



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,
Complainant
v.
Progressive Interest, Inc.,
Respondent,

OSHRC Docket No. **12-1805**

APPEARANCES:

Chris Green, Esquire, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For the Complainant

Shannon Hepburn, Pro Se, Progressive Interest, Inc., Houston, Texas
For the Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

The Secretary filed an Opposition to Relief under Rule 60 (b), asserting that the notice contesting her Citation was filed late, that the Citation is now a final order of the Commission and that Respondent is not entitled to relief under Rule 60 (b) of the Federal Rules of Civil Procedure. Respondent filed no response to this pleading.

A hearing was held on the timeliness of the Notice of Contest in Alexandria, Louisiana on March 28, 2013. For the reasons that follow, the Notice of Contest is dismissed, and the Citation and Notification of Penalty are affirmed.

A bench decision was entered following the hearing. Excerpts of relevant transcript pages and paragraphs, including the bench decision entered at the hearing, finding of facts and conclusions of law (Tr. 39-43) are included in this decision as follows:

Bench Decision

I've considered the presentation of evidence by the Secretary and by the company, and I'm ready to enter a decision from the bench at this time.

You'll receive a written decision subsequently but I'm prepared to make a ruling at this time.

This matter is before the Review Commission for me to determine whether relief should be granted to the company pursuant to the Federal Rules of Civil Procedure, Rule 60 (b), from the final order in this case resulting from the company, Progressive Interest, Incorporated, failure to contest the citation and notification of penalty within the prescribed time period.

Now, my first determination must be was the Notice of Contest late. And if I find it was filed late, is there relief that can be granted due to excusable neglect by the company.

Let me just go through what the evidence has shown to this point. The citation in this matter was issued to the company on July 30, 2012, and received by the company by certified mail, signed for by an employee of the company, on August 2, 2012.

The deadline to file the Notice of Contest, that is, postmarked, was August 23, 2012, a Thursday.

Respondent, through Ms. Hepburn, testified today, the accounts manager for the company, also secretary of the corporation, that there was an admission that the company did not file its Notice of Contest until August 27, 2012. In fact, the letter is entitled "Late Notice of Contest."

I find that the Secretary has established the Notice of Contest was filed late, but remaining for me to determine, was this late filing a result of excusable neglect by the company.

Ms. Hepburn, the accounts manager and secretary of the company, who routinely handles all the mail, was out of the country for 30 days and returned back to Houston, the home office of the company on August 21, 2012, which was two days before the deadline to file the Notice of Contest.

At that time Ms. Hepburn did not sort the mail or go through the mail at that time. The Respondent did not communicate with the Area office of the Secretary of OSHA before filing written Late Notice of Contest on the 27th of August.

Respondent had no guidelines for employees handling the mail, including certified mail during this period, except employees were to put the mail on the account manager's desk unopened.

Two employees were charged with this responsibility. The back-up employee in this instance signed for the certified mail at the Post Office and put this on the account manager's desk unopened.

Respondent now has guidelines, however, for its employees handling mail. These are internal guidelines of the company.

In the past Respondent had asked the Post Office to hold its mail when its officers were out of the country, but some of the mail had been lost.

So Respondent decided the two employees should pick up the mail and put it on Ms. Hepburn's desk unopened.

Ms. Hepburn testified that Respondent does not typically get certified mail. It wasn't expected in this situation.

But it's also not unusual to receive certified mail. Respondent now receives approximately one certified mail item every month.

Ms. Hepburn testified that the president should have been aware of the Secretary's inspection, but she was not aware of that.

Respondent had a previous inspection two years prior to this case, and Ms. Hepburn, the accounts manager, sent in Notices of Contest on both the prior case and on this case, after receiving the citations.

I find that the late filing of the Notice of Contest is a result of the Respondent's internal mail handling process and is found not to be the result of excusable neglect.

A timely filing of Notice of Contest could have occurred had Respondent in place satisfactory internal mail handling procedures.

So based on the evidence received here today, no relief can be granted under Rule 60 (b) of the Federal Rules of Civil Procedure, and Items 1 and 2 of Citation 1 are a final order, remain a final order of the Commission by operation of statute.

And the total penalties of \$3600 are also a final order, and relief cannot be granted from that at this time.

A written decision incorporating this decision that I'm issuing from the bench will be issued subsequently upon receipt of the transcript to the parties.

(Tr.39-43).

Respondent's delay was not the result of excusable neglect mistake or inadvertence. No evidence was produced indicating fraud, misrepresentation or other misconduct by the Secretary. Respondent has failed to demonstrate that it is entitled to relief under Rule 60 (b).

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based on the foregoing decision, it is ORDERED that:

1. The Secretary's opposition to Relief under Rule 60 (b) is Granted.
2. Respondent's Notice of Contest is Dismissed.
3. The Citation and Notification of Penalty are affirmed as a final order of the Commission.
4. No relief is granted pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure.

/s/

Stephen J. Simko, Jr.
Judge

Date: April 23, 2013
Atlanta, Georgia