



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.

STOLTZFUS WELDING & RENTALS,
LLC,

Respondent.

OSHRC DOCKET No. 13-0471

**DECISION AND ORDER DENYING RESPONDENT'S MOTION
FOR LEAVE TO FILE LATE NOTICE OF CONTEST**

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to Section 10(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Stoltzfus Welding & Rentals (“Respondent”) at its worksite located at 201 N. 7th Street in Lebanon, Pennsylvania on September 21, 2012. As a result of the inspection, OSHA issued a Citation and Notification of Penalty (“Citation”) to Respondent alleging two serious violations and one repeat violation of the Act with penalties totaling \$ 8360.00. The Citations were issued on November 16, 2012. By operation of law, the Citation in this case became a final order 15 working days after it was received by Respondent on November 21, 2012. By letter dated March 12, 2013, Respondent requested an extension of time in which to contest the Citation. Thereafter, Respondent’s Notice of Contest (“NOC”) was

docketed by the Commission on March 21, 2013. For the reasons that follow, Respondent's Motion for Leave to File Late Notice of Contest is DENIED.

Background¹

On November 16, 2012, OSHA issued the subject Citation in this case to Respondent via certified mail. Respondent's NOC was due within fifteen working days from November 21, 2012, which was the date of receipt. See Ex. B to Secy's Opp. Respondent did not file a timely NOC. On February 7, 2013, the OSHA Area Director ("A.D.") in Harrisburg, Pennsylvania sent a delinquency notice to Respondent for non-payment of penalties proposed for the subject Citation. On February 19, 2013, Respondent called the OSHA A.D. to explain that a NOC was not filed in this case because he (Owner, Elmer Stoltzfus) did not understand that he had received a Citation and wanted to file a late NOC. During that phone call, the OSHA A.D. informed Respondent that the Citation had become a final order and that he could file a motion with the Commission requesting leave to file a late NOC. Through its attorney, Respondent filed a letter on March 12, 2013, indicating that its failure to timely contest was based on Complainant's representation that no citations would be issued. In the same letter, Respondent requested additional time to file its NOC. On April 5, 2013, the Secretary of Labor's ("Complainant" or "the Secretary") letter request for an extension of time to April 12, 2013, to file a Complaint was granted. In lieu of a Complaint, the Secretary filed Complainant's Response in Opposition to Respondent's Motion for Leave to File Late Notice of Contest on

¹ The background information is based on Respondent's letter requesting an extension of time to file late NOC, Complainant's Response in Opposition to Respondent's Motion for Leave to File Late Notice of Contest, and Respondent's Reply in Support of Its Motion for Leave to File Late Notice of Contest.

April 12, 2013. On April 22, 2013, Respondent filed its Reply in Support of its Motion for Leave to File Late Notice of Contest.²

Discussion

Rule 60(b)(3) of the Federal Rules of Civil Procedure (“Rule 60 (b)” or “Rule 60(b)(3)”)states:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons...fraud (whether previously called intrinsic or extrinsic), **misrepresentation**, or misconduct by an opposing party.

(emphasis added).

The Commission derives its authority to grant relief from a final order from Rule 60(b). *Jackson Assocs. of Nassau*, 16 BNA OSHC 1261 (No. 91-0438, 1993). A Rule 60(b)(3) motion cannot be granted absent clear and convincing evidence of material misrepresentations. *Id.* at 1267 n. 10. The Commission has held that to be entitled to relief under Rule 60(b), Respondent has to show that “its failure to file a timely written notice of contest was due to excusable neglect or was the result of misrepresentation or other misconduct on the Secretary’s part warranting relief.” *Craig Mech. Inc.*, 16 BNA OSHC 1763, 1764 (No. 92-0372, 1994). More specifically, the Commission has held that relief under Rule 60(b)(3) is “appropriate only when prejudicial Government misconduct is coupled with a reasonable diligence by the employer.” *Id.* at 1766. Under Commission precedent, a layperson must exercise reasonable diligence, and what is reasonable may vary depending on the information available to her or him. *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2193 (No. 88-2521, 1991).

² Although Respondent references a Motion for Leave to File Late Notice of Contest, no such motion is a part of the record. However, it appears that Respondent’s March 12, 2013 letter requesting additional time to file its NOC is the “motion” to which it refers.

In the case at bar, Respondent alleges that its failure to file a timely NOC in this case is a result of a misrepresentation by the OSHA A.D. that no citation would be issued. In a letter to Respondent dated November 16, 2012, the Harrisburg, Pennsylvania OSHA A.D. stated, “[a]lthough no citations will be issued for the item **at this time...**” (emphasis added). The “item” referenced in the November 16th letter concerned the use of a forklift to lift personnel. The Citation issued by Complainant to Respondent on November 16th cited three violative conditions unrelated to the one referenced in the OSHA A.D.’s letter. The Citation issued to Respondent provided clear instructions on how to file a timely contest under the “Right to Contest” section. Yet, Respondent waited until February 19, 2013, to contact the OSHA A.D. and did so in response to a delinquency notice he received for the unpaid penalties. I find that the same amount of diligence exercised by Respondent in response to the delinquency notice could and should have been exercised in response to the Citation and Notification of Penalty. In fact, in light of Respondent’s contention that it believed, based on the OSHA A.D.’s representation, that no citation would be issued, it should have made an inquiry to get clarification on the Citation that was issued. Following Respondent’s February 19th call with the OSHA A.D., it did not file its Motion for Leave to File Late Notice of Contest until three weeks later on March 12, 2013. The passage of time between Respondent’s communication with OSHA and the Commission concerning its late notice of contest reflects a lack of reasonable diligence on the part of Respondent. I find that Respondent has not presented any evidence to establish Government misconduct causing it to miss the NOC filing deadline.³ Further, I find that based on the information provided in the

³ Based on this finding, there is no need to address the quality or quantum of Respondent’s evidence.

Citation, it would have been reasonable for Respondent to either file a timely NOC or at the very least place a call to OSHA before the contest period elapsed.

ORDER

Based on the foregoing findings of fact and conclusions of law, I find that Respondent has failed to establish a basis for relief under Rule 60(b)(3). Accordingly, the Citation items and proposed penalties for this case are hereby AFFIRMED.

SO ORDERED.

Dated: July 23, 2013

Keith E. Bell
Keith E. Bell
Judge, OSHRC