

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 98-1527
	:	
PRESTON TRUCKING COMPANY,	:	
INC.,	:	
	:	
Respondent.	:	

APPEARANCES:

John Ho, Esquire
New York, New York
For the Complainant.

Glenn DeMarco
Preston, Maryland
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 whether Respondent, Preston Trucking Company (“Preston”), filed a timely notice of contest of a citation and notification of penalty issued by the Occupational Safety and Health Administration (“OSHA”). The hearing in this matter was held January 15, 1999.

Background

OSHA inspected Preston’s workplace in Kearny, New Jersey, on January 27, 1998, and issued the company a citation and notification of penalty on July 1, 1998.¹ Section 10(a) of the Act requires an employer to notify OSHA of the intent to contest a citation within 15 days of receiving it, and the failure to file a timely notice of contest results in the citation and penalty becoming a final judgment

¹OSHA held its closing conference with Preston on May 11, 1998.

of the Commission by operation of law. It is undisputed that OSHA mailed the citation by certified mail, that Preston received it on July 10, 1998, and that the 15-day notice of contest period expired on July 31, 1998. It is also undisputed that Preston filed its notice of contest on September 24, 1998, and that the Commission received the notice of contest on September 28, 1998. The Secretary filed her motion to dismiss the notice of contest as untimely on November 12, 1998.

Discussion

The record plainly shows that Preston did not file its notice of contest until well after the 15-day contest period had already 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 that 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 fact, Preston concedes its fault in filing the untimely timely notice of contest. (Tr. 18). Rather, Preston requests, in essence, that its untimely filing be excused under the circumstances.

At the hearing, Glenn DeMarco, Preston's terminal manager, stated that his secretary received the citation while he was on vacation; she then misplaced it, which resulted in his being unaware of the citation until the OSHA compliance officer who had conducted the inspection returned to the site to do a follow-up inspection on August 28, 1998. DeMarco noted that Preston had taken the inspection very seriously, that it had significantly upgraded its safety efforts and had also fully abated all of the cited conditions by the time of the follow-up inspection, and that the company was very frustrated by not having had the opportunity to discuss the citations with OSHA. (Tr. 18-20). In addition, Donald Hansen, Preston's vice-president of safety and insurance, stated in the notice of contest that the company had always responded in a timely manner to OSHA complaints and alleged violations and that this was the first time a document of such importance had been misplaced.

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

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, as follows:

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 Rule 60(b), noted *supra*, 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.” *Id.* Finally, the Commission has held that a business must have orderly procedures for the handling of important documents and has denied Rule 60(b) relief where the employer asserted that the late filing was caused by events such as a change in management, the improper handling of the citation by company personnel, and the absence, even when due to illness, of the person responsible for OSHA matters. *See 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); and cases cited therein.

It is clear from the record that the untimely filing in this case was due to clerical mishandling of the citation. I am sympathetic to Preston’s plight in this matter, and I have noted the company’s good faith, its prompt abatement of the cited conditions, and the obvious sincerity of Glenn DeMarco, Preston’s terminal manager. However, I am constrained to follow Commission precedent, and, in light of the foregoing case law, I am forced to conclude that the late filing was the result of simple negligence and not excusable neglect. I therefore have no choice but to grant the Secretary’s motion

to dismiss Preston's untimely notice of contest. The Secretary's motion to dismiss is consequently 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: