

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

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 01-1454
	:	
PRONTO CONSTRUCTION CO., INC.,	:	
	:	
Respondent.	:	
	:	

Appearances:

Jeffrey S. Rogoff, Esquire
New York, New York
For the Complainant.

Michael P. Tempesta, Esquire
Staten Island, New York
Lewis H. Fishlin, 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”), for the purpose of determining whether the Secretary’s motion to dismiss Respondent’s request to file its notice of contest (“NOC”) out of time should be granted.

On June 19, 2001, the Occupational Safety and Health Administration (“OSHA”) inspected a work site on Staten Island, New York, where Respondent Pronto Construction (“Respondent” or “Pronto”) was performing construction work. As a result, OSHA issued Respondent a citation and notification of penalty alleging serious and willful 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 NOC results in the citation and penalty becoming a final judgment of the Commission by operation of law. OSHA determined that the NOC filing period in this case ended on July 18, 2001. Pronto failed to file an NOC by that date, but, on August 1, 2001,

it filed a letter with the Commission requesting, in essence, that it be permitted to file an NOC out of time. On August 21, 2001, the Secretary filed a motion to dismiss the request. A hearing was held on January 30, 2002, in New York, New York. Both parties have filed post-hearing briefs.

Factual Background

The record shows that OSHA first inspected the subject site on April 26, 2001, and, as a consequence, issued to Pronto a citation and notification of penalty on May 8, 2001.¹ On May 29, 2001, Pronto's president, Mensur Dika, met with Richard Torre, the OSHA assistant area director ("AAD"), in an attempt to settle the citation, but Mr. Dika believed the penalty was too high and no settlement occurred. The AAD told Mr. Dika he would need to see his tax returns for the prior three years before he could further reduce the penalty, and Mr. Dika agreed to drop them off; before Mr. Dika left his office, the AAD told him that if he wished to contest the citation, he would need to do so by June 4, 2001. After receiving the returns, the AAD called Mr. Dika on June 1, 2001, to advise him that one year was missing; he also advised him, again, that if he wanted to contest the citation he should do so by June 4, after which they could continue to discuss settlement. On June 4, 2001, Mr. Dika sent OSHA his NOC letter, which contested only the penalty. (Tr. 7-12; 29; 64-65; C-1-2).

On June 19, 2001, the OSHA compliance officer ("CO") who had conducted the initial inspection called AAD Torre to tell him that, on his way to another site, he had gone by the subject site and observed safety hazards similar to those he had seen during his first inspection. The AAD directed the CO to inspect the site again, and two days later, on May 21, 2001, the AAD further directed the CO to contact Mr. Dika and ask him to come into his office to continue their settlement discussions. On the afternoon of May 21, 2001, Michael Tempesta called the AAD and identified himself as Mr. Dika's attorney. Mr. Tempesta asked why he wanted to see his client, and the AAD explained that they were still trying to settle the first citation. Mr. Tempesta also asked why his client had been inspected again, and the AAD explained why and the fact that a second citation would be issued.² Mr. Tempesta and the AAD set up a meeting for June 26, 2001. (Tr. 12-17; 37-39; 47-51).

¹The initial citation, which alleged serious and "other" violations, was sent to Respondent's business address by certified mail, return receipt requested. (Tr. 9-10; C-1).

²Although the citation states on its face that it was issued on June 19, 2001, it had not yet
(continued...)

The June 26 meeting was held in the OSHA area office. Mr. Tempesta and Mr. Dika were present, as were AAD Torre, the CO who had inspected the site, and Robert Kulick, the OSHA area director (“AD”). AD Kulick said there were two citations to discuss, and, when he asked if they wanted to combine them or settle them individually, Mr. Tempesta and Mr. Dika stated they wanted to combine them. AD Kulick then said he had the citation from the second inspection and handed an envelope to Mr. Tempesta, who opened it and began reviewing the citation with Mr. Dika. The AD told Mr. Tempesta and Mr. Dika that they had 15 working days to have an informal conference or settle the citation and that otherwise they would need to file a written NOC by June 17, 2001.³ Mr. Tempesta and Mr. Dika informed the OSHA officials that the penalty was too high, and the meeting concluded with no settlement taking place.⁴ However, before they left, AD Kulick again told Mr. Tempesta and Mr. Dika that they had 15 working days to contest the citation. He also said that they should get back to him with an offer. (Tr. 16-22; 28-30; 39-41; 49-53; 65-66; C-3).

AAD Torre was out of the office the first three weeks of July 2001, due to business meetings and a vacation. When he returned on July 23, 2001, the Pronto files were on his desk, and, having many matters to attend to and not being aware that the NOC filing period was over, he called Mr. Tempesta to continue to attempt a settlement. The AAD made an offer to Mr. Tempesta that day on the phone, and Mr. Tempesta said he would get back to him. On July 30, 2001, Mr. Tempesta called the AAD and rejected the offer but made a counteroffer. On July 31, 2001, AAD Torre realized the second citation had become a final order, and he called Mr. Tempesta to advise him of that fact. Mr. Tempesta became very irate, pointing out that they had been negotiating. The AAD apologized and explained that he had been away for three weeks and hadn’t realized that the NOC filing deadline had ended; he noted, however, that Pronto had been told about the contest period and had not filed

²(...continued)
been delivered to Respondent when the AAD spoke to Mr. Tempesta on June 21. (Tr. 13-17; C-3).

³AAD Torre testified that the actual filing deadline was July 18, 2001, and that AD Kulick had failed to take into account the July 4 holiday when he provided the July 17 date. (Tr. 21-22).

⁴The first citation ultimately settled. (Tr. 43).

an NOC by the required date. On August 1, 2001, Mr. Tempesta sent a letter to the Commission asking that Pronto be allowed to file its NOC. (Tr. 23-27; 30-33; 44; 54-58; C-5).

Discussion

There is no dispute that Respondent Pronto failed to file a timely NOC with respect to the second citation. Commission precedent is well settled that an otherwise untimely NOC may be accepted where the delay in filing was caused by deception on the Secretary's part or her failure to follow proper procedures. An employer is also entitled to relief if it can show that 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 Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No.80-1920, 1981). *See also* Fed. R. Civ. P. 60(b). In support of its request that it be allowed to file an NOC out of time, Pronto contends that OSHA's serving the citation by hand at the June 26, 2001 meeting was improper, making the service invalid. Pronto also contends that misleading statements by OSHA officials vitiated the 15-day filing requirement.

As Respondent asserts, section 10(a) of the Act states that the Secretary, when issuing a citation to an employer, "shall ... notify the employer by certified mail of the penalty." However, as the Secretary notes, the Commission has found personal service acceptable, stating as follows:

[I]f an employer receives actual notice of a citation, it is immaterial to the exercise of the Commission's jurisdiction that the manner in which the citation was sent was not technically perfect.

General Dynamics Corp., Elec. Boat Div., 15 BNA OSHC 2122, 2126 (No. 87-1195, 1993), (quoting *P&Z Co.*, 7 BNA OSHC 1589, 1591 (No. 14822, 1979).

It is clear from the record that Pronto received actual notice of the citation. AAD Torre testified that at the meeting on June 26, 2001, AD Kulick handed an envelope containing the citation to Mr. Tempesta, who opened it and began reviewing the citation with Mr. Dika, his client. (Tr. 18). Mr. Tempesta also testified in this regard, and he agreed that he had received the citation and reviewed it with Mr. Dika at the meeting. (Tr. 40; 52-53). On the basis of the record and the foregoing Commission precedent, Pronto's first contention is rejected.

As to its second contention, Respondent asserts that AAD Torre misled Mr. Tempesta into believing that the continuing settlement negotiations extended the NOC period, that the AAD had

a duty to advise Mr. Tempesta that the NOC period was going to expire, and that these circumstances vitiated the 15-day filing requirement. I disagree. While it is clear the AAD's phone conversations with Mr. Tempesta on July 23 and July 30 fostered the latter's belief that the NOC filing period was not yet over, it is equally clear that the AAD in no way intended to mislead or deceive Mr. Tempesta. However, that the AAD and Mr. Tempesta discussed settlement on July 23 and July 30 is simply not material. The NOC filing period ended on July 18, 2001, five days before the AAD's first call to Mr. Tempesta. Further, AD Kulick advised Mr. Tempesta and Mr. Dika of the filing deadline twice during the June 26 meeting, and there is no evidence of any other conversations between OSHA and Pronto before the deadline.⁵ (Tr. 18; 21-22; 28-29). Mr. Tempesta first testified he had called the AAD sometime before July 23 and the AAD had not called him back, but he then conceded he had no record of such a call and was unsure if he had done so.⁶ (Tr. 56-59). Regardless, the Commission has held that an OSHA official's failure to call an employer back, standing alone, does not justify a late-filed NOC. See *CalHar Constr., Inc.*, 18 BNA OSHC 2151 (No. 98-367, 2000); *Craig Mech., Inc.*, 16 BNA OSHC 1763 (No. 92-372, 1994). Pronto's second contention is rejected.

The final issue to resolve is whether Respondent's failure to file a timely NOC was due to "excusable neglect." The Commission has held that a key factor in determining if the delay in filing was due to excusable neglect is "the reason for the delay, including whether it was within the reasonable control of the movant." See *CalHar Constr., Inc.*, 18 BNA OSHC 2151 at 2153, and cases cited therein. The Commission has also held that the OSHA citation plainly 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). Finally, the Commission has held that ignorance of procedural rules does not constitute "excusable neglect" and that mere carelessness or negligence

⁵Although the July 17, 2001 date that AD Kulick gave them was incorrect, this fact would be material only if the date provided had been later than the actual filing date.

⁶The AAD said it was possible he had a message on his voice mail from Mr. Tempesta when he got back to the office, but he could not recall if this was actually the case. (Tr. 36-37)

does not justify relief.⁷ *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).

As the Secretary notes, the citation itself stated the requirement to file an NOC within 15 working days after receipt; the citation also stated that the “running of this contest period is not interrupted by an informal contest.” *See* C-3, p. 2. As the Secretary further notes, the “OSHA 3000” informational pamphlet provided with the citation contained similar language. *See* C-4, pp. 9-11. However, Mr. Tempesta admitted he had only “skimmed” the citation after the June 26 meeting and that he had probably not read the OSHA 3000 pamphlet until after the AAD told him that the filing period had expired. (Tr. 44; 53-55). In addition, the record shows that Mr. Tempesta and Mr. Dika were advised twice at the June 26 meeting of the NOC filing date, but that, despite these warnings, no NOC was submitted. (Tr. 18; 21-22; 28-29). Finally, the record shows that Mr. Dika was aware of the NOC filing requirement due to his experience with the first citation. (Tr. 28-29; 65).

In view of the facts of this case and the Commission precedent set out above, I conclude that Respondent’s failure to file an NOC was not due to “excusable neglect” or “any other reason justifying [Rule 60(b)] relief.” I have considered the fact that Pronto is a small company and that the penalties proposed for the second citation are not insubstantial; I have also considered the fact that Mr. Tempesta was representing Mr. Dika on a pro bono basis because of their friendship and that Mr. Tempesta had no prior experience in OSHA matters. (Tr. 38-43). I am sympathetic to Respondent’s plight, but I am constrained to base my decision on the record and the Commission precedent noted *supra*. Accordingly, the Secretary’s motion to dismiss is GRANTED, and the citation and notification of penalty is AFFIRMED in all respects. So ORDERED.

/s/

Irving Sommer
Chief Judge

Dated: 25 MAR 2002
Washington, D.C.

⁷Attorney negligence likewise is no excuse, as employers are bound by the acts and/or omissions of their chosen counsel. *Byrd Produce Co.*, 16 BNA OSHC 1268 (Nos. 91-823-24, 1993).