

SECRETARY OF LABOR,

Complainant,

v.

TAJ MAHAL CONTRACTING/  
GEN CONSTRUCTION CO.,

Respondent.

OSHRC DOCKET NO. 03-1088

Appearances:

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

Keith Dague  
U.S. Compliance Systems  
Tallmadge, Ohio  
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(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”), in order to determine whether the Secretary’s motion to dismiss Respondent’s notice of contest (“NOC”) as untimely should be granted. A hearing in this regard was held on January 21, 2004 and February 26, 2004, in New York, New York. Both parties have filed post-hearing submissions.

**Background**

The Occupational Safety and Health Administration (“OSHA”) inspected a work site located on Haven Avenue in New York, New York on April 1, 2003. During his inspection, the OSHA compliance officer (“CO”) saw employees working at the site, and he also saw a number of conditions that he determined were in violation of OSHA’s construction standards. The CO spoke with Supiquel Islam, who identified himself as the employer at the site and the president of Taj Mahal Construction Company (“Taj Mahal”). As a result of the inspection, OSHA on April 14, 2003 issued a Citation and Notification of Penalty (“Citation”) alleging various violations of the OSHA construction standards; the Citation was sent by certified mail to Mr. Islam’s attention at the business

address the CO had been given.<sup>1</sup> On April 21, 2003, the Citation was delivered and “M. Akkas” signed for it. On May 1, 2003, Mohammed Akkas called the OSHA area office and spoke to Antonio Pietroluongo, the assistant area director (“AAD”). Mr. Akkas told the AAD that he had never worked at the Haven Avenue site, that the name and company shown on the Citation were not his, and that he was unaware of who had worked at the site. The AAD advised Mr. Akkas to come to his office and bring any documentation that would substantiate his claim and that he would look into the matter. The AAD also advised Mr. Akkas of the 15-day filing requirement for submitting an NOC and told him he was still within the 15-day contest period. Despite the advice of the AAD, Mr. Akkas neither went to the OSHA office to present documentation nor filed an NOC by the required date of May 12, 2003; however, he did file an NOC letter with the OSHA area office on May 15, 2003, in which he repeated his claim that he did not work at the subject site and had no connection with Mr. Islam or Taj Mahal. The OSHA area office wrote to Mr. Akkas on June 3, 2003, and informed him that because his NOC had not been filed within the required 15 days, he should send an NOC to the Commission. On June 16, 2003, Mr. Akkas sent another NOC letter to the Commission; in that letter, he reiterated that he had no connection with the work site or Mr. Islam, and he also stated that the NOC he had sent to OSHA had been tardy due to illness.<sup>2</sup> The Secretary filed her motion to dismiss the NOC on August 29, 2003. (Tr. 4-15; 26-28, 33; C-1, C-3-5).

**Whether Respondent was Wrongfully Cited**

Respondent contends that it was wrongfully cited in this matter. As set out above, Mr. Akkas did not go to the OSHA area office to present documentation, as the AAD had advised. At the hearing on January 21, 2004, Mr. Akkas stated that he had not gone as he had been sick; he also indicated that he had had the documents to prove his claim. (Tr. 15-16). I therefore held the hearing in abeyance and instructed Mr. Akkas to provide the AAD with everything he requested in order to resolve this matter. (Tr. 16-19). On February 2, 2004, Mr. Akkas provided documentation to the

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<sup>1</sup>That address was 1311 Newkirk Avenue, Brooklyn, New York 11226.

<sup>2</sup>Along with the NOC letter to the Commission, Mr. Akkas sent a copy of his business license; the license shows his business name as “Taj Mahal Contracting Gen Construction Co” and his business address as 1311-15 Newkirk Avenue, Brooklyn, New York 11230.

AAD through his representative. However, the AAD testified at the reconvened hearing on February 26, 2004, that he had not been given what he had requested. (Tr. 48-50).

In addition to the foregoing, there is other evidence in the record that is not supportive of Respondent's claim. For example, I have noted the similar names of the two businesses involved in this matter and the fact that, although their zip codes are different, their street addresses are the same. I have also noted the AAD's testimony that OSHA faxed an abatement letter to the fax number the CO had obtained during the inspection and that the receipt of that fax prompted Mr. Akkas to call on May 1, 2003. (Tr. 25-26, 32). Finally, I have noted that Mr. Akkas indicated at the hearing on January 21, 2004, that the AAD on May 1, 2003 had asked him for his social security number and that he believed, but was not sure, that he had given the AAD that number; at the hearing on February 26, 2004, however, Mr. Akkas was positive he had given his social security number to the AAD on May 1, 2003 and that that was the only thing the AAD had requested. (Tr. 15-16, 39-44). The AAD, on the other hand, was adamant that he never requested social security numbers in his position with OSHA and that he would never accept a social security number as a means of deleting a citation; he was also adamant that he had asked Mr. Akkas to bring in documentation that would prove that the cited business was not Mr. Akkas' company. (Tr. 46-48, 51). Based on the evidence, Respondent has not shown that it was wrongfully cited.

**Whether Respondent is Entitled to Rule 60(b) Relief**

Section 10(a) of the Act requires an employer to notify the Secretary of the 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. As noted above, and based on the date that it received the Citation, Respondent was required to file its NOC in this case by May 12, 2003. The record plainly shows that Respondent did not file its NOC by that date. 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) ("Rule 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.” See *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). It is the employer’s burden to establish that it is entitled to Rule 60(b) relief.

There is no evidence that the late filing in this case was due to deception on the Secretary’s part or her failure to follow proper procedures. To the contrary, the record shows that when Mr. Akkas called OSHA on May 1, 2003, the AAD specifically advised him of the 15-day filing requirement for submitting an NOC and that he was still within the 15-day period. (Tr. 26-28). However, in view of the record, Respondent is asserting various other reasons for the late filing. Mr. Akkas testified that his business was new, that he had never been cited before, and that he didn’t know anything about OSHA; he also testified that his company was very small, having no employees but himself, and he indicated that the reason for the late filing was because he had been ill. (Tr. 16, 37). The testimony of Mr. Akkas is interpreted to be a request that his late filing be deemed excusable neglect under the circumstances. However, there is no basis for concluding that the late filing was due to excusable neglect, for the following reasons.

Commission precedent is well settled that the OSHA citation clearly states the requirement to file an NOC 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 further held that ignorance of procedural rules does not constitute “excusable neglect” and that mere carelessness or negligence 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 a business must maintain orderly procedures for the handling of important documents and that when the lack of such procedures results in an untimely NOC, the late filing will be deemed to be simple negligence and not excusable neglect. *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989). The Commission has thus denied Rule 60(b) relief in cases where the late filing was due to an employer’s misunderstanding or confusion about the 15-day filing period. *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). The Commission has also denied relief where the

delay in filing was caused by absence, even if due to illness, of the person responsible for handling OSHA matters. *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991).

As noted above, it is the employer's burden to demonstrate that it is entitled to relief, and Respondent has not established a reason that shows, under Commission precedent, that the untimely filing in this case was due to excusable neglect. Respondent's request for Rule 60(b) relief is DENIED, the Secretary's motion to dismiss Respondent's NOC as untimely is GRANTED, and the Citation is AFFIRMED in all respects.<sup>3</sup>

So ORDERED.

/s/

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Irving Sommer  
Chief Judge

Date: May 17, 2004  
Washington, D.C.

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<sup>3</sup>In deciding this case in this manner, I am aware of the Second Circuit's decision, *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002), holding that the Commission does not have authority to accept a late-filed NOC pursuant to Rule 60(b). However, the Commission at this time continues to follow its precedent, set out *supra*, with respect to the applicability of Rule 60(b) in NOC cases. See *HRH Constr. Corp.*, 19 BNA OSHC 2042 (No. 99-1614, 2002); *Villa Marina Yacht Harbour, Inc.*, 19 BNA OSHC 2185 (No. 01-0830, 2003).