
SECRETARY OF LABOR, :
: :
Complainant, :
: :
v. :
: :
DESSAU BRASS, INC., :
: :
Respondent. :

OSHRC DOCKET NO. 99-0533

Appearances:

Margaret A. Temple, Esquire
New York, New York
For the Secretary.

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”), for the sole purpose of determining whether the Secretary’s motion to dismiss Respondent’s notice of contest as untimely should be granted.

Background

The Occupational Safety and Health Administration (“OSHA”) inspected Respondent’s facility in Moonachie, New Jersey, in November of 1998. As a result, OSHA issued Respondent a citation and notification of penalty alleging serious violations of the Act. Section 10(a) of the Act requires an employer to notify OSHA of the intent to contest a citation within 15 working days of receiving it, and the employer’s failure to file a timely notice of contest results in the citation and penalty becoming a final judgment of the Commission by operation of law. The record shows that OSHA mailed the citation by certified mail, that Respondent received it on December 10, 1998, and that the notice of contest period ended on January 4, 1999. The record also shows that Respondent did not file a notice of contest until March 29, 1999, after receiving a letter from OSHA advising that the penalties assessed were past due. The Secretary filed her motion to dismiss on May 20, 1999. The hearing in this matter was held in New York, New York on July 27, 1999.

Discussion

The record plainly shows that Respondent did not file its notice of contest until after the 15-day contest period had ended. An otherwise untimely notice of contest may be accepted where the Secretary's deception or failure to follow proper procedures caused the delay in filing. An employer is also entitled to relief if it shows the Commission's 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 which would prevent a party from protecting its interests. *See* Fed. R. Civ. P. 60(b); *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no evidence and no contention that the Secretary was deceptive or failed to follow proper procedures in this matter. Rather, Respondent concedes the lateness of its notice of contest and, in essence, requests that the late filing be excused under the circumstances.

No representative of Respondent made an appearance at the hearing. However, in the company's notice of contest letter, Mr. Howard Dessau indicates that all of the violations found during the inspection were abated as required. He also indicates that this was Respondent's first experience with OSHA and that company officials did not understand the 15-day notice of contest filing requirement. Finally, Mr. Dessau indicates that paying the assessed penalties would present a financial hardship for the company and requests that the penalty assessment be "reversed."

The citation issued to Respondent, and the cover letter accompanying it, explain the 15-day contest period. The cover letter states, in the first paragraph on page 1, that:

You must abate the violations referred to in this Citation by the dates listed and pay the penalties proposed, unless within 15 working days ... from your receipt of this Citation and Notification of Penalty you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above. Please refer to the enclosed booklet (OSHA 3000) which outlines your rights and responsibilities and which should be read in conjunction with this form.

The cover letter also states, on page 2, the following:

Right to Contest - You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates without contesting the underlying violations. **Unless you inform the Area Director in writing that you intend to contest the citation(s) and/or proposed penalty(ies) within 15 working days after receipt, the citation(s) and the proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.**

The Commission has held that the OSHA citation “plainly state(s) the requirement to file a notice of contest within the prescribed time period.” *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). The Commission has also held that ignorance of procedural rules, even by a layman, does not constitute “excusable neglect” for purposes of Rule 60(b) relief. *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1127 (No. 88-2291, 1991). Finally, the Commission has held that Rule 60(b) cannot be invoked “to give relief to a party who has chosen a course of action which in retrospect appears unfortunate or where error or miscalculation is traceable really to a lack of care.” *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

Based on Howard Dessau’s letter, the failure to file a timely notice of contest in this case was due to the company’s inexperience with OSHA and its not understanding the 15-day filing requirement. However, in light of the foregoing Commission precedent, these reasons do not constitute excusable neglect or “any other reason justifying relief” pursuant to Rule 60(b). I have noted the statements in Respondent’s notice of contest letter indicating that all of the cited conditions were abated as required and that paying the assessed penalties would impose a financial burden on the company. Although I sympathize with Respondent’s plight in this matter, I am constrained by Commission precedent and the circumstances of this case to conclude that Respondent is not entitled to Rule 60(b) relief. The Secretary’s motion to dismiss is accordingly GRANTED, the notice of contest is DISMISSED, and the citation and notification of penalty is AFFIRMED in all respects. So ORDERED.

Irving Sommer
Chief Judge

Date: