

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. :
 :
MR. FOX TIRE COMPANY, INC., :
 :
Respondent. :

OSHRC DOCKET NO. 98-0605

APPEARANCES:

Mychelle Morgan, Esquire
New York, New York
For the Complainant.

Michael J. Stachowski, Esquire
Buffalo, New York
For the Respondent.

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 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 on August 17, 1998, and both Respondent and the Secretary have filed post-hearing submissions.

Background

OSHA inspected Respondent’s place of business on December 3, 1997, and issued a serious citation to the company on December 18, 1997. 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 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 sent the citation by certified mail on December 18, 1997, that Respondent received it on December 19, 1997, and that the notice of contest period ended on January 14, 1998. The record also shows that Respondent did not send

OSHA a notice of contest, although it did mail in an abatement verification form during the contest period, and that OSHA accordingly sent Respondent a demand letter for payment of the penalty on February 18, 1998. Respondent's owner, Eric Fox, called OSHA on February 20, 1998, in order to protest the penalty, and was advised that he could file a late notice of contest with the Commission for its consideration. Fox filed a notice of contest letter with the Commission on April 24, 1998, after which the Secretary filed her motion to dismiss the notice of contest as untimely.¹

Discussion

It is clear that Respondent did not file its notice of contest until well after the 15-day notice period. 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).

Although Eric Fox did not appear at the hearing, his affidavit is attached to Respondent's post-hearing submission.² In his affidavit, Fox states that he was under the mistaken impression that OSHA would not assess any penalties as long as he corrected the cited conditions and that his abatement letter served, in effect, as a notice of contest; Fox also states, in his February 25, 1998 letter, that the citation was misleading. However, Linda Luraschi, the OSHA compliance officer who conducted the inspection, testified at the hearing that she advised Fox at the closing conference that if he wanted to contest the citation and/or penalty he would need to file a notice of contest within 15 working days of receiving the citation and that she never told him he would not have to pay any penalties if he corrected the violations; she further testified that during their phone conversation on February 20, 1998, Fox agreed that she had told him about the 15-day contest period. (Tr. 41-46).

¹Attached to the notice of contest is a February 25, 1998, letter to the office of a United States Senator, in which Fox explained his situation and requested assistance; also attached to the notice of contest is the Senator's letter to OSHA and his response to Fox.

²Respondent presented only one witness at the hearing, and that individual had no personal knowledge of either the inspection or why the notice of contest was not timely filed. (Tr. 47-50).

In addition to the foregoing, the citation and the cover letter accompanying it explain the 15-day contest period. The cover letter states, in the first paragraph, 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” and that the OSHA 3000 booklet accompanying the citation “provide[s] additional, straightforward explanations.”³ *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). The Commission has further held that an employer “must bear the burden of its own lack of diligence in failing to carefully read and act upon the information contained in the citations,” that lack of knowledge of procedural rules does not constitute excusable neglect for purposes of Rule 60(b) relief, and that the rule 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.” *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

Respondent contends that, based on the record, it is entitled to Rule 60(b) relief. I disagree. There is no evidence that OSHA misled Fox with respect to the 15-day filing requirement; to the contrary, the compliance officer advised Fox of the filing requirement at the conclusion of the

³The record establishes that the compliance officer gave Fox an OSHA 3000 booklet at the closing conference and that another copy was sent with the citation. (Tr. 14-15; 44).

inspection and gave him an OSHA 3000 booklet at that time. There is likewise no evidence of excusable neglect or any other reason justifying Rule 60(b) relief. The citation, cover letter and OSHA 3000 booklet provided sufficient information to enable Respondent to file a timely notice of contest, and the company's failure to carefully read and then act on that information in a timely manner was simple negligence, which, in light of the Commission decisions set out above, provides no basis for Rule 60(b) relief. I have noted the statements in Fox's letters indicating that all of the cited conditions have been abated and that the assessed penalty, in his opinion, is excessive and unfair. However, although I sympathize with Respondent's plight, I am constrained by the record in this case and by the foregoing Commission precedent to find for the Secretary in this matter. The Secretary's motion to dismiss Respondent's notice of contest is accordingly GRANTED, and the citation and penalty are AFFIRMED in all respects.

Irving Sommer
Chief Judge

Date: