

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,
Complainant,
v.
PRIME ROOFING CORP.,
Respondent.

DOCKET NO. 04-0004

Appearances: Natalia Baltazar, Esquire
Office of the Solicitor
U.S. Department of Labor
Boston, Massachusetts
For Complainant

William Seppala
President
Prime Roofing Corp.
New Ipswich, New Hampshire
For Respondent

Before: Michael H. Schoenfeld
Administrative Law Judge

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”), for the purpose of determining whether the Secretary’s motion to dismiss Respondent’s notice of contest as untimely should be granted. A hearing in this regard was held on April 14, 2004 in Boston, Massachusetts. Both parties have filed post-hearing briefs.

Background

The Occupational Safety and Health Administration (“OSHA”) inspected a work site of Respondent, Prime Roofing Corp. (“Respondent” or “Prime”), on April 24, 2003¹. On May 13, 2003, OSHA issued a Citation and Notification of Penalty (“Citation”) to Prime. OSHA mailed the Citation to Prime by certified mail, return receipt requested, and, on May 21, 2003, William Seppala, Prime’s President, signed for the Citation.

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 notice of contest (“NOC”) results in the citation being deemed a final order of the Commission by operation of law. Based on the date that it received the Citation, a calender reference or dactylonomy, shows that Prime was required to file its NOC no later than June 11, 2003. Prime, however, did not file an NOC by that date. Its NOC was dated June 30, 2003 and was received by OSHA on July 2, 2003.

OSHA wrote to Prime on July 23, 2003, acknowledging receipt of the June 30, 2003 letter but stating that it was “unable to accept your letter of contest” because it had been filed after June 11, 2003. (Ex. C-5). On August 12, 2003, Respondent sent OSHA a letter requesting a hearing and noting that its president was “out of the office during the so-called (15) day window and was unable to respond.” (Ex. C-6). Following a series of letters to OSHA, Respondent wrote to the Commission seeking “their day in court.” The matter was docketed by the Commission as a contested matter on January 9, 2004 and was assigned to this judge. On January 29, 2004 an order was issued directing the parties to participate in a telephone conference on February 20, 2004. During that conference, Respondent’s representative reiterated Prime’s desire to have a hearing on the substance of the alleged violations. On February 17, 2004, the Secretary filed a Motion for Leave to File a Motion to Dismiss the Notice of Contest. The Secretary’s motion was granted on February 19, 2004. Respondent opposed the motion in a filing dated March 2, 2004. The Secretary filed her Motion to Dismiss a Late Notice of Contest on March 4, 2004. By order dated March 22, 2004, a hearing was scheduled for Boston, Massachusetts on April 22, 2004. The hearing was held on that date with the

¹ All relevant dates are undisputed.

OSHA compliance officer testifying for the Secretary and William Seppala, Respondent's president, representing and testifying on behalf of Prime.

Discussion

At the hearing, William Seppala, Respondent's president, testified that Prime is a very small company which relied on one employee as its sole salesman/estimator. This individual left his position with Prime surprisingly and on short notice during the fall of 2002. Not only did this individual leave but, according to Mr. Seppala, he took some of Prime's business, customers and contracts with him. He set up a competing business and, knowing Respondent's pricing structure and contacts, underbid Prime on jobs it otherwise would have had. Mr. Seppala described his company as undergoing a massive disruption and fighting for survival during this period, and he noted that he personally was out of the office most of the time seeking to restore his business. He agreed that he was aware that the Citation had been issued to Prime and that, as an employer, he had 15 working days within which to contest the Citation. (Tr. 34-36).

Respondent maintains that Prime was on the verge of going out of business and that this situation warrants consideration as a reason for the acknowledged late filing. In its post-hearing submission, Respondent carefully lays out the importance of the position of the individual who quit and the importance to the business of his taking with him contacts, contracts and intimate knowledge of Prime's business practices. There is no doubt that this event, as described by Mr. Seppala, was of the type that would in fact cause massive disruption in a small business. Respondent examines and seeks to distinguish several cases cited by the Secretary in support of her motion.² Respondent notes that in each of the cases, the employer was a much larger entity with more general and clerical employees and that none had undergone the "major disruption of business" suffered by Prime. Prime contends that "there is a major difference between a management transition and a major disruption."

² *Secretary of Labor v. Baretto Granite Corp.*, 830 F.2d 396 (1st Cir. 1987); *Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002); *E. Clifford Durell & Son, Inc.*, _____ BNA OSHC _____ (No. 90-0808, June 6, 1990) (ALJ); *NYNEX*, 18 BNA OSHC 1967 (No. 95-1671, 1999); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989).

Respondent notes that in its situation, failing to timely file the NOC was not a matter of neglect or lack of concern for employee safety and health or OSHA but was rather a result of financial pressures that forced its president to personally seek out sales in order to maintain his business. Respondent suggests that the degree of culpability for a late filing should be measured against the nature of the business disruption and its impact on the particular employer, with consideration given to the employer's size and means of coping with the business problem at hand, as well as to the basic "fairness" of allowing a cited employer the opportunity to defend a citation on its merits. In sum, Respondent maintains that under the totality of the circumstances in this case, the neglect in failing to timely file the NOC should be regarded as excusable.

The Secretary relies on the admittedly late NOC. She urges the Commission to adopt the position of the Court of Appeals for the Second Circuit, as set forth in *Secretary of Labor v. Russell P. Le Frois*, 291 F.3d 219 (2002). In that case, the court held that the Commission has no jurisdiction where an NOC has not been timely filed and that the Commission thus has no authority to apply the criteria developed under Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"). Suffice it to say that at this juncture, this case will not fall under the jurisdiction of the Second Circuit. Further, the Commission has not adopted or applied the Second Circuit position in any similar matters arising in any other jurisdictions. These facts, however, do not resolve the matter at issue here.

Under applicable Commission precedent, otherwise untimely NOC may be accepted where 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 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).

As indicated above, the issue here is whether the business disruption that occurred at or about the time during which Respondent could have filed a timely NOC may be deemed "excusable neglect" under Rule (60)(b) such that Prime may be granted relief from the Citation's having become a final order. The Commission has held that a key factor in determining whether a late filing was due to excusable neglect is "the reason for the delay, including whether it was within the reasonable

control of the movant.” *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-367, 2000), citing to *Pioneer Inv. Serv. v. Brunswick Assoc.*, 507 U.S. 380, 395 (1993). The Commission has also 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).

Particularly persuasive in my opinion are the facts that Mr. Seppala conceded that he receives all certified mail for Respondent but that he sometimes doesn’t even look at it. (Tr. 36) Similarly, it is important to note that the salesman/estimator actually left Respondent’s employment some nine months before the citation was issued. Based on the evidence and the foregoing Commission precedent, I conclude that the late filing here was due to Prime’s preoccupation and high degree of concern with its business position. Prime’s president was, however, aware of the requirements, and, having filed previous NOC’s, was aware of how to deal with OSHA. What this situation presents is, in essence, a business-driven decision to attend to matters considered more crucial than the timely filing of the NOC. While I am sympathetic to the plight of Prime, and am convinced of the sincerity of Respondent’s president, I am constrained to decide cases based upon the facts and circumstances presented and upon applicable Commission precedent. The employer has the burden of showing it is entitled to relief, and Prime, in my opinion, has not established the required basis for finding its neglect to be excusable. Thus, this record does not establish justification for the granting of Rule 60(b) relief in this case. Accordingly, the Secretary’s motion to dismiss Prime’s NOC as untimely is GRANTED, and the Citation is deemed to be a final order of the Commission in all respects. This matter before the Commission is dismissed.

/s/

Michael H. Schoenfeld
Judge, OSHRC

Date: June 1, 2004
Washington, D.C.