Secretary of Labor,
Complainant,

v.

Airloc, Inc.,
Respondent.

OSHRC Docket No. **00-2291**

APPEARANCES

Paul Spanos, Esq.
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Mr. William Soroka, President
Airloc, Inc.
Youngstown, OH
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER DISMISSING NOTICE OF CONTEST

Airloc, Inc. (Airloc), is a small manufacturer of aluminum windows, doors and awnings in Youngstown, Ohio. On June 22, 2000, Airloc received Notification of Failure to Abate Alleged Violations of 29 C.F.R. § 1910.217(b)(4)(i) for failing to guard pedal mechanisms on 12 mechanical power presses and 29 C.F.R. § 1910.217(e)(1)(i) for failing to perform periodic and regular inspections on the 12 mechanical power presses. The notification proposed $3,000 in additional penalties. By letter dated November 20, 2000, Airloc contested the additional penalties. The case was docketed and a hearing was scheduled.

On January 18, 2001, the Secretary of Labor moved to dismiss Airloc's notice of contest as untimely. By Order to Show Cause, Airloc was directed to show why its notice of contest should not be dismissed. Airloc, by letter dated February 2, 2001, responded in part that:

> All documents from OSHA concerning the citations imposed on Airloc were acknowledged by my office with a response letter. Your June 20, 2000 document was received as a duplicate letter which I felt required no response. I certainly did not intend to avoid the Citation. I merely felt nothing more needed to be done as all previous documents had been acknowledged.

On February 28, 2001, a show cause hearing was held in Youngstown, Ohio. Airloc was represented *pro se* by its president William Soroka. This was Airloc's first OSHA proceeding (Tr. 4, 27).

There is no dispute that Airloc received OSHA's Notification of Failure to Abate Alleged Violations on June 22, 2000 (Exh. C-1). It was personally received by president Soroka (Tr. 16). Airloc's notice of contest letter dated November 20, 2000, clearly was untimely -- more than four months after Airloc's receipt of the notification.

Section 10(a) of the Occupational Safety and Health Act (Act) requires an employer to notify the Secretary of Labor that it intends to contest the citation or proposed penalties within 15 working days after receipt of a citation. Otherwise, the citation and proposed penalties are deemed a final order, not subject to review by any court or agency. In this case, 15 working days after Airloc's receipt of the notification was July 8, 2000.

At the show cause hearing, Airloc argued that an earlier letter dated June 28, 2000, to the OSHA area director was intended to be its notice of contest (Exh. R-1; Tr. 16). If the June 28, 2000, letter is found to be a proper notice of contest, it was undeniably timely filed (Tr. 13).

The June 28, 2000, letter by president Soroka to the OSHA Area Director states:

> This letter is in response to your June 26, 2000 letter concerning your April 21, 2000 inspection.
>
> The violations that were sited during your inspection have been corrected and the necessary repairs made.
>
> We have installed protective coverings on the foot pedals and installed see-through plexiglass on the working parts of the tooling machines.
>
> Some of the machinery that is here at Airloc, Inc. is at least 75 years old and a safety feature was not required at that time. All of these machines have been safety equipped as per your inspection.
>
> A few of the existing machines that we have are only used periodically, but we understand the importance of safety and have now added the necessary safety devices to the machines.
>
> Enclosed are pictures of the safety actions that were taken here at Airloc.
>
> If you have any questions concerning the above situation, please contact me at the office.

(Exh. R-1).

Although there is no prescribed form for a notice of contest, the notice must show an intent by an employer to contest the alleged violations or proposed penalties. Section 10(a) of the Act requires that an employer "notify" the Secretary of an intent to contest. In order to be considered a timely notice of contest, Airloc's June 28th letter must express an intent to contest.

Ambiguous and unartfully drawn letters are construed liberally and given "wide leeway" to ascertain an employer's intent, particularly a *pro se* represented employer such as Airloc. *Tice Industries*, 2 BNA OSHC 1489, 1491 (No. 1622, 1975); *Frank C. Gibson*, 6 BNA OSHC 1557 (No. 13925, 1978) (although *pro se* employers are given a wide leeway, "a tortured construction of the notice of contest is not permitted").

As examples, an employer's letter stating that it regarded OSHA's "request for payment to be unfounded" was considered a valid notice of contest. *United States v. B & L Supply Co.*, 486 F. Supp. 26 (N.D. Tex. 1980). In another case, an abatement letter was considered a timely notice of contest because the employer made statements that compliance was physically impossible or infeasible, which showed an intent to dispute the citation. *Herasco Contractors, Inc.*, 16 BNA OSHC 1401 (No. 93-1412, 1993). On the contrary, a letter to an OSHA area office stating that two violations had been abated "100% complete" was not considered a valid notice of contest. *Arena Construction Co.,* 1978 OSHD ¶ 22,987 (S.D.N.Y. 1978). Similarly, an employer's letter stating that it had "complied with this citation, and everything has been corrected" was also not found to be a valid notice of contest. The letter showed no evidence of dissatisfaction with the Secretary's citation. *M & S Jewelry Manufacturing Corp.*, 1980 CCH OSHD ¶ 24,329 (S.D.N.Y. 1980).

Airloc's June 28, 2000, letter is not deemed to be a notice of contest. First, the June 28th letter references the original citation issued April 21, 2000 (inspection number 103539128), and not the notification of failure to abate alleged violations issued June 20, 2000 (Exh. R-1). The June 28th letter does not respond to the notification. Even if found to be a valid notice of contest, Airloc's June 28, 2000, letter was untimely filed as to the April 21st citation.

More importantly, Airloc's June 28th letter does not express, directly or impliedly, an intent to contest either the April 21st citation or the June 20th notification of failure to abate alleged violations. The letter merely advises OSHA that the alleged violations have been

corrected. It fails to express dissatisfaction with the notification or prior citation. Even considering the letter under the most liberal interpretation, there is no indication that Airloc questioned, objected or protested the alleged violations, proposed penalties or abatement dates. The testimony of Airloc's president and other correspondence sent by Airloc confirm this characterization of the letter. In response to a question as to what was being contested by his June 28th letter, president Soroka testified:

> No, the only thing we have is that the violations that were being cited during the inspection were corrected and necessarily repaired. (Tr. 26)

Having found that the June 28th letter was not a notice of contest as required by Section 10(a) of the Act, attention is now directed to Airloc's November 20th letter which expressly does contest the additional penalties. Airloc's November 20th letter is clearly untimely. However, an otherwise untimely notice of contest may be accepted if it is shown that the delay in filing was caused by deception on the part of the Secretary of Labor or by the failure of the Secretary to follow proper procedures. An employer may also be entitled to relief under Federal Rules of Civil Procedure, Rule 60(b)(1), if it demonstrates that the final order was entered as a result of "mistake, inadvertence, surprise, or excusable neglect" or under Rule 60(b)(6) for mitigating circumstances such as absence, illness, or a disability which prevents the party from protecting its interests. *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981). The burden is on Airloc to show sufficient basis for the relief. *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

During the hearing and after a review of correspondence, it is found that Airloc offered no justification for its failure to file an untimely notice of contest. Soroka concedes that he received the notification of failure to abate alleged violations and read the requirement to file a notice of contest if it objected to the violations or proposed penalties (Tr. 25). The notification cover sheet specifically advises an employer:

> You are further notified that you must pay the ADDITIONAL PENALTY unless you inform the Area Director in writing that you intend to contest the Notification or the Additional Penalty within 15 working days (excluding weekends and Federal holidays) from receipt of this notification. If you do not contest within 15 working days after receipt, the Notification and the additional penalties will become the final order of the Occupational Safety and Health

Review Commission and may not be reviewed by any court or agency.

Airloc offered no explanation for its delay in filing the contest, except that it believed that by correcting the violations, the citations and proposed penalties would not be pursued (Tr. 26). Although Airloc is unsophisticated in handling OSHA matters, it is noted that Airloc has been in business since 1952 and employs 8 employees (Tr. 15). As a business owner, Soroka has sufficient ability to handle and understand numerous business matters. The directions in OSHA's notification are clear and unambiguous. Airloc's president failed to carefully read and act upon the unambiguous instruction accompanying the notification. If it had questions or did not understand the process, there is no showing that Airloc made an attempt to contact OSHA or other knowledgeable persons such as trade associations or attorneys for assistance (Tr. 19). Airloc had an obligation and responsibility, if confused, to seek clarification. Airloc made no such attempt.

While not unsympathetic to Airloc's plight, there is no showing but to hold it responsible for failing to file its notice of contest in a timely manner. Its mistake was neither excusable nor justified. By its failure to file timely, the court lacks jurisdiction to review the notification or additional penalties. Airloc's claim of inability to pay the penalties is a matter which should be considered by OSHA in pursuing collection action.

Airloc's notice of contest is dismissed.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Citation no. 1, item 1, alleged failure to abate violation of § 1910.217(b)(4)(i), is affirmed and an additional penalty of $1,500 is assessed.

Citation no. 1, item 3, alleged failure to abate violation of § 1910.217(e)(1)(i), is affirmed and an additional penalty of $1,500 is assessed.

/s/
KEN S. WELSCH
Judge

Date: March 26, 2001