



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. :

EXTERIOR ERECTING SYSTEMS, INC., :

Respondent. :

OSHRC DOCKET NO. 97-2063

APPEARANCES:

Susan B. Jacobs, Esquire
 New York, New York
 For the Complainant.

Anthony J. Tyse
 Burlington, New Jersey
 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”), to determine whether Respondent filed a timely notice of contest of a citation and notification of penalty issued by the Occupational Safety and Health Administration (“OSHA”). The Secretary filed a motion to dismiss the notice of contest, and the hearing in this matter was held on March 25, 1998. Neither party has filed a post-hearing brief.

Background

The citation setting forth the alleged violation and the proposed penalty was issued to Respondent on August 29, 1997. Pursuant to section 10(a) of the Act, Respondent was required to notify OSHA of its intent to contest the citation within 15 working days of its receipt of the citation, and failure to file a timely notice of contest would result in the citation and proposed penalty becoming a final judgment of the Commission by operation of law. It is undisputed that OSHA mailed the citation by certified mail, that Respondent received the citation on September 2, 1997, and

that the 15-day notice of contest period ended on September 23, 1997. It is also undisputed that Respondent did not file a notice of contest until November 13, 1997, after receiving a letter from OSHA on November 4, 1997, advising that the penalty as reflected in the citation was past due. Respondent requested a hearing before the Commission in a letter dated December 8, 1997.

Discussion

The record plainly shows that Respondent did not provide notice of its intent to contest the citation and proposed penalty until after the expiration of the 15-working-day period. The issue to be resolved in this case is whether the untimely filing may be excused under the circumstances. An otherwise untimely notice of contest may be accepted where the delay in filing was caused by deception on the part of the Secretary or by the Secretary's failure to follow proper procedures. An employer is also entitled to relief under Federal Rule of Civil Procedure (60)(b)(1) if it establishes that the Commission's final order was entered as a result of "mistake, inadvertence, surprise, or excusable neglect," or under Federal Rule of Civil Procedure (60)(b)(6) for "any other reason justifying relief," including mitigating circumstances such as absence, illness, or a disability which would prevent a party from protecting its interests. *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no contention and no evidence that the Secretary has acted improperly in this matter. Based on the record, Respondent's contention would appear to be that the untimely filing should be excused because of the illness of its secretary, the person who signed for the citation.

Anthony Tysenn, Respondent's vice-president, testified that his company was two and a half years old, that it had 20 full-time employees, and that its office staff included a secretary, an estimator, an overhead door employee, and himself; he further testified that Carol Goldenbaum, the secretary, handled payroll, accounting and incoming matters, and that she left the office after signing for the citation on September 2, 1997, due to serious illness and was out of the office for two months. Tysenn said that Goldenbaum's main job was payroll, that her absence resulted in the other office staff performing that function, and that while the items on her desk were reviewed there were a number of matters that "fell to the wayside until she returned." He also said that Robert Dunlap, the company president, went through the items on Goldenbaum's desk after receiving the November 4, 1997, letter from OSHA and that that was when the citation was discovered. (Tr. 15-20).

The cover letter to the citation issued to Respondent states, in the first paragraph, 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.

In addition, page 2 of the cover letter has a paragraph which provides 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.**

The Commission has held that the OSHA citation “plainly state(s) the requirement to file a notice of contest within the prescribed time period,” and that the OSHA 3000 booklet accompanying the citation “provide[s] additional, straightforward explanations.”¹ *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). The Commission has also held that a business must have orderly procedures for the handling of important documents and has denied relief where the employer claimed that the late filing was due to the prolonged illness and consequent absence of the individual responsible for attending to the OSHA citation. *See E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460), and cases cited therein. Finally, it is well settled 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).

Applying the foregoing to the facts of this case, Respondent is not entitled to relief in this matter. First, it is clear the company is a going concern and that it should have had office procedures in place which would have allowed it to attend in a timely manner to important matters such as the

¹Kevin Brennan, the OSHA compliance officer (“CO”) who conducted the inspection, testified it is the practice of his area office to send an OSHA 3000 booklet with the citation. (Tr. 8-9).

OSHA citation, even in Goldenbaum's absence. Second, although Tysenn testified that Goldenbaum handled "all incoming OSHA claims," he also testified that any of the office staff could have signed for the citation and that he himself was responsible for general managership of the office. (Tr. 16-17; 20). Third, Tysenn's testimony shows that the paperwork on Goldenbaum's desk was gone through during her absence and that the citation was evidently overlooked; it also shows that he was aware of the inspection, and, while he indicated he did not recall the conversation, CO Brennan testified that he had a telephonic closing conference with Tysenn after the inspection and that he advised Tysenn at that time of his rights and the 15-day filing requirement. (Tr. 8; 19-21). Finally, the record establishes the citation was addressed to Robert Dunlap, Respondent's president, and that it was Dunlap who looked for the citation on Goldenbaum's desk after receiving the November 4, 1997, letter from OSHA; further, Dunlap signed the notice of contest and the letter to the Commission requesting a hearing. (Tr. 7; 18). Although I am sympathetic to Respondent's plight, I am constrained by the above Commission precedent and the record to conclude that the failure to file a timely notice of contest was not due to excusable neglect or any other reason justifying relief under Rule 60(b).

Order

For the reasons set out above, the Secretary's motion to dismiss the notice of contest is GRANTED, and the citation and notification of penalty is AFFIRMED.

Irving Sommer
Chief Judge

Date: