

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.	:	OSHRC DOCKET NO. 99-1197
	:	
AMERICAN TOWER, LLC,	:	
	:	
Respondent.	:	

Appearances:

John S. Ho, Esquire
New York, New York
For the Secretary.

Kevin J. Conyngham, Esquire
Saddle Brook, New Jersey
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 notice of contest as untimely should be granted.

On February 18, 1999, the Occupational Safety and Health Administration (“OSHA”) inspected a site in Verona, New Jersey, where Respondent had erected a radio tower for the Township of Verona.¹ 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 working 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 mailed the citation

¹Although Respondent had finished erecting the tower several months before, OSHA conducted its inspection due to a complaint about an injury that had occurred on the job.

by certified mail, that Respondent received it on February 26, 1999, and that the notice of contest period ended on March 19, 1999. The record also shows that Respondent did not file a notice of contest until July 7, 1999.² The Secretary filed her motion to dismiss on September 1, 1999, and the hearing in this matter was held in New York, New York on January 11, 2000. The parties have filed post-hearing submissions setting out their respective positions.

Discussion

The record plainly shows that Respondent did not file its notice of contest until after the 15-day contest period had 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 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. Respondent contends, rather, that the late filing should be deemed excusable neglect under the circumstances.

John Rhodes, the OSHA compliance officer ("CO") who inspected the site, appeared and testified at the hearing. He said he held the opening and closing conferences during a single phone conversation on February 24, 1999, with Charles Simone, the owner of Tower Construction; he also said that after identifying himself and discussing the matter, he advised Simone that a citation would be issued and that if he wanted to contest it he would need to file a notice of contest in writing within 15 working days of receiving it.³ The CO noted that Simone was unhappy about the citation and disagreed with it, but he did not recall Simone stating that he contested it. (Tr. 26-32; 36-39; 66).

²Respondent's counsel sent an identical notice of contest letter to the Commission by Federal Express on April 8, 1999, but the letter was returned as undeliverable, evidently due to the fact that OSHA had provided an incorrect address for the Commission. However, it is clear from the record that no representative of Respondent contacted OSHA or filed a notice of contest at any time during the 15-day contest period. (Tr. 15-18; 24; 28-29; 55-56; 61-62).

³The record shows that while the CO had inspected the site on February 18, 1999, he had not been able to reach the employer until February 24, 1999. (Tr. 20-22).

Charles Simone also appeared and testified at the hearing. According to his testimony, he told the CO during their February 24 phone conversation that he disagreed with the citation, that he was contesting it, and that he would seek counsel in that regard. Simone initially indicated that the CO had not informed him that the notice of contest had to be in writing, but he later conceded that the CO had in fact advised him that this was the case. Simone also indicated that he had told Wendy Kanarr, the company's CEO, that he had contested the citation and that she should seek legal counsel in the matter; he stated that Kanarr would have been responsible for sending in the notice of contest, but he noted that in view of what he told her she had probably believed he had already filed one. Simone said he had owned his company for five years but that it was a small business and he had never been cited by OSHA before; he also said that he had read the citation when he received it, including the "Right to Contest" paragraph, and then given it to Kanarr. (Tr. 40-63).

The citation issued to Respondent explains the 15-day contest period, in the first paragraph on the first page, 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 citation further explains the contest period, 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 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.**

Besides the citation itself, the OSHA 3000 pamphlet that was mailed along with the citation reiterates the filing requirement. (Tr. 11-13). Specifically, in the first paragraph on page 11 (entitled "How Do You Contest Citations?"), the pamphlet states that:

If you wish to contest any portion of your citation, a Notice of Intent to Contest must be submitted in writing within 15 working days after receipt of the Citation and Notification of Penalty even if you have orally stated your disagreement with a

citation, penalty, or abatement date during a telephone conversation or an Informal Conference.

The Commission has held that the OSHA citation plainly states 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 ignorance of procedural rules does not constitute “excusable neglect” and that mere carelessness or negligence, even by a layman, does not justify relief. *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). Finally, the Commission has 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).

On the basis of the record and the foregoing Commission precedent, the untimely filing of the notice of contest in this case was not a result of excusable neglect. The CO testified that he advised Simone that the notice of contest had to be in writing, and Simone conceded this was the case; Simone also conceded that he had read the citation, which, as noted above, “plainly states the requirement to file a notice of contest within the prescribed period.” (Tr. 27-29; 38-39; 49-52; 58). In addition, Simone’s testimony indicates that he passed the citation on to Kanarr, who, as the company’s CEO, was responsible for such matters. (Tr. 42; 50-51; 59-63). In view of the evidence, it is my conclusion that the late filing of the notice of contest was due to the failure of both Simone and Kanarr to carefully read and act upon the information in the citation; Simone and Kanarr also apparently failed to read the OSHA 3000 pamphlet that was included with the citation. In so concluding, I have considered *Merritt Elec. Co.*, 9 BNA OSHC 2088 (No. 77-3772, 1981), the case cited by Respondent. However, the late-filed contest in that case was deemed timely because of misleading remarks made by an OSHA official in regard to the filing requirement, which did not occur here. I have also noted that Respondent is a small company, that this was its first experience with OSHA, and that when it became aware that no notice of contest had been filed it attempted to submit one on April 8, 1999, as discussed above. (Tr. 51; 62-64). Although I am sympathetic to

Respondent's plight, I am constrained by the circumstances of this case and the Commission precedent set out *supra* to find that Respondent is not entitled to relief pursuant to Rule 60(b). The Secretary's motion to dismiss is accordingly GRANTED, Respondent's notice of contest is DISMISSED, and the citation and notification of penalty is AFFIRMED in all respects.

So ORDERED.

/s/

Irving Sommer
Chief Judge

Date: 20 MAR 2000