

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, :
 :
 Complainant, :
 :
 v. :
 :
 YANNUZZI, INC., :
 :
 Respondent. :

OSHRC DOCKET NO. 99-0237

APPEARANCES:

Troy E. Leitzel, Esquire
Philadelphia, Pennsylvania
For the Complainant.

Dominic Yannuzzi
Hazleton, Pennsylvania
For the Respondent, *pro se.*

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 sole purpose of determining whether the Secretary’s motion to dismiss Respondent’s notice of contest as untimely should be granted.

Background

The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a work site of Respondent, located in Hazleton, Pennsylvania, on May 27, 1998. As a result of the inspection, OSHA issued Respondent a citation and notification of penalty alleging serious 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 days of receiving it, and the failure to file a timely notice of contest results in the citation and penalty becoming a final judgment of the Commission by operation of law. The record shows that OSHA sent the citation to Respondent by certified mail, that Respondent received the citation on June 4, 1998, and that the 15-day notice of contest period expired on June 25, 1998. The

record also shows that Respondent did not reply to the citation in writing until August 7, 1998, and that it sent two additional letters to OSHA, one on October 16, 1998, and another on January 11, 1999.¹ Finally, the record shows that on January 28, 1999, Respondent sent a letter to the Commission stating that the citation was “without merit” and asking that its letter be considered a “late notice of contest.” The Secretary filed her motion to dismiss Respondent’s notice of contest as untimely on February 24, 1999.

Discussion

The record plainly shows that Respondent did not file its notice of contest until well after the 15-day contest period had already ended. An otherwise untimely notice of contest may be accepted where the Secretary’s deception or failure to follow proper procedures caused the delay in filing. An employer is also entitled to relief if it shows 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 which 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 case. There is also no evidence or contention that the failure to file a timely notice of contest was due to excusable neglect or “any other reason justifying relief,” and, for the reasons that follow, Rule 60(b) relief must be denied.

The citation issued to Respondent, and the cover letter accompanying it, explain the 15-day contest period. The cover letter states, in the first paragraph on page 1, as follows:

You must abate the violations referred to in this Citation by the dates listed and pay the penalties proposed, unless within 15 working days ... from your receipt of this Citation and Notification of Penalty you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above. Please refer to the enclosed booklet (OSHA 3000) which outlines your rights and responsibilities and which should be read in conjunction with this form.

The cover letter also states, on page 2, as follows:

Right to Contest - You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates without contesting the underlying

¹All three of these letters disputed the issuance of the citation and notification of penalty.

violations. **Unless you inform the Area Director in writing that you intend to contest the citation(s) and/or proposed penalty(ies) within 15 working days after receipt, the citation(s) and the proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.**

The Commission has held that the OSHA citation “plainly state(s) the requirement to file a notice of contest within the prescribed time period.” *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). The Commission has also held that Rule 60(b), noted *supra*, 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.” *Id.* Finally, the Commission has held that a business must have orderly procedures for the handling of important documents and has denied Rule 60(b) relief where the employer asserted that the late filing was caused by events such as a change in management, the improper handling of the citation by company personnel, and the absence, even when due to illness, of the person responsible for OSHA matters. *See Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989); *J.F. Shea Co.*, 15 BNA OSHC 1092, 1094 (No. 89-976, 1991); *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460).

As indicated above, all of Respondent’s correspondence in this matter disputes the issuance of the citation and notification of penalty. However, none of that correspondence sets forth any basis whatsoever for relief from the consequences of having filed an untimely notice of contest. Although I have noted Respondent’s concerns, I am constrained by the circumstances in this case and the foregoing Commission precedent to conclude that Respondent is not entitled to Rule 60(b) relief. The Secretary’s motion to dismiss is consequently GRANTED, the notice of contest is DISMISSED, and the citation and notification of penalty is AFFIRMED in all respects. So ORDERED.

Irving Sommer
Chief Judge

Date: