

SECRETARY OF LABOR,

Complainant,

v.

AVON CONTRACTORS, INC.,

Respondent.

DOCKET NO. 02-0772

APPEARANCES:

Vivian V. Ranada, Esq.
Office of the Solicitor
U.S. Department of Labor
New York, New York
For the Complainant

Mark D. Kentos, Esq.
Schibell & Mennie, LLC
Ocean, 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 determination of the Secretary’s motion to dismiss Respondent’s request to file a late notice of contest (“NOC”).

Background

The underlying Citation and Notification of Penalty (“Citation”) arose from an inspection OSHA conducted from January 8, 2002 through January 10, 2002, at a work site of Respondent, Avon Contractors, Inc. (“Avon”) in Northvale, New Jersey. OSHA sent the citation and notice of proposed penalty to Avon by certified mail, return receipt requested, on February 22, 2002, and Avon received it on February 26, 2002. (Exhs. C-1 & C-3). Avon did not file an NOC, and the citation became a final order of the Commission by operation of law on March 19, 2002. *See* § 10(a) of the

Act.

On May 15, 2002, Avon mailed a letter to the Commission that essentially requested that it be permitted to file an NOC out of time; the reason given for the failure was that the employee responsible for handling OSHA matters did not receive it, and that the receptionist who had signed for the citation had been terminated. (Exh. C-5). The Secretary moved to dismiss the proffered NOC, and a hearing on this issue was accordingly conducted on September 24, 2002. The Respondent has filed a post-hearing brief, but the Secretary has not.¹

Discussion

The record clearly demonstrates that Respondent did not file a timely NOC. 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, as indicated above, the failure to do so results in the citation and penalty becoming a final order of the Commission by operation of law.

Under Commission precedent, however, an otherwise untimely NOC may be accepted if the employer can show that the late filing was caused by the Secretary's deception 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 for "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). *See also* Fed. R. Civ. P 60(b).² There is no allegation and no proof that Avon's failure to file a timely NOC was caused by deception on the part of the Secretary or her failure to follow proper procedures.

Instead, Avon asserts that it was precluded from filing a timely NOC because the receptionist who had accepted the citation was disgruntled and may have destroyed it, and that, accordingly, the

¹ Post-hearing briefs were due on or before November 15, 2002.

² Relying on *Le Frois Builder Inc.*, 291 F.3d 219 (2d Cir. 2002), the Secretary's motion asserts that the Commission does not have authority to accept a late-filed NOC. The Secretary's reliance on *Le Frois*, however, is misplaced, as this case arises in the Third Circuit, not the Second. Accordingly, *J. I. Hass Co., Inc.*, 648 F. 2d 191 (3d Cir. 1981) and *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981), not *Le Frois*, are controlling.

company's failure to file a timely NOC was the result of mistake and/or excusable neglect. Avon's evidence in this regard is it had discovered that other "official" mail was missing, that its receptionist had been told that she was not permitted to accept certified mail, and that the receptionist was terminated or quit in March. The evidence also showed that Avon's office manager called OSHA on April 29, 2002 to find out why the company had not received the citation. (Exh. C-5, Tr. 29-33, 36-37).

Avon's argument is compelling, particularly as Avon initiated contact with OSHA with respect to the whereabouts of the citation. However, a key factor in determining this issue is whether the failure was within the control of the employer. *See CalHar Constr. Inc.*, 18 BNA OSHC 2151, 2153 n.5 (No. 98-0367, 2000). Here, the record does not show how long the receptionist had been destroying or misplacing the mail or when the company first became aware of the problem. I do not know, therefore, if the alleged destruction of the citation was an unprecedented and unexpected act, or whether this type of activity was an ongoing problem which should have been corrected. Indeed, the only apparent effort Avon undertook to rectify the problem was to tell the receptionist not to accept certified mail, and, according to the office manager, this occurred "right before" the receptionist left the company. (Tr. 31). Without more, I cannot find that it was not within Avon's reasonable control to prevent the series of events which led up to its failure to timely file the NOC, and, accordingly, I conclude that Respondent has failed to show that it is entitled to relief under Fed. R. Civ. P. 60(b).

In light of the above, I conclude that the citation was properly served, that Avon did not file a timely NOC, and that the company is not entitled to relief pursuant to Rule 60(b). The Secretary's motion to dismiss is accordingly GRANTED, and the citation and notification of penalty is AFFIRMED in all respects. So ORDERED.

/s/
IRVING SOMMER
Chief Judge

Date: January 21, 2003

Washington, D.C.