

SECRETARY OF LABOR,

Complainant,

v.

PROTO CONSTRUCTION &
DEVELOPEMENT CORP.,

Respondent.

OSHRC Docket No. 02-1930

DECISION AND ORDER

The Secretary has filed a motion to dismiss Respondent's notice of contest ("NOC") as untimely. Respondent has filed no response to the motion.

Background

The Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent, Proto Construction & Development Corp. ("Proto"), located in the Bronx, New York, in August of 2002. As a result, OSHA issued Proto a Citation and Notification of Penalty ("Citation") on September 20, 2002. OSHA mailed the Citation by certified mail, return receipt requested, and Proto received the Citation on September 23, 2002. Section 10(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"), requires an employer to notify the Secretary of the intent to contest the 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 Occupational Safety and Health Review Commission ("the Commission") by operation of law. Based on the date that it received the Citation, Proto was required to file its NOC by October 15, 2002. Proto did not file an NOC by that date; however, on October 17, 2002, it submitted a letter to OSHA indicating its disagreement with the Citation and its desire for a hearing. OSHA received Proto's letter on October 21, 2002, and Proto filed a copy of the same letter with the Commission on November 8, 2002. The Secretary filed her motion to dismiss Proto's NOC as untimely on December 3, 2002, and, as noted above, Proto has filed no response to the motion.

Discussion

The record plainly shows that Proto did not file an NOC within the required 15 working day period. However, an 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 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); see also Fed. R. Civ. P. 60(b) (“Rule 60(b)”). There is no indication and no contention that the late filing here was caused by the Secretary’s deception or failure to follow proper procedures. Moreover, Proto’s letter offers no reason for the late filing of the NOC, and it did not respond to the Secretary’s motion. Regardless, even if Proto had asserted that it was entitled to Rule 60(b) relief, it would be unlikely that any such relief would be warranted, for the following reasons.

Commission precedent is well settled that the OSHA citation plainly 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 also 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 handling 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 accordingly denied Rule 60(b) relief in cases where the late filing was due to mishandling the citation, changes in management, or illness of the individual responsible for OSHA matters. See, e.g., *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989); *J.F. Shea Co.*, 15 BNA OSHC 1092, 1094 (No. 89-976, 1991); *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991).

While I am sympathetic to Proto’s plight in this matter, I am constrained to decide cases based on the circumstances presented and on Commission precedent. Because Proto has articulated no reason whatsoever for the late filing of its NOC, and in light of the Commission precedent set out

supra, there is no justification for the granting of Rule 60(b) relief in this case.¹ The Secretary's motion to dismiss Proto's NOC as untimely is accordingly GRANTED, and the Citation is AFFIRMED in all respects.

So ORDERED.

/s/
Irving Sommer
Chief Judge

Date: January 13, 2003
Washington, D.C.

¹In deciding this case in this manner, I am aware of the Second Circuit's decision, *Chao v. Russell P. Le Frois Builder, Inc.*, No. 00-4057 (2d Cir. May 10, 2002), holding that the Commission does not have authority to accept a late-filed NOC pursuant to Rule 60(b). I am also aware that this case could be appealed to the Second Circuit. However, it is unlikely that Proto would do so, in light of the Second Circuit's decision, and, for this reason, I have decided this matter pursuant to Rule 60(b). See *HRH Constr. Corp.*, 19 BNA OSHC 2042, 2044-45 (No. 99-1614, 2002). Regardless, the end result for Respondent Proto is the same whether this case is decided under Commission precedent or the Second Circuit's decision.