



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. 15-0190

GT TILE LOADING,

Respondent.

APPEARANCES:

Timothy S. Williams, Counsel for Safety & Health; John Rainwater, Associate Regional Solicitor; James E. Culp, Regional Solicitor; M. Patricia Smith, Solicitor; U.S. Department of Labor, Washington, DC and Denver, CO
For the Complainant

Thomas Dunrud; Denver, CO
For the Respondent

DIRECTION FOR REVIEW AND REMAND ORDER

Before: ATTWOOD, Acting Chairman and MACDOUGALL, Commissioner.

BY THE COMMISSION:

At issue before the Commission is a May 5, 2015 decision of Administrative Law Judge John H. Schumacher affirming a two-item serious citation with a total penalty of \$3,600 based on the judge's determination that Respondent failed to timely file its notice of contest ("NOC"). For the reasons that follow, we direct this case for review, set aside the judge's decision, and remand this case to the judge for further proceedings.

On December 5, 2014, Respondent received the citation issued by the Occupational Safety and Health Administration. Respondent, appearing pro se, filed its NOC by email on December 30, 2014. In a letter dated January 12, 2015, OSHA informed Respondent that the 15-working-day period allowed for contesting the citation had expired on December 29, 2014, and that Respondent's NOC was untimely because it was not received until the next day. OSHA

explained in the letter that if Respondent disagreed with this determination, it could communicate directly with the Commission. In a letter dated January 26, 2015, Respondent's representative explained to the Commission's Executive Secretary that he "was out of town for the Holidays at the end of the year so that was the first chance that I had to send the letter of contention." The case was then docketed by the Executive Secretary and assigned to the judge.

On February 11, 2015, the Secretary filed a motion to dismiss Respondent's NOC. In his motion, the Secretary asserted that the NOC was untimely and argued that no basis for relief existed under Federal Rule of Civil Procedure 60(b), which sets forth the grounds for relief from a final order. The judge issued Respondent a show cause order on March 9, 2015, stating: "All initial indications are that Respondent has failed to timely comply with both the letter and the spirit of the Commission's Rules of Procedure, thereby showing disrespect for the Commission and a lack of decorum in dealing with the legal process." The judge ordered Respondent to answer the show cause order by April 3, 2015, but it does not appear that Respondent ever received the order. The certified mail envelope containing the order was returned to the judge's office and marked "Addressee Unknown." In his May 5, 2015 decision, the judge found that Respondent was not entitled to relief under Rule 60(b) and affirmed the citation as issued.¹ Respondent subsequently submitted a letter to the Commission, which we construe as a petition for discretionary review. *See* 29 C.F.R. § 2200.91(b) (procedures for filing petition for discretionary review).

The Occupational Safety and Health Act, 29 U.S.C. § 659(a), requires an employer to file a notice contesting a citation or proposed penalty assessment "within [15] working days from the receipt of the notice issued by the Secretary." The day of receipt, as well as Saturdays, Sundays, and Federal holidays, are not included in computing the 15-working-day contest period. 29 C.F.R. § 1903.22(c). Here, the 15 working days following Respondent's receipt of the citation

¹ In his decision, the judge also discussed Commission Rule 101(a), 29 C.F.R. § 2200.101(a), and declared Respondent to be in default. We note that when an NOC is untimely and there are no grounds for relief under Rule 60(b), it is unnecessary to consider whether a default judgment under Rule 101(a) is warranted, as an untimely NOC deprives the Commission of jurisdiction. 29 U.S.C. § 659(a). In any event, the conduct to which the judge refers does not support entry of a default judgment under Rule 101(a)—most of the alleged conduct pertains to Respondent's interactions with OSHA before this case was transmitted to the Commission and, thus, has little to do with whether Respondent "failed to plead or otherwise proceed as provided by these rules or as required by the Commission or Judge." 29 C.F.R. § 2200.101(a).

on December 5, 2014, were December 8-12, 15-19, 22-24, 29 and 30, 2014. This excludes all Saturdays and Sundays (December 6, 7, 13, 14, 20, 21, 27 and 28, 2014), as well as the Federal holidays on December 25 and 26, 2014, that were designated by executive order.² Respondent's NOC, therefore, was timely filed on the 15th working day following receipt of the Secretary's citation. Accordingly, we set aside the judge's decision and remand this case for further proceedings.

SO ORDERED.

/s/ _____
Cynthia L. Attwood
Acting Chairman

/s/ _____
Heather L. MacDougall
Commissioner

Dated: June 5, 2015

² December 25 is defined as a Federal holiday in Executive Order 11,582, 3 C.F.R. 539 (1971-1975), which pertains to "Observance of holidays by Government agencies." The President issued an executive order on December 5, 2014 directing the closure of executive departments and agencies on December 26, 2014. Exec. Order No. 13,682, 79 Fed. Reg. 73,459 (Dec. 10, 2014). Section 3 of this order states that "Friday, December 26, 2014, shall be considered as falling within the scope of Executive Order 11[,]582." *Id.* Therefore, while it appears both the Secretary and the judge overlooked the status of December 26, 2014, it is a Federal holiday for purposes of calculating the 15-working-day period.



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SECRETARY OF LABOR,
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GT TILE LOADING,
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OSHRC DOCKET
NO.: 15-0190

DECISION AND ORDER ON ORDER TO SHOW CAUSE

On March 9, 2015, the Court issued an Order to Show Cause to Respondent to show by April 3, 2015, that it had On February 11, 2015, that it had not demonstrated neglect by filing its Notice of Contest outside of the regulatory time period for doing so. The Court's Show Cause Order included the following warning: "*Failure to timely comply will result in sanctions being imposed by the Court, up to and including dismissal of Respondent's Notice of Contest.*"

This Show Cause Order was mailed to Respondent's business address of Record via certified mail, return receipt requested. The USPS Article Number was 7008 1830 0000 5152 8103. On April 8, 2015, the original certified mail envelope was returned to this office by the USPS marked "*Addressee Unknown.*"

On February 11, 2015, Complainant had filed its *Motion to Dismiss Untimely Contest* in the instant case. Complainant related that Respondent did not file its Notice of Contest within the required period of time and that it had not demonstrated "excusable neglect" or any other ground for which relief is allowed under Federal Rule of Civil Procedure 60(b). The Complainant averred the following:

1. On October 8, 2014 OSHA opened an inspection of Respondent's worksite at 12017 West 75th Lane, Arvada CO
2. On December 4, 2014, OSHA issued a Citation to Respondent containing two items, with

penalties totaling \$3600.00. OSHA received confirmation of receipt by Respondent dated December 5, 2014.

3. The Citation contained the standard Notice of Right to Contest, which included notice that Respondent had fifteen business days after receipt to inform the OSHA Area Director that it wished to contest the Citation and/or the proposed penalties.
4. Respondent's representative, Mr. Tom Dunrud, requested an informal conference, which was scheduled for December 22, 2014. However, Mr. Dunrud failed to appear at that informal conference.
5. On December 30, 2014, Respondent submitted an untimely contest via electronic mail. OSHA responded by informing Respondent that the date to contest the Citation had passed. OSHA also provided the address of the Occupational Safety & Health Review Commission if Respondent wished to petition the Commission to reopen the matter.
6. Two weeks later, on January 26, 2015, Respondent's representative filed a Notice of Contest (NOC). In that Letter of NOC, Mr. Dunrud related that he "...was out of town for the Holidays at the end of the year, so that was the first chance that I had to send the letter of contention."

The record before the Court indicates that Respondent has failed to timely comply with both the letter and the spirit of the Commission's Rules of Procedure, thereby showing disrespect for the Commission and a lack of decorum in dealing with the legal process. The Code of Federal Regulations, at § 29 C.F.R. 2200.101(1), provides that:

"[w]hen any party has failed to...proceed...as required by the Commission of Judge, he may be declared to be in default either on the initiative of the Commission or Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default, or on the motion of a party. Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules."

The inherent powers doctrine allows a court to impose... respect, and decorum, in their presence, and submission to their lawful mandates. U.S. v. One Parcel of Real Estate Located at 1948 Martin Luther King Drive, Springfield, Illinois, 193 F.Supp.2d 1067 (C.D. Ill., 2002).

The Court has carefully considered all the evidence in the record in the light most favorable to the Respondent. The Court notes that Respondent's representative initially requested, but later failed to attend, an informal conference scheduled for December 22, 2014. By a letter and email dated December 30, 2014, Respondent's representative purported to submit an untimely Notice of Contest. By another letter dated January 26, 2015, Respondent's representative again purported to submit an

untimely Notice of Contest. In this latest letter, Respondent's representative advised that "*I was out of town for the Holidays at the end of the year so that was the first chance that I had to send the letter of contention.*"

It appears to the Court that Respondent's representative had received a copy of the Citation and Notification of Penalty via UPS Ground Delivery, and signed for same on December 5, 2014. This document contained an advisement as to the 15 day period in which any Notice of Contest could be timely filed. As further evidence that Respondent's representative received and understood the procedural rules, Respondent's representative requested an informal conference that was scheduled for December 22, 2014. However, Respondent's representative elected to not appear at this scheduled conference. It now appears to the Court that he was instead "...*out of town for the Holidays...*"

The record is devoid of any evidence that Respondent's representative made any good faith effort to reschedule the December 22, 2015 informal conference, prior to going "...*out of town for the Holidays...*" Consequently, the Court has no basis upon which to conclude that Respondent's representative has demonstrated "mistake, inadvertence, surprise or excusable neglect" sufficient to excuse its failure to timely file a Notice of Contest.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Respondent is declared in DEFAULT, its Notice of Contest is DISMISSED, and the citation items issued in this matter are AFFIRMED, and that all proposed penalties are hereby assessed.

For administrative questions, please contact my legal assistant, Ms. Kate Sydney, at 303-844-3409.

/s/

JOHN H. SCHUMACHER
Judge, OSHRC

Dated: May 5, 2015
Denver, CO