

SECRETARY OF LABOR,

Complainant,

v.

F& G SONS CONTRACTORS, INC.,

Respondent.

DOCKET NO. 02-1894

APPEARANCES:

Evanthia Voreadis, Esq.
Office of the Solicitor
U.S. Department of Labor
New York, New York
For the Complainant

Frank Guidice
F & G Sons Contractors, Inc.
Montville, New Jersey
For the Respondent, *pro se*

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 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”), to determine the Secretary’s motion to dismiss Respondent’s request to file a late notice of contest (“NOC”).

Background

Following an inspection of a work site of Respondent, F & G Sons Contractors, Inc. (“F&G”), in Montville, New Jersey, the Occupational Safety and Health Administration (“OSHA”) issued a Citation and notification of penalty alleging serious violations of the Act and proposing a penalty of \$9,000.00. Section 10(a) of the Act requires the employer to notify OSHA of the intent to contest a Citation within 15 working days of receiving it. A failure to do so results in the Citation becoming a final judgment of the Commission by operation of law.

OSHA issued the Citation to F&G on July 3, 2002, by certified mail. The return receipt card indicates that it was received on August 2, 2002. Based on this date, OSHA determined that the 15-day period for filing a notice of contest ended on August 23, 2002. (Exhs. C-1 & 3).

On October 27, 2002, OSHA hand-delivered a demand letter to F&G. On November 1, 2002, F&G’s president, Frank Guidice, wrote the Commission, stating that the post office had not delivered

the letter, and requesting that he be permitted to file an NOC out of time. (Exhs. C-4, 5 & 6). The Secretary moved to dismiss the proffered NOC, and a hearing on this issue was conducted on January 22, 2003. The Secretary has filed a post-hearing brief but Respondent has not.

Discussion

The Secretary's evidence establishes that the Citation was properly served in accordance with the Act. I also find that the return receipt card from the post office proves that the Citation was received and accepted at F&G's place of business on August 2, 2002, and that the Citation accordingly became a final order on August 23, 2002. (Exh. C-3).¹

As is indicated above, F&G contends that it did not receive the Citation. Mr. Guidice admitted that the signature on the return receipt card belonged to his wife, but explained that Mrs. Guidice had told him that she signed the card to request that the post office leave the mail at the door and that no further delivery ever followed. (Tr. 23-24). The statement Mrs. Guidice purportedly made to her husband, however, is contrary to the physical evidence presented at the hearing. Exhibit C-3, the item Mr. Guidice identified as the card his wife left at the door for the post office, is *not* an alternative delivery request slip, but, as indicated above, a document used by the post office to prove that mail is delivered. Furthermore, Exhibit C-3 contains no direction that the mailing be left at the door, which directly contradicts Mrs. Guidice's purported statement. Because Mrs. Guidice did not testify at the hearing, the discrepancies between her statement and the physical evidence are unexplained. Moreover, without her live testimony, Mrs. Guidice's statement cannot be verified. I accordingly find that F&G failed to rebut the Secretary's proof and that F&G's November 1, 2002 NOC was untimely. (Exhs. C-1, 3 & 6).

Under Commission precedent, however, an otherwise untimely NOC may be accepted if the employer can show that the late filing was caused by the Secretary's deception or her failure to follow proper procedures, if the final order was entered as a result of "mistake, inadvertence, surprise or excusable neglect" or for "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*

¹ The Secretary has requested that I take judicial notice of the fact that Exhibit C-3 is a return receipt card routinely used by the post office to prove delivery of an item, and I do so.

Branciforte Builders, Inc., 9 BNA OSHC 2113 (No. 80-1920, 1981). *See also* Fed. R. Civ. P. 60(b) (“Rule 60(b)”). The record, however, is devoid of proof of any circumstance that would enable Respondent to obtain relief under any of the above grounds. F&G’s argument that the post office did not deliver the Citation cannot form the basis for such relief, as I have already found that the Citation was indeed delivered to Respondent’s place of business. It is more likely that Respondent’s failure to timely file the NOC was due to Respondent’s admitted lack of procedures with respect to the acceptance and distribution of mail. (Tr. 26-30). While I am not unsympathetic to procedural problems faced by Mr. Guidice in running an office out of his home, I am constrained to apply Commission precedent, which states that employers are expected to maintain orderly procedures for the handling of important documents. *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020 (No. 86-1266, 1989). I accordingly cannot grant relief on that basis.

In light of the above, I conclude that the Citation was properly served, that F&G did not file a timely NOC, and that the company is not entitled to relief pursuant to Rule 60(b). The Secretary’s motion to dismiss is accordingly GRANTED, and the citation and notification of penalty is AFFIRMED in all respects. So ORDERED.

/S/
IRVING SOMMER
Chief Judge

Dated: March 21, 2003

Washington, D.C.