omitted). To establish entitlement to relief, the employer must show prejudice as a result of the failure to hold a closing conference. *Id.* at 1863.

Respondent argues failure to hold a closing conference is inherently prejudicial. In so arguing, Respondent erroneously relies on the decision of the ALJ in *Kast Metals*. Although finding it harmless error, the Commission overturned the ALJ on the ground "the record fails to establish how [the failure to hold a closing conference] specifically prejudiced the respondent's case." Respondent must show more than the Secretary failed to hold a closing conference, it must show it suffered prejudice as a result.

There is a factual dispute regarding whether CSHO Spencer held a closing conference. CSHO Spencer asserts in his affidavit that he held a closing conference during which he confirmed Respondent's mailing address. His affidavit is silent on when he held the closing

conference and what else, if anything, was discussed. Safety Coordinator Harris has no recollection of a closing conference, but asserts CSHO Spencer told her that he doubted Respondent was in violation of any OSHA standard. It is not necessary to resolve this factual dispute, as I find even if no closing conference were held, Respondent has failed to show prejudice as a result.

Respondent's argument is circular. Respondent contends the evidence of prejudice to its right to contest within the 15-day period is its failure to contest within the 15-day period. Respondent appears to suggest the purpose of the closing conference is to provide the employer with advance notice of the impending citations.⁴ Respondent has provided no authority supporting this view and Commission precedent would suggest the contrary. See *Kast Metal*, 5 BNA OSHC at 1862 (the purpose of the regulation is to "promote the orderly conduct of safety inspections."); and *General Dynamics Corp., Quincy Shipbuilding Div.*, 6 BNA OSHC 1753, 1758-59 (No. 12212, 1978) (recognizing the Secretary's right to continue his inspection after holding a closing conference during which evidence of additional violations may be discovered). The regulation should be read such that it serves the purposes of the Act. So read, the regulation's direction to the Secretary to "informally advise" the employer of "apparent safety and health violations" provides the employer with the opportunity to expeditiously address, and, if appropriate, correct such violations to ensure a safe work environment.

Respondent received the notice of the issuance of a citation required by the Act. Even if the Secretary or his representative's failed to hold a closing conference, that failure does not provide ground for relief.

Failure to Serve Respondent's Counsel

Although it refers only to the penalty, the Commission has consistently held § 10(a) of the Act governs service of citations. *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474 n. 6 (No. 76-2165, 1979). It requires the Secretary to "notify **the employer** by certified mail of the penalty..." (emphasis added). There is no dispute the Secretary served the employer with the citation by certified mail. The Secretary has established, and Respondent does not dispute, the address to which the citation was mailed was the address of the inspection, the mailing address

⁴ In its motion, Respondent contends the Secretary "decided simply to send a certified letter to Respondent without first conducting a closing conference to alert Respondent to the likelihood of any citation..." (Respondent's Opposition and Motion for Relief at p. 8).

provided by Respondent's representatives during the inspection, and Respondent's "Principal Office Address" registered with the Georgia Secretary of State, Corporations Division. The Secretary has met his statutory obligation to notify the employer of the citation and proposed penalty.

Respondent's argument the Secretary was obligated under the Rules of Professional Responsibility of the State of Georgia to contact its counsel is unsupported. Respondent cites specifically to Rule 4.2(a) of the Code of Professional Responsibility which prohibits a "lawyer who is representing a client in a matter" from communicating with a person known to be represented by "another lawyer in the matter." Under the Act, the Secretary is responsible for enforcement of the Act, including issuing citations. The Secretary has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order No. 4-2010 (75 FR 55355), *as superseded in relevant part by* 1-2012 (77 FR 3912). The Assistant Secretary has delegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). Neither the Secretary nor his delegates are lawyers "representing a client." None are bound by Georgia's Code of Professional Responsibility or any other rule or regulation applicable to lawyers.⁵ The Secretary and his delegates are under no obligation to notify an employer's counsel in lieu of the employer. Serving counsel in lieu of the employer would be contrary to a strict reading of the Secretary's statutory obligations under the Act.

Having found no deficiency in the service of the citation, I find no merit to Respondent's contention it was not properly notified of the issuance of the citation.

Excusable Neglect

The determination of excusable neglect pursuant to Rule 60(b)(1) is an equitable one, taking into account of all relevant circumstances surrounding Respondent's failure to file a timely notice of contest, including the danger of prejudice to the Secretary, the length of delay and its potential impact on the judicial proceedings, the reason for the delay and whether Respondent acted in good faith. *Pioneer Investment Servs. v. Brunswick Assoc.*, 507 U.S. 380, 395 (1993); *Secretary of Labor v. Craig Mechanical, Inc.*, 16 BNA OSHC 1763 (No. 92-0372,

⁵ Either Respondent is contending the Secretary and his delegates are lawyers representing a client or the Code of Professional Responsibility of the State of Georgia applies to non-lawyers. Either contention could be fairly characterized as frivolous. Counsel is directed to Rule 3.1(b) of Georgia's Code of Professional Responsibility.

1994); *Merritt Electric Company*, 9 BNA OSHC 2088 (No. 77-3772, 1981); *Henry C. Beck Co.*, 8 BNA OSHC 1395 (No. 11864, 1980). However, neither a lack of prejudice to the Secretary nor good faith on the part of Respondent in attempting to comply with the statutory filing requirement alone will excuse a late filing. *Fitchburg Foundry Inc.*, 7 BNA OSHC 1516 (Nos.77-520 & 76-1073, 1979). The Commission has held that whether the reason for the delay was within the control of the Respondent is a “key factor” in determining the presence of “excusable neglect.” *A. W. Ross, Inc.*, 19 BNA OSHC 1147 (No. 99-0945, 2000).

It well settled the Commission requires an employer to exercise due diligence before it will find excusable neglect. *Keefe Earth Boring Company, Inc.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991); *Craig Mechanical*, 16 BNA OSHC at 1763. The Commission has consistently held “[e]mployers must maintain orderly procedures for handling important documents,” and that when the lack of such procedures results in the untimely filing of a notice of contest, relief under Rule 60(b) is not warranted. *Villa Marina Yacht Harbor, Inc.*, 19 BNS OSHC 2185, 2187 (No. 01-0830, 2003) (company messenger mishandled mail); *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1149 (No. 99-0945, 2000) (employer's president failed to carefully read and act upon information contained in citation); *Montgomery Security Doors & Ornamental Iron, Inc.*, 18 BNA OSHC 2145, 2148 (No. 97-1906, 2000) (record showed a breakdown of business procedures such that relief was not warranted even assuming employee sabotage); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (notice of contest was overlooked due to personnel change in operations manager position). Conspicuously absent from Respondent’s motion is any explanation why the citation was not timely processed by its personnel.

Rather, Respondent engages in finger pointing. It argues its neglect is excusable because it was denied advance notice of the citation and the right to have counsel served with the citation. For the reasons discussed herein, it is entitled to neither. Respondent characterizes both the failure to hold a closing conference and failure to serve counsel with the citation as “errors” by the Secretary. Even if errors, neither excuses Respondent’s failure to process its mail. Once the citation was received by Respondent, it was Respondent’s obligation to ensure it was handled in a timely manner. Respondent has the burden to establish it exercised due diligence. In providing no explanation as to how the citation was processed once in its possession, Respondent has failed to meet its burden.

Respondent's request for relief pursuant to Fed. R. Civ. P. 60(b) is denied.

ORDER

Based upon the foregoing decision, it is **HEREBY ORDERED** that the Secretary's *Motion to Dismiss Respondent's Late Notice of Contest* is **GRANTED**. Respondent's *Motion for Relief Under FRCP 60(b)* is **DENIED**.

It is further **ORDERED** that the notice of contest filed in this case is **DISMISSED** and the Citation and Notification of Penalty is **AFFIRMED** in all respects.

SO ORDERED.

/s/ _____

Date: **June 6, 2018**

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