

SECRETARY OF LABOR,

Complainant,

v.

AGGRECON CONCRETE, INC., and its
successors,

Respondent.

OSHRC DOCKET NO. 00-1631

APPEARANCES:

For the Complainant:

Susan M. Meyercord, Esq., Raquel Tamez, Esq., Office of the Solicitor, U.S. Department of
Labor, Dallas, Texas

For the Respondent:

Alberto Closner, President, Aggrecon Concrete, Inc., Mission, Texas

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Aggrecon Concrete, Inc., and its successors (Aggrecon), at all times relevant to this action maintained a place of business at the Colonia Nueva Water Distribution and Wastewater Collection Systems project in Donna, Texas, where it was engaged in the installation of sewer and water lines (Tr. 40). Because construction is in a class of activity which as a whole affects interstate commerce, *see, Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983), Aggrecon is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On April 18, 2000 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Aggrecon's Donna work site. As a result of that inspection, on May 17, 1999, OSHA issued citations to Aggrecon alleging violations of the Act together with proposed penalties. It is undisputed that Aggrecon received the OSHA citation on May 19, 2000, but did not file a notice of

contest to the citations until August 24, 2000. A citation that is not contested within 15 days of its receipt automatically becomes a final order of the Commission pursuant to §10(a) of the Act.

The Commission has held that it is without jurisdiction to set aside a final order arising out of a late notice of contest except in limited circumstances. A party seeking relief from such a final order may obtain Commission review by filing a motion for relief from judgment or order under Fed. R. Civ. P. 60(b). Complainant has moved to dismiss Aggrecon's late notice of contest and to affirm the final order in this matter. Aggrecon's response to Complainant's motion to dismiss, filed *pro se*, was deemed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) (Exh. C-7). A 60(b) hearing was held on January 29, 2000, in McAllen, Texas. Having reviewed the transcript of those proceedings and the relevant cases and authorities, this judge has determined that briefs are unnecessary in this case. The above-captioned matter is, therefore, ready for disposition.

Facts

John A. Giefer, OSHA's area director, testified that the citation May 17, 2000 citation, along with a cover letter explaining the employer's rights and obligations was sent to Aggrecon by certified mail (Tr. 19-20; Exh. C-1). The certified receipt of service was signed by Alberto Closner, Aggrecon's president, on May 19, 2000 (Tr. 22).

Mr. Closner was not unfamiliar with OSHA procedures, having made some inquiries following OSHA's inspection of Aggrecon's Donna work site (Tr. 57). Closner admitted that he received and signed for the citations (Tr. 44). Closner realized that the certified letter came from OSHA, and recognized that it was an important government document (Tr. 58-59). Nonetheless, Closner maintained, he did not open the citation. Instead, he placed the unopened envelope, along with the rest of the May 17, 2000 mail, into a bag to be moved to Aggrecon's new offices. Aggrecon was in the process of relocating from Mercedes to Mission, Texas (Tr. 44, 48, 58). Closner could not explain what happened to the citations once the mail was unpacked in Mission. He believed that his office manager, Blanca Munoz, would have acted on the citations had she received them (Tr. 45, 51). Closner testified that he did not realize Aggrecon had received the OSHA citations until he received a past due notice from OSHA's Corpus Christi office on August 7, 2000 (Tr. 47-51; Exh. C-3, C-4).

Area Director Giefer testified that Aggrecon contacted his office on August 11, 2000. In response to their request, Giefer's office faxed copies of the original citation and penalties to Aggrecon (Tr. 25-26), resulting in Aggrecon's late notice of contest (Tr. 26-27).

Discussion

Rule 60(b) allows for such relief in cases of “mistake, inadvertence, surprise, or excusable neglect.” In *Pioneer Investment Serv. v. Brunswick Assoc. Lim. Part.*, 507 U.S. 380 (1993), the Supreme Court held that the determination of whether a party’s neglect of a filing deadline is excusable is an equitable one. The Court found that the factors to be considered included:

the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395 [footnote omitted].

There is no evidence that Aggregate’s two month delay in filing its notice of contest either impacted the Commission’s judicial proceedings, or prejudiced the Secretary in the preparation of her case. However, as Commissioner Weisberg acknowledged in *CalHar Construction, Inc.*, 18 BNA OSHC 2151, 2000 CCH OSHD ¶32,081 (98-0367, 2000), it is unlikely that a late filing would ever either adversely affect the efficient administration of Commission proceedings, or prejudice the Secretary in her preparation of her case. *Id.*, at fn. 5. The Commission’s resolution of 60(b) motions, therefore, focuses almost entirely on the reason for the delay in filing. *Id.*; see also, *Montgomery Security Doors & Ornamental Iron, Inc.*, 18 BNA OSHC 2145, 2000 CCH OSHD ¶32,082 (No. 97-1906, 2000).¹

In his dissent to the full Commission’s decision in *CalHar*, *supra*, Commissioner Visscher opined that the Commission should effectuate its stated policy of providing employers with a full hearing on the merits of alleged OSHA violations. This judge has favored such a policy for some time. In fact, it is my belief that Commission precedent should be modified, prospectively, to allow 60(b) relief to employers filing a late notice of contest whenever such late notice did not arise from the employer’s willful noncompliance with procedural rules and did not result in actual prejudice to the Secretary’s development and/or presentation of her case. Such a rule would strike a clear balance between the need for finality and the employer’s right to be heard on the merits of its contest. The Commission would thus be giving full consideration to the competing interests involved while adopting a test that is both practical and fair to all the parties.

Having said that, the Commission has repeatedly held that mere negligence, *i.e.* a lack of care or ignorance of procedural rules, does not constitute excusable neglect, and cannot serve as a basis for vacating a final order. As noted by the Commission, a business must maintain orderly

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procedures for handling important documents. *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 1989 CCH OSHD ¶28,409 (No. 86-1266, 1989); *Craig Mechanical*, 16 BNA OSHC 1763, 1993-95 CCH OSHD ¶30,442 (No. 92-0372-S, 1994); *see, Northwest Conduit Corp.* 18 BNA OSHC 1948, 1999 CCH OSHD ¶ (No. 97-851, 1999)[relief granted where week long delay resulted from attorney/client mis-communication rather than lack of diligence, or inadequate business procedures]. When the reason for an employer's delay in filing a notice of contest is due solely to poor business practices entirely within the employer's control, no relief is merited. *CalHar Construction, Inc., supra.*

The burden is on the employer to show sufficient basis for relief under rule 60(b). *Branciforte Builders Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). *Keefe Earth Boring Company, Inc.*, 14 BNA OSHC 2187, 1991-93 CCH OSHD ¶29,277 (No. 88-2521, 1991). The evidence establishes that Aggrecon's failure to file its notice of contest in a timely manner resulted from of Closner's lack of diligence in following up on his receipt of important government documents. Closner, Aggrecon's president, was aware of OSHA's inspection of his Donna work site. After that inspection, Closner signed for a certified package from OSHA, yet he did not bother to open it or inquire as to its contents. This judge cannot find that Aggrecon's neglect was "excusable" as the Commission has defined that term.

No relief is available to Aggrecon under Rule 60(b), and Complainant's motion to dismiss Aggrecon's notice of contest is GRANTED.

ORDER

Complainant's motion to dismiss Aggrecon's late notice of contest is granted, and the May 17, 2000 citation is affirmed as a final order of the Commission.

/s/

Stanley M. Schwartz
Judge, OSHRC

Dated: March 16, 2001