



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, :
:
Complainant, :
:
v. :
:
E.G. FASHION, INC., :
:
Respondent. :

DOCKET NO. 04-0911

Appearances:

Jennifer Marciano, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

Fang Bao Xiao, President
E.G. Fashion, Inc.
New York, New York
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(c) 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 (“NOC”) as untimely should be granted.

The Occupational Safety and Health Administration (“OSHA”) inspected the work site of Respondent, E.G. Fashion, Inc., on February 20, 2004. As a result of the inspection, on February 26, 2004, OSHA issued to Respondent a Citation and Notification of Penalty (“Citation”). The Manhattan OSHA office (“the OSHA office”) mailed the Citation to Respondent by certified mail, return receipt requested, but, when the return receipt was not received, the OSHA office learned from the Post Office that the packet containing the Citation was never claimed. A compliance officer from the OSHA office telephoned Jeffrey Eng at Respondent’s place of business on March 26, 2004, and

asked how the Citation could be delivered; the Citation was faxed to Mr. Eng that same day, and the compliance officer confirmed it was received. Mr. Eng phoned the OSHA office on April 26, 2004, and stated that the penalties were too high. The OSHA office advised Mr. Eng that the 15-day period for contesting the Citation had expired on April 16, 2004. On April 28, 2004, the OSHA office wrote to Respondent to advise that its payment of the penalties was delinquent, in that the payment had been due on April 16, 2004; Respondent was also told that OSHA no longer had jurisdiction of the matter and that Respondent could communicate directly with the Commission.

On June 2, 2004, the Commission received an undated letter from Respondent. In the letter, Respondent stated it had corrected the violations “immediately after the inspection.” Respondent also requested that, because its factory was small and its profits were low, the “excessive” penalties be “abated under the circumstances.” The Secretary filed her motion to dismiss Respondent’s NOC as untimely on August 11, 2004. Respondent has filed no response to the motion.

Discussion

Section 10(a) of the Act requires an employer to notify the Secretary of its intent to contest a citation within 15 working days of receipt, and the failure to file a timely NOC results in the citation becoming a final order of the Commission by operation of law. In light of the March 26, 2004 receipt date in this case, Respondent was required to file an NOC by April 16, 2004. It is clear from the foregoing that Respondent did not file its NOC by that date and that, in fact, Respondent submitted its NOC letter about six weeks after the filing date had expired. However, an otherwise untimely NOC may be accepted if the delay in filing was caused by deception on the part of the Secretary or her failure to follow proper procedures. A late filing may also be excused, pursuant to Federal Rule of Civil Procedure 60(b), if the 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.” *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). The employer has the burden of demonstrating that it is entitled to relief.

As noted above, Respondent did not file a response to the Secretary's motion to dismiss. Moreover, in its NOC letter, Respondent was essentially requesting relief from paying the penalty and gave no explanation whatsoever as to why its NOC was untimely. Respondent has therefore not established that it is entitled to relief.

Based on the foregoing, the Secretary's motion to dismiss Riverside's NOC as untimely is GRANTED, and the Citation is AFFIRMED in all respects.

So ORDERED.

/s/

Irving Sommer
Chief Judge

Dated: September 24, 2004
Washington, D.C.