

The Testimony

Maureen Smith, the OSHA compliance officer (“CO”) who conducted the inspection, testified that when she arrived at the site she saw two individuals working without fall protection on the pitched roof of a building that was being converted into a residence; one identified himself as Victor Vega, and both said they worked for L & D Construction. CO Smith further testified that when Leon Taylor arrived at the site, she told him why she was there and about the violations she had seen; he said he was the owner of L & D, and she did not recall him stating that the employees were not his or that he was not getting paid for his work. However, she indicated that the individuals she spoke to had said something about working for a friend and a church; she also indicated that their statements had conflicted with Taylor’s and that she had not known who to believe. (Tr. 32-39; 42).

Leon Taylor testified that although he did carpentry and masonry work and had been in business since 1996, he had always worked by himself, he had never had any employees, and he was not getting paid for his work at the site.¹ Taylor explained that Justin Lambert, a friend and a member of his church, bought the building to convert it into his personal residence and that he (Taylor) was working on the house one or two days a week on a voluntary basis; he further explained that Lambert also had other individuals working on the house and that while he knew Lambert’s son and Victor Vega, who also belonged to the church, he did not really know the others. Taylor said neither Vega nor anyone else at the site worked for him and that he had so informed the OSHA representative, who was there when he arrived. Taylor also said that upon receiving the citation, he went to Lambert, who told him he would take care of it; he went back to Lambert after getting a demand letter for the penalties that were due, and Lambert again told him he would take care of it.² (Tr. 23-31; 40-43).

Discussion

The record plainly shows that no notice of contest was filed in this matter until after the 15-day contest period had ended. An otherwise untimely notice of contest may be accepted where the

¹Although this case was initially captioned as “L & D Construction, Inc.,” Taylor testified that his company was a “full proprietorship” and was not incorporated. (Tr. 24). As his testimony was not rebutted, the caption set out above reflects the name Taylor indicated.

²Lambert’s action to “take care of” this matter, apparently, was to send in the notice of contest letter, which, while consistent with Taylor’s testimony, was unsigned.

Secretary's deception or failure to follow proper procedures caused the delay in filing. An employer is also entitled to relief if it shows 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* Fed. R. Civ. P. 60(b); *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no evidence and no contention that the Secretary was deceptive or failed to follow proper procedures in this matter. However, the testimony of Leon Taylor is construed to be a request that the late filing be excused under the circumstances.

It is clear Leon Taylor received the citation in this case, and the Commission has held that OSHA citations plainly state the requirement to file a notice of contest 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 also held that Rule 60(b) cannot be invoked "to give relief to a party who has chosen a course of action which in retrospect appears unfortunate or where error or miscalculation is traceable really to a lack of care." *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). Regardless, on the facts of this case, I conclude that the late filing was due to excusable neglect.

Under other circumstances, Leon Taylor's failure to file a timely notice of contest and his reliance on Lambert to "take care of" the citation would not constitute excusable neglect. However, after considering the testimony of Taylor and the CO, I find that Taylor had no employees at the site. I observed Taylor's demeanor as he testified and found his statements to be consistent, convincing and credible. Although the CO's testimony was also sincere, she herself indicated that she recalled the individuals she spoke to saying something about working for a friend and a church; I also note her testimony that she was not sure who to believe and that she "figured it would get sorted out at one time or another." (Tr. 37; 42). In light of this testimony, I conclude that the workers misunderstood her or that she misunderstood them and that when she later spoke to Taylor she was already operating under the assumption that he was their employer. In my opinion, these circumstances, together with Lambert's assurances that he would resolve the citation and the fact

that this was Taylor's first experience with OSHA, excuse Taylor's not filing a notice of contest within the statutory period and justify Rule 60(b) relief. (Tr. 25).

For the foregoing reasons, the Secretary's motion to dismiss Respondent's notice of contest is DENIED, and the citation and notification of penalty is VACATED in its entirety.

So ORDERED.

Irving Sommer
Chief Judge

Date: 16 DEC 1999