SECRETARY OF LABOR, Complainant, v. TAJ MAHAL CONTRACTING/ GEN CONSTRUCTION CO., Respondent.	:	OSHRC Docket No. 03-1088

REMAND ORDER

Before the Commission is a decision of Chief Administrative Law Judge Irving Sommer granting the Secretary's motion to dismiss respondent's late filed Notice of Contest ("NOC") and denying respondent's motion to reopen the matter pursuant to Federal Rule of Civil Procedure ("FRCP") 60(b)(1) on the basis of "excusable neglect."[1] Based on a review of the hearing transcript, together with documents in the record, we remand for further proceedings consistent with this Order.

The Occupational Safety and Health Administration ("OSHA") inspected a worksite located in New York City on April 1, 2003. During his inspection, the compliance officer ("CO") spoke with Supiquel Islam, who identified himself as the employer at the site and the president of Taj Mahal Construction Company. As a result of that inspection, OSHA issued, on April 14, 2003, to Taj Mahal Construction Company a citation alleging various violations of the OSHA construction standards with a proposed penalty of $9,300. It was sent by certified mail to the attention of Mr. Islam at the business address the CO was given at the

[1] **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)

worksite. On April 21, 2003, the citation was delivered and was signed for by Mohammed Akkas, the owner of Taj Mahal Contracting / Gen Construction Co. [2] ("Respondent").

On May 1, 2003, Mr. Akkas called the OSHA area office and spoke to the assistant area director ("AAD"), Antonio Pietroluongo. Mr. Akkas told the AAD that he had never worked at the inspected worksite, that the name and company shown on the citation were not his, and that he was unaware who had worked at the site. The AAD claims that he advised Mr. Akkas to come to his office and bring documentation substantiating his claim, and that he was still within the 15 working day contest period. (Tr. 13-15, 26, 28, 46-48) However, Mr. Akkas claims that he was told only to provide his social security number, that nothing else was required, and that he did not need to go to their office. (Tr. 39-43) After the AAD discussed with Mr. Akkas his claim that he was not at the cited worksite, the AAD sent a CO (it is unclear if it was the same CO that conducted the original inspection) back to the worksite to speak with the manager of the building where the work took place. The AAD stated that the manager of the building told that CO that there was "no contract" with the company that performed the work and that they were paid in cash. (Tr. 28) Mr. Akkas subsequently filed a NOC on May 15, 2003, three days late, where he repeated his claim. OSHA notified Mr. Akkas that he was late, and Mr. Akkas followed OSHA's instruction to file his NOC with the Commission.

Thereafter, the judge held two hearings in this matter on the issue of the Secretary's motion to dismiss the NOC as being untimely. The first hearing, on January 21, 2004, was held in abeyance when Mr. Akkas agreed that he would provide documents to the AAD that would prove his claim. According to Respondent's February 2, 2004 letter to the AAD, it provided copies of bank statements and other documents. The letter also states that "Mr. Akkas has no employees, and any work not performed by Mr. Akkas is subcontracted." Mr. Akkas also testified at the reconvened hearing held on February 26, 2004, that he does not

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mistake, inadvertence, surprise, or excusable neglect . . .

[2] The citation was sent to 1311 Newkirk Avenue, Brooklyn, NY 11226. Taj Mahal Contracting / Gen Construction Co.'s address is 1311-15 Newkirk Avenue, Brooklyn, NY 11230. OSHA also faxed an abatement letter to the fax number the CO was given at the job site. That fax number was identical to the fax number of Taj Mahal Contracting / Gen

have any employees. (Tr. 37) The AAD claimed at that hearing that the documents they received were not useful. (Tr. 48-50) On May 25, 2004, the judge issued his decision and order granting the Secretary's motion to dismiss the NOC as untimely and denying Respondent's request for FRCP 60(b) relief. The judge found that Mr. Akkas failed to demonstrate either that he was mistakenly cited as the employer at the site, or that his failure to file a timely NOC was the result of excusable neglect.

Turning first to the issue of excusable neglect, we affirm the judge's conclusion that Respondent failed to demonstrate that he was entitled to relief under Rule 60(b)(1).[3] After receiving the citation, Respondent's owner telephoned the OSHA area office within the 15-day working day period, claiming that his company was being mistakenly cited. During the telephone conference, an OSHA official invited him to come to the office and to bring any documentation that could establish that his company was not present at the cited worksite. The official also reminded Akkas of the necessity of filing a timely NOC, which was not the first instance in which Akkas was advised about filing a timely NOC. Accompanying the citation itself was an informational booklet (OSHA 3000-09R (2003)) explaining an employer's rights and responsibilities following an OSHA inspection, including the contest procedure. Yet, Akkas failed to file before the deadline, and instead offered vague (he was ill) and sundry excuses (he was new in business, had never been cited by OSHA before, and did not know anything about OSHA) that pointed to no more than a lack of diligence in handling his business affairs. Under our precedents, Respondent's neglect was not excusable. *See, e.g., Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185, 2002 CCH OSHD ¶ 32,620 (No. 01-0830, 2003).

While we think the judge properly ruled against the Respondent on the Rule 60(b)(1)

Construction Co.

[3] In light of the Second Circuit decision in *Chao v. Russell P. LeFrois Builder, Inc.*, 291 F.3d 219, 227-28 (2d Cir. 2002), *rev'g* 18 BNA OSHC 1978, 1999 CCH OSHD ¶ 31,950 (No. 98-1099, 1999), and in light of the fact that this case arises in the Second Circuit, Commissioner Rogers would not consider the merits of the Respondent's argument that relief should be granted under a Rule 60(b)(1) analysis. *See HRH Construction Corp.*, 19 BNA OSHC 2042, 2044, 2002 CCH OSHD ¶32,607, p 51,002. (No. 99-1614, 2002). However, she would agree that were Rule 60(b)(1) the appropriate analytic framework, Respondent has not made out a

issue, his resolution of the preliminary issue – whether this is a case of mistaken identity – gives us pause not so much for what he did resolve but for what the judge did not address. As reflected in the procedural posture of the case below, the judge considered the misidentification issue in connection with whether the record supported the jurisdictional basis of the citation and its status as a final order of the Commission. Under section 10(a) of the Act, a citation is as a matter of law deemed a final order of the Commission in the absence of a timely filed NOC. However, this does not place the citation completely beyond review. Thus, where an untimely NOC is docketed, under Commission practice it is incumbent upon the Secretary to file a motion to dismiss the NOC as untimely, and at the hearing, as was the case here, the judge places the initial burden on the Secretary to establish the grounds for dismissal of the NOC: namely, the citation was issued and served upon the respondent, and that the Secretary did not receive any NOC from the respondent within 15 working days after receipt of the citation. This is normally sufficient to uphold the citation as a final order in the absence of allegations or evidence putting jurisdiction into question.

The record shows that (1) during an inspection on April 1, 2003, an OSHA CO obtained the name and address of a purported employer who was allegedly committing certain violations of OSHA construction standards at the jobsite; (2) the employer named in the citation closely, if not exactly, matched the Respondent's business name (Taj Mahal Construction Co. *versus* Taj Mahal Contracting / Gen Construction Co.); (3) the street address on the citation closely, if not exactly, matched the Respondent's business address (1311 Newkirk Ave., Brooklyn, NY 11226 *versus* 1311-15 Newkirk Ave., Brooklyn, NY 11230); (4) OSHA issued a citation on April 14, 2003, and effectuated personal service of the citation on the Respondent by certified mail addressed to 1311 Newkirk Ave., Brooklyn, NY 11226, on April 21, 2003; (5) the CO also obtained at the jobsite (and recorded on an OSHA 1 form) the fax number of the Respondent, which the AAD successfully utilized to send the Respondent an abatement letter; and (6) the NOC was not filed by the May 12, 2003, deadline. This evidence is sufficient to demonstrate that the citation was issued and properly served on the Respondent and that a timely NOC was not filed. It also could permit, in the

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case for relief.

absence of contrary evidence, an inference that the Respondent was the putative employer witnessed at the jobsite.

However, the difficulty with the Secretary's evidence is that it was in critical part based on the hearsay testimony of the AAD, Mr. Pietroluongo. Rather than produce the investigating CO as a witness, the Secretary's counsel called the AAD as her principal witness, who was permitted to state what the CO supposedly saw and did at the jobsite during the initial inspection, including how he identified the Respondent. (Tr. 13) The AAD also was permitted to give double hearsay testimony as to what the CO supposedly learned from an unidentified building manager upon a return visit to the jobsite to investigate the claim of mistaken identity. (Tr. 28-30)

Further complicating the hearsay problem is the testimony of Akkas, who claimed that he owned and operated the Respondent as a sole proprietorship and that he did not have any employees. (Tr. 37) He in effect asserted that his company could not have been present at the jobsite because he had no employees nor was he there himself. This assertion was raised not only at the trial, but was suggested prior to the second day of hearings by the Respondent's hearing representative in a letter dated February 2, 2004, to the OSHA area office. It was reiterated in the representative's post-hearing letter, dated March 31, 2004, to the judge. The judge neither explicitly credited nor explicitly discredited Mr. Akkas' testimony on this point; interestingly though, in the context of discussing whether excusable neglect was shown, the judge stated that, as one of Mr. Akkas' reasons for filing late, "he also testified that his company was very small, *having no employees* but himself." (ALJD at 4)(emphasis added)

If Mr. Akkas' testimony were true, it would, of course, rebut the Secretary's contention that the Respondent was correctly cited as the employer at the jobsite. And, just as significantly, it would raise doubts about jurisdiction over the Respondent. For section 3(5) of the Act, 29 USC § 652(5), defines an employer as "a person engaged in a business affecting commerce who has employees," and our caselaw recognizes that if a business does not have employees, jurisdiction is absent. *Hudson Wood Recycling, Inc.*, 17 BNA OSHC 1638, 1996 CCH OSHD ¶ 31,069 (No. 95-1767, 1996). *See also Don Davis*, 19 BNA

OSHC 1477, 2001 CCH OSHD ¶ 32,402 (No. 96-1378, 2001)(a sole proprietor not covered under Act because he did not exercise sufficient control over at least one worker at jobsite to be an "employer"). Furthermore, other relevant authorities teach that a party seeking to invoke the jurisdiction of a federal tribunal has the burden of proving that jurisdiction exists by a preponderance of evidence. *See* 5B C. Wright & A. Miller, *Federal Practice and Procedure,* §1350, p. 160, n.47; 211, n.63 (3d ed. 2004), *citing, e.g., Moser v. Pollin*, 294 F.3d 335 (2d Cir. 2002). *See also EEOC v. St. Francis Xavier Parochial Sch.*, 928 F. Supp. 29 (D.D.C. 1996)(EEOC as plaintiff in ADA action had burden of proving subject matter jurisdiction), *rev'd on other grounds*, 117 F.3d 621 (D.C. Cir 1997). And a court may *sua sponte* raise the issue of lack of jurisdiction (and indeed is under an independent obligation to do so) when the matter comes to the attention of the court during the course of proceedings. *See* 5B C. Wright & A. Miller, *Federal Practice and Procedure,* §1350, p.120 n.25 (3d ed. 2004), *citing, e.g., Columbia Gas of Pennsylvania, Inc. v. Marshall*, 636 F.2d 913, 918 (3d Cir. 1980)(issue of OSHA subject matter jurisdiction can be raised by court *sua sponte*). *Accord*, *Members for a Better Union v. Bevona*, 152 F.3d 58, 61 (2d Cir. 1998)("Even if the parties do not directly address the jurisdictional issue, we do so sua sponte whenever it appears that jurisdiction may be lacking."); *Mennen Co. v. Atlantic Mut. Ins. Co.*, 147 F.3d 287, 293-94 (3d Cir. 1998), *citing* FRCP 12(h)(3)("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

Measured against these authorities, we conclude that under the unique circumstances of this case, where the record raises doubts over jurisdiction and over the identity of the employer witnessed at the jobsite, the judge *sua sponte* should have required that the Secretary, who bore the ultimate burden of proof as to jurisdiction, provide direct relevant evidence through the testimony of the CO who conducted the inspection at the jobsite. *See* Fed.R.Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness had personal knowledge of the matter."). The CO's testimony is especially critical here, since it is relevant to whether the Respondent had a presence at the jobsite and whether it was a covered employer; the CO allegedly met and

interviewed Supiuel Islam, who supposedly identified himself as the president of the Respondent. In addition, because Mr. Akkas' testimony directly touched on factual matters relevant to jurisdiction, including whether he had employees in his business, we think it was incumbent upon the judge to make an explicit finding as to the credibility of his testimony.

Therefore, we conclude that the appropriate relief (*see* section 10(c) of the Act) here is to remand the case for the limited purposes of directing the judge to make a further determination as to credibility of the Respondent's owner and of affording the Secretary the opportunity to offer evidence through the testimony of the investigating compliance officer who had personal knowledge as to circumstances witnessed at the jobsite that relate to jurisdiction over the Respondent. Consistent with the Commission's approach in *Hudson Wood Recycling*, *supra*, if the judge finds upon further consideration of the evidence that jurisdiction exists, then the citation items will be affirmed in view of the Respondent's failure to establish that its untimely NOC was the result of excusable neglect.

SO ORDERED

/s/
W. Scott Railton
Chairman

/s/
Thomasina V. Rogers
Commissioner

/s/
James M. Stephens
Commissioner

Dated: October 25, 2004

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.	:	OSHRC DOCKET NO. 03-1088
	:	
TAJ MAHAL CONTRACTING/ GEN CONSTRUCTION CO.,	:	
	:	
Respondent.	:	

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.[1] 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.[2] 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

[1]That address was 1311 Newkirk Avenue, Brooklyn, New York 11226.

[2]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.

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 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.[3]

So ORDERED.

/s/

Irving Sommer
Chief Judge

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

[3]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).