



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.

BILL JONES REPAIRS AND REROOFS,
INC.,

Respondent.

OSHRC Docket No. 11-1284

DECISION AND ORDER

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

At issue before the Commission is an August 2, 2011 decision of Administrative Law Judge Dennis L. Phillips granting the Secretary's motion to dismiss an untimely notice of contest ("NOC") filed by Bill Jones Repairs and Reroofs, Inc. ("Jones" or "Respondent"). On March 15, 2011, following an inspection of a worksite in Naples, Florida, the Occupational Safety and Health Administration ("OSHA") issued Jones a citation alleging serious violations of various construction industry standards under the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. §§ 651-678. OSHA proposed a total penalty of \$10,000. Jones received the citation on March 17, 2011, and had until April 7, 2011, to file a timely NOC. *See* § 10(a) of the OSH Act, 29 U.S.C. § 659(a) ("employer has fifteen working days within which to notify the Secretary that it wishes to contest the citation or proposed assessment of penalty").

On April 5, 2011, Miguel Leorza, the Acting Assistant Area Director at OSHA's Area Office in Fort Lauderdale, Florida, held an informal conference with Bill Jones, Respondent's president. At the informal conference, the possibility of settling the case was discussed, but Bill Jones indicated that he wanted more time to consider the matter. On April 8, 2011, one day after

the NOC period ended, Bill Jones called Leorza to further discuss the citation. Leorza told him that settlement was no longer possible, and he could file a late NOC with the Commission.¹

On April 26, 2011, Bill Jones filed a handwritten letter with the Commission explaining that accepting the Secretary's settlement offer "would put me out of business and leave my employees jobless." He also asked for a reduction in the penalty proposed in the citation and questioned the merits of some of the citation items. On May 26, 2011, the Secretary filed a motion with the judge in which she characterized Respondent's letter as a late-filed NOC and asked the judge to dismiss it. According to the Secretary, Jones failed to provide any basis for relief from the Commission's final order under Federal Rule of Civil Procedure 60(b).² In his decision, the judge determined that relief under Rule 60(b) was not warranted, granted the Secretary's motion to dismiss the untimely NOC, and affirmed the citation together with the proposed penalty.

On September 7, 2011, Respondent's counsel filed a petition with the Commission seeking review of the judge's decision. Attached to the petition was a letter from Bill Jones to the Fort Lauderdale OSHA Area Office dated March 23, 2011, which states: "I wish to request an Informal Conference as soon as possible as I disagree with the Citation and Notification of Penalty." In its petition, Respondent claims that (1) this letter was faxed to the OSHA Area Office on March 23, 2011; (2) the letter constitutes a timely NOC; and (3) the Secretary acted improperly by not placing it in the case file or forwarding it to the judge. See § 10(c) of the OSH Act, 29 U.S.C. § 659(c) (upon receipt of employer's timely NOC, Secretary shall advise the Commission of the filing); Commission Rule 33, 29 C.F.R. § 2200.33 (same).

We agree with Jones that the language of its March 23, 2011 letter demonstrates an intent to contest the citation and, therefore, find that the letter was a valid NOC. See *Prime Roofing Corp.*, 22 BNA OSHC 1892, 1897, 2004-09 CCH OSHD ¶ 33,028, p. 54,345 (No. 07-1409, 2009) (construing language of employer's letter liberally to determine whether it exhibits a clear

¹ We note that Respondent initially appeared before the Commission *pro se*, but is now represented by counsel.

² Rule 60(b) provides, in relevant part:

On motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
(1) mistake, inadvertence, surprise, or excusable neglect

intent to dispute the citation); *Herasco Contr. Inc.*, 16 BNA OSHC 1401, 1402, 1993-95 CCH OSHD ¶ 30,229, p.41,613 (No. 93-1412, 1993) (same). And on the record before us, it appears that Jones faxed the letter to the OSHA Area Office on March 23, 2011, which was within the NOC period.

Under these circumstances, we set aside the judge's decision and remand the case for him to provide the parties with an opportunity to fully address Respondent's filing.³ If the judge concludes that the NOC was timely, he should reinstate the case and conduct further proceedings as necessary. If he concludes that the NOC was untimely, he should reconsider whether relief under Rule 60(b) is appropriate given the record before him.

Accordingly, we remand this case to the judge for further proceedings consistent with this opinion.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: September 22, 2011

³ In its petition, Jones requests reimbursement for its legal costs. Because this case will now be reconsidered by the judge on remand, Respondent's request is premature. *See* Equal Access to Justice Act, 5 U.S.C. § 504, et. seq.

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,	:	
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Complainant,	:	
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v.	:	OSHRC DOCKET NO. 11-1284
	:	
BILL JONES REPAIRS & REROOFS, INC.,	:	
	:	
Respondent.	:	

**ORDER GRANTING COMPLAINANT’S MOTION TO DISMISS
RESPONDENT’S UNTIMELY NOTICE OF CONTEST**

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Secretary has filed a motion to dismiss the untimely notice of contest (“NOC”) filed by Respondent. Respondent has not filed a response to the Secretary’s motion. For the reasons that follow, the Secretary’s motion is granted.

Background¹

The Fort Lauderdale Area Office of the Occupational Safety and Health Administration (“OSHA”) inspected Respondent’s job site located in Naples, Florida on March 4, 2011.² As a result, on March 11, OSHA issued to Respondent a four-item serious citation alleging violations of the Act. The citation also proposed a total penalty of \$10,000.00. OSHA mailed the citation to the mailing address Respondent had provided. The citation was sent by certified mail via the

¹ The background is based on exhibits attached to the Secretary’s motion and an affidavit of the Acting Assistant Area Director (“AAAD”) of the Fort Lauderdale Area Office.

² All dates in this decision will refer to the year 2011 unless otherwise indicated.

United States Postal Service (“USPS”). Based on the certified mail return receipt, signed by “D. Salvi,” Respondent received the citation on March 17. The following sentence, underlined and in bold, appears on page 2 of the citation, in the paragraph entitled **Right to Contest**:

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

Because Respondent received the citation on March 17, the NOC was due on or before April 7. Respondent failed to file its NOC by that date.

Bill Jones, Respondent’s owner, met with the AAAD on April 5 for an informal conference. At that time, OSHA offered a settlement agreement to Respondent. Mr. Jones did not accept the offer, but he stated that he would think it over and would get back to OSHA the next day. The AAAD advised Mr. Jones that Thursday, April 7 would be the final day to accept the settlement offer or to submit an NOC. Mr. Jones telephoned the AAAD on April 8, and requested further changes to the offered settlement. The AAAD told Mr. Jones that the offer was no longer available, that the citation and proposed penalty had become final, and that if he wanted to contest the citation he would have to contact the Commission and ask it to accept a late NOC. The AAAD provided the Commission’s contact information to Mr. Jones.

The Commission received Mr. Jones’ letter on April 29. In that letter, Mr. Jones discussed the settlement offer OSHA had made and asked that the penalty be reduced further because his company could not afford to pay it. He also discussed how his company had always stressed safety and why he questioned the violations set out in the citation. The Commission docketed this matter on May 23. On June 17, the Solicitor’s Office received a facsimile from the Office of the Chief Administrative Law Judge that included the Commission’s Notice of Docketing and Mr. Jones’ letter. The Secretary filed her motion on June 30.

Discussion

Upon receiving a citation and notification of penalty, an employer has 15 working days within which it must file an NOC. *See* section 10(a) of the Act, 29 U.S.C. § 659(a). If it does not file an NOC within this time period, “the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.” *Id.* It is clear from the foregoing that Respondent did not file a timely NOC in this matter. A late filing may be excused under Federal Rule of Civil Procedure 60(b) (“Rule 60(b)”), if the final order was entered as a result of “mistake, inadvertence, surprise or excusable neglect.” *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981) (citations omitted). In determining whether a late-filed NOC was due to “excusable neglect,” the Commission follows the Supreme Court’s test in *Pioneer Inv. Serv. v. Brunswick Assoc.*, 507 U.S. 380 (1993). *See Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1950 (No. 97-851, 1999). The Commission has held that the “reason for the delay, and whether it was within the reasonable control of the movant,” is a “key factor” and, in appropriate circumstances, the dispositive factor. *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148 (No. 9-0945, 2000); *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-0367, 2000).

Here, Respondent has provided no reason whatsoever for its failure to file a timely NOC. Respondent received written notice of the filing requirement in the citation itself. It received oral notice of the filing requirement from the AAAD during the informal settlement conference. Specifically, on April 5, the AAAD told Mr. Jones that Thursday, April 7 would be the last day Respondent could either accept the settlement offer or submit an NOC. And, despite being provided with the Commission’s contact information on April 8, Respondent did not file its letter with the Commission until late April. *See* Affidavit of AAAD.

Under these circumstances, I find that Respondent's untimely filing is not due to excusable neglect. This is particularly true in light of the fact that Respondent has provided no reason at all for the late filing, which, in my view, is dispositive. The Secretary's motion to dismiss Respondent's untimely NOC is GRANTED, and the citation and notification of penalty is AFFIRMED in all respects.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC JUDGE

Date: 12 Aug. 2011
Washington, D.C.