

SECRETARY OF LABOR,

Complainant,

v.

VILLA MARINA YACHT HARBOR, INC.,

Respondent.

OSHRC Docket No. 01-0830

DECISION

Before: RAILTON, Chairman; ROGERS and STEPHENS, Commissioners.

BY THE COMMISSION:

This case requires the Commission to decide whether Villa Marina Yacht Harbor, Inc. (“Villa Marina”) should be granted relief under Rule 60(b) of the Federal Rules of Civil Procedure because it filed an untimely notice of contest to a Citation and Notification of Penalty (“citation”) and Notification of Failure to Abate Alleged Violations (“notification”).¹ Chief Administrative Law Judge Irving Sommer held a hearing on this limited issue. The judge concluded that Villa Marina was not entitled to relief under Rule 60(b)(1), because it

¹Under § 10(a) of the Occupational Safety and Health Administration Act, 29 U.S.C. § 659(a), (“the Act”), an employer may contest a citation or proposed penalty by filing a notice of contest with the Secretary within fifteen working days after receiving notice of the citation.

had failed to establish that its untimely filing was due to inadvertence or excusable neglect.² We agree and affirm his decision.³

The facts are largely not in dispute. OSHA sent the citation and notification in two separate packages to the Post Office Box designated by Villa Marina during the OSHA inspection as its mailing address. On January 18, 2001, the packages were picked up and

²Rule 60(b)(1) provides in relevant part:

Rule 60. Relief from Judgment or Order.

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . .[.]

Under longstanding Commission precedent, relief may be granted under Rule 60(b) for noncompliance with the fifteen-day contest period set forth under § 10(a) of the Act. *See, e.g., Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1999 CCH OSHD ¶ 31,949 (No. 97-851, 1999); *Jackson Assocs. of Nassau*, 16 BNA OSHC 1261, 1993-95 CCH OSHD ¶ 30,140 (No. 91-438, 1993); *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 1981 CCH OSHD ¶ 25,591 (No. 80-1920, 1981).

³Although this case arose in the First Circuit, we asked the parties and the *Amicus Curiae*, the National Federation of Independent Business Legal Foundation, to address in their briefs whether the Commission should reconsider its Rule 60(b) precedent in light of the Second Circuit's decision in *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002) ("*Le Frois*"), *rev'g* 18 BNA OSHC 1978, 1999 CCH OSHD ¶ 31,950 (No. 98-1099, 1999). *LeFrois* is the only circuit court decision holding that the Commission lacks jurisdiction to grant an employer relief under Rule 60(b) for failing to file a timely notice of contest. *Id.* at 227-28. *Cf. J.I. Hass Co., Inc. v. OSHRC*, 648 F.2d 190, 195 (3d Cir. 1981) ("Commission has jurisdiction to entertain a late notice of contest under [R]ule 60(b)"). While, under Commission precedent, relief under Rule 60(b) or some other basis may be appropriate in some cases, we find that it is not warranted based on the facts in this case. Accordingly, we believe that this is not the appropriate case for the Commission to revisit our Rule 60(b) precedent.

signed for by a messenger employed by Villa Marina. Based upon this date of receipt, Villa Marina's fifteen-day contest period expired on February 8, 2001.

On January 19, 2001, the messenger brought the mail he had picked up the day before, including the packages from OSHA, to the company. He gave the citation and notification to a secretary, but did not inform her that he had picked up the mail the previous day. The secretary stamped both the citation and the notification as received on January 19, leading Villa Marina to believe that it had one more day than it actually had within which to file a timely notice of contest. Later that same day, a Villa Marina supervisor discussed the OSHA matter with the employer's attorney. Thereafter, a notice of contest was prepared and dated February 9, 2001, one day after the period of contest expired. An envelope containing the notice of contest was given to the same messenger to mail via the U.S. Postal Service. However, the envelope in which it was mailed was subsequently postmarked February 10, 2001, a Saturday. Although Villa Marina argues that the notice of contest must have been mailed by the messenger on Friday, February 9, because he did not work on Saturdays, there is no dispute that the notice of contest was not timely filed.

We note at the outset that this is not the first time Villa Marina has failed to timely file a notice of contest. The notification at issue in this case arose out of an earlier citation that Villa Marina also failed to timely contest. In the earlier case, OSHA apparently accepted the late filed contest, and the parties settled the case. Based in part upon the company's prior experience with this citation, the judge rejected Villa Marina's argument that the information on the citation and notification relating to the 15-day filing requirement was confusing and unclear. We agree with the judge that this argument – which might be construed as a request for equitable relief – lacks merit.⁴

⁴Chairman Railton notes that in reviewing the arguments presented to the Commission on this issue, he is particularly mindful of the problems noted by the *amicus* that small employers face in dealing with OSHA on this issue and the hard-line position taken by OSHA opposing late-filed notices of contest by such employers. The Chairman is also mindful that the Commission was created in 1970 to bring swift relief in those situations where hazards exist. That consideration is to be weighed against the reasons given by the employer for filing an untimely notice of contest. The Chairman concurs, however, that this is not an appropriate case for the Commission to revisit the reasons or basis for granting such relief for a late filed notice of contest.

Regarding Villa Marina's mail procedures, the judge found that the company's messenger "mishandled the mail both when he picked up the [c]itation and [n]otification and when he mailed the [notice of contest]." Therefore, the judge concluded that Villa Marina "did not have orderly procedures in place for the handling of important documents and/or . . . [the messenger] was not properly supervised." We find that the judge's conclusion is consistent with Commission precedent. *See Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021, 1987-90 CCH OSHD ¶ 28,409, p. 37,537 (No. 86-1266, 1989) (excusable neglect not established when employer's failure to maintain orderly procedures for handling important documents results in untimely notice of contest).⁵ Therefore, we affirm his decision.

/s/

W. Scott Railton
Chairman

/s/

Thomasina V. Rogers
Commissioner

/s/

James M. Stephens
Commissioner

Date: March 3, 2003

⁵With respect to our Rule 60(b) precedent, Commissioner Rogers notes that she has previously expressed the view "that the Secretary's 'statutory limitation' argument is a substantial one, particularly in light of the language of sections 10(a) and 12(g) of the Act." *Northwest Conduit*, 18 BNA OSHC at 1950 n.7, 1999 CCH OSHD at p. 47,457 n.7. The decision of the Second Circuit in *LeFrois* further supports the Secretary's position in this matter. However, Commissioner Rogers is persuaded that the principles of *stare decisis* compel her to continue to apply the Commission's longstanding precedent in this matter. *See Branciforte Builders*, 9 BNA OSHC 2113, 1981 CCH OSHD ¶ 25,591. In her view, the application of *stare decisis* is essential for the orderly administration of justice. She also notes that the appellate courts are split 1-1 on this question. *Compare Le Frois*, 291 F.3d 219 (2d Cir. 2002), *with Haas*, 648 F.2d 190 (3d Cir. 1981). Accordingly, she will continue to apply the Commission's precedent in resolving this case.

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Appearances:

Marc G. Sheris, Esquire
New York, New York
For the Complainant.

Eduardo Ferrer-Ramirez, Esquire
San Juan, Puerto Rico
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 (“NOC”) as untimely should be granted.

Background

The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Respondent, Villa Marina Yacht Harbour (“VMYH”), from August 21, 2000,

to December 18, 2000; VMYH owns and operates a small marina located in Fajardo, Puerto Rico. As a result of the inspection, OSHA issued a Citation and Notification of Penalty (“Citation”) and a Notification of Failure to Abate Alleged Violations (“Notification”) to VMYH on January 11, 2001.⁶ OSHA sent the Citation and the Notification to VMYH in two

⁶The Notification was based on a previous inspection, from January 19, 2000, to February 28, 2000, (continued...)

separate packages by certified mail, return receipt requested, on January 11, 2001; the address, a P.O. Box in Fajardo, was the one that VMYH had given OSHA during the inspection. Hector Benabe, an employee of VMYH, picked up the company's mail on January 18, 2001, at which time he signed the receipts for both the Citation and the Notification; however, he did not take the mail to VMYH until the next day.⁷ Yeritza Morales, another VMYH employee, stamped the Citation and the Notification as received on January 19, 2001, and then gave them to Julio Collazo, a VMYH supervisor. Mr. Collazo faxed the Citation and the Notification to the company's attorney that same day, after which he called the attorney to discuss contesting both matters.⁸ The NOC was dated February 9, 2001, and was postmarked February 10, 2001. (C-1-2; C-4-5; C-7-8; R-1-2).

OSHA received the NOC letter on February 13, 2001, and, on February 28, 2001, the agency wrote to the company's attorney to advise that the NOC was untimely because it had not been filed within 15 working days of the date that VMYH had received it. The agency also advised the company's attorney that if VMYH wished to appeal the Citation and the Notification it would need to do so directly with the Commission. The NOC and other documents were forwarded to the Commission, and this matter was docketed on May 11, 2001. On May 29, 2001, the Secretary filed her motion to dismiss the NOC as untimely, and on June 15, 2001, VMYH filed its opposition to the motion to dismiss. A hearing in regard

⁶(...continued)

that had also resulted in a citation being issued to VMYH.

⁷Based on the January 18, 2001 receipt date, OSHA determined that the end of the 15-day period for filing an NOC was February 8, 2001. *See* C-4; C-7-8.

⁸Mr. Collazo also provided a copy of the Citation and the Notification to the owner and president of VMYH, Eduardo Ferrer-Bolivar, but the record does not reveal if this was on January 19, 2001, when he faxed the documents to the attorney, or at some later date. (Tr. 52).

to this matter was held in San Juan, Puerto Rico, on April 30, 2002.⁹ Both the Secretary and VMYH have submitted post-hearing briefs. (C-5-8).

Discussion

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 NOC results in the citation and penalty becoming a final judgment of the Commission by operation of law. The record shows that Mr. Benabe signed the return receipts for the Citation and the Notification on January 18, 2001, and that, based on that date, OSHA determined that the 15-day NOC filing period ended on February 8, 2001. The record also shows that the NOC letter was postmarked February 10, 2001, and, as the Secretary notes, the postmark date is presumed to be the mailing date unless there is evidence to the contrary.¹⁰ *Kerr-McGee Chem. Corp.*, 4 BNA OSHC 1739 (No. 9890, 1976).

In view of the foregoing, the NOC of VMYH was clearly untimely. However, an otherwise untimely NOC may be accepted if the employer can show that the late 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 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.”¹¹ *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-

⁹At the hearing, the Secretary requested that her motion to dismiss be amended to include the Notification, which was inadvertently omitted from the motion, and VMYH moved to include the Citation in its NOC, which referenced only the Notification. Both motions were granted. (Tr. 4-6).

¹⁰Mr. Collazo testified he gave the letter to Mr. Benabe to mail on February 9, 2001, but he agreed the postmark was February 10, 2001. When asked for an explanation, he said Mr. Benabe “probably couldn’t get it in the mail that day.” He then said it was “possible” that Mr. Benabe did get it in the mail on February 9 and that it was not postmarked until the next day. (Tr. 55-57). Mr. Benabe did not testify, and, based on the record, I find the NOC was filed on February 10, 2001.

¹¹As the Secretary notes, the Second Circuit recently held that the Commission does not have the authority to accept a late-filed NOC pursuant to Rule 60(b). *Chao v. Russell P. Le Frois Builder*,
(continued...)

1920, 1981); *see also* Fed. R. Civ. P. 60(b) (“Rule 60(b)”). There is no evidence and no contention that the late filing here was caused by the Secretary’s deception or failure to follow proper procedures. Rather, VMYH contends that the late filing should be excused because the information on the Citation and the Notification relating to the 15-day filing requirement was confusing and unclear. VMYH also contends that it had an established mail procedure that had never caused any problems before and that it had had a good faith belief that the Citation and the Notification were received on January 19, 2001.

As to the company’s first contention, Commission precedent is well settled that the OSHA citation plainly 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 also held that ignorance of procedural rules, even by a layman, 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, testimony adduced at the hearing established that VMYH had failed to file a timely NOC in regard to the previous citation that formed the basis for the Notification in this case.¹² In view of the foregoing Commission precedent and the company’s prior experience with an OSHA citation, VMYH’s first contention is rejected.

¹¹(...continued)

Inc., No. 00-4057 (2d Cir. May 10, 2002). However, as the Secretary further notes, the Commission has not departed from its precedent in this regard, set out *supra*, and Commission judges are constrained to follow Commission precedent.

¹²The area director for the Puerto Rico OSHA office testified that VMYH had also filed a late NOC in the original inspection and that VMYH had been advised of that fact. He further testified that the late NOC ultimately had been accepted, after which the case had settled. (Tr. 7; 16-17). VMYH presented no evidence to attempt to rebut this testimony.

As to the company's second contention, the Commission has held that "a business must maintain orderly procedures for handling 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 also held that Rule 60(b) relief is not justified where the employer did not properly supervise the employee who mishandled the OSHA citation. *See, e.g., Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830, 1989); *Rebco Steel Corp.*, 8 BNA OSHC 1235 (Nos. 77-2040 & 77-2947, 1980). Turning to the facts of this case, Ms. Morales testified that the company procedure was for Mr. Benabe to pick up the mail every workday and to take it to VMYH the same day. (Tr. 42). However, it is clear from the record, and Ms. Morales agreed, that although Mr. Benabe picked up the mail and signed for the Citation and the Notification on January 18, 2001, he did not deliver the mail to VMYH until the next day.¹³ (Tr. 46). Moreover, it would appear that Mr. Benabe did not inform Ms. Morales that he had picked up the mail the day before, leading her to stamp the mail as received on January 19, 2001, and it would also appear that while the NOC letter was given to Mr. Benabe to mail on January 9, 2001, he did not actually mail it until January 10, 2001. (Tr. 55-57). That Mr. Benabe mishandled the mail both when he picked up the Citation and the Notification and when he mailed the NOC persuades me that VMYH did not have orderly procedures in place for the handling of important documents and/or that Mr. Benabe was not properly supervised. In these circumstances, the late filing of the NOC was not due to excusable neglect and VMYH is not entitled to Rule 60(b) relief. The Secretary's motion to dismiss is GRANTED, and the Citation and the Notification are AFFIRMED in all respects.¹⁴

¹³Ms. Morales indicated that the reason that Mr. Benabe did not deliver the mail to VMYH on January 18 might have been because he went to San Juan that day. (Tr. 45).

¹⁴In affirming the Secretary's motion to dismiss, I have considered the cases cited by VMYH in support of its position. Regardless, under the facts of this case, I conclude that VMYH is not entitled to Rule 60(b) relief.

So ORDERED.

/s/

Irving Sommer
Chief Judge

Date: July 15, 2002
Washington, D.C.