

SECRETARY OF LABOR,

Complainant,

v.

HIGH END SYSTEMS, INC.,

Respondent.

OSHRC DOCKET NO. 98-0988

DECISION AND ORDER

This matter comes up on Complainant's July 30, 1998 motion to dismiss Respondent's, High End Systems, Inc. (High End) notice of contest. On August 4, 1998, this judge issued an order, directing High End to show good cause why Complainant's motion should not be granted. On August 6, 1998, High End filed a response, admitting that its notice of contest was untimely filed, and asking that the untimely filing be excused.

Section 10(a) of the Occupational Safety and Health Act, 29 U.S.C. §659(a) provides:

If, within 15 working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation. . . the citation and the [penalty] assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

The citation issued in this matter, therefore, has become a final order of the Commission. The Commission may set aside such final order, however, under Fed. R. Civ. P. 60(b) in cases where the employer demonstrates that the failure to file the notice of contest in a timely manner was due to excusable neglect. *Craig Mechanical, Inc.*, 16 BNA OSHC 1763, 1994 CCH OSHD ¶30,442 (No. 92-0372-S, 1994).

Viewing the facts in the light most favorable to High End, Respondent fails to make the requisite showing.

Facts

On April 16, 1998, High End Systems, Inc., engaged a safety consultant, Double D Safety Enterprises, LLC (Double D), to represent its interests in an OSHA inspection which took place on that date. On May 12, 1998, Double D received a copy of the OSHA Citation and Notification of Penalty. Double D advised High End to contest the citations. Double D made High End aware of the deadline to file a notice of contest, June 3, 1998. High End approved the contest, calling Double D and asking what had been done in their behalf. Double D prepared the notice of contest, which it submitted to High End for review and approval on June 1. On that same date, High End notified OSHA that Double D would be

representing it in this matter. On June 10, Double D and High End discovered that the notice of contest had never been sent.

Discussion

Double D implies that it did not realize it was authorized to proceed in High End's behalf, and/or that it believed High End itself would file the notice of contest prepared by Double D. Double D suggests that its failure to file the notice of contest, or otherwise pursue the matter was, therefore, excusable. This judge does not agree. Double D was engaged to represent High End from the time the OSHA investigation was instigated. High End asked Double D to pursue the matter; Double D actually prepared the notice. Having been entrusted with the OSHA matter, Double D was obliged to ensure the June 3 deadline was met. Double D's lack of diligence in ensuring that the notice of contest was timely filed amounts to simple neglect, and so is not excusable under Rule 60(b).

The Commission has adopted the position that employers must be held accountable for the acts and omissions of their chosen counsel. *Byrd Produce Co.*, 16 BNA OSHC 1268, 1993 CCH OSHD ¶30,139 (No. 91-0823, 1993). No relief, therefore, is available to High End.

ORDER

The Citation and Notification of Penalty are AFFIRMED as a final order of the Commission. No relief under Rule F. Civ. P. 60(b) is available.

James H. Barkley
Judge, OSHRC

Dated: