

# STATE OF ALASKA

## DEPARTMENT OF LABOR

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P.O. BOX 21149  
JUNEAU, ALASKA 99802-1149  
PHONE: (907) 465-2700  
FAX: (907) 465-2784

**RECEIVED**

**MAY 10 1991**

Law Offices of Robert W. Landau

STATE OF ALASKA, )  
DEPARTMENT OF LABOR, )  
 )  
Complainant, )  
 )  
vs. )  
 )  
NEAL AND COMPANY, INC., )  
 )  
Contestant. )

Docket No. 91-858  
Inspection No. Ho-6338-118-90

#### DECISION AND ORDER

This matter comes before the Board upon Contestant's petition to accept its late-filed notice of contest. The Department of Labor opposes Contestant's petition. After consideration of the facts and arguments presented by the parties, the Board makes the following findings of fact, conclusions of law and order.

#### FINDINGS OF FACT

1. On August 25, 1990, the Department conducted an occupational safety and health inspection of Contestant's worksite at the aircraft direct fueling facility in Adak, Alaska.

2. As a result of the inspection, the Department issued a citation to Contestant alleging two serious violations of the Alaska Construction Code requirements for excavations.

3. The Department's citations were sent by certified mail to Contestant's principal place of business in Homer, Alaska, on November 2, 1990, and were received by Contestant on November 5, 1990.

4. Pursuant to 8 AAC 61.150, the 15 working day contest period expired on November 28, 1990.

5. In a letter dated December 19, 1990, Contestant for the first time notified the Department in writing that it wished to contest the citations and penalties issued in connection with the Adak inspection.

6. In a follow-up letter dated December 21, 1990, Contestant stated that it was unable to file its notice of contest within the required 15 working day period due to circumstances beyond its control. Contestant's letter stated in pertinent part:

The citation was received at our Homer office where review by the president of the company and the project manager was required. The alleged citation occurred on Adak, an island on the Aleutian Chain. The citation was forwarded to our project engineer on Adak, Beth Flynn, for review. Ms. Flynn found ample cause to contest the violation and forwarded her comment and photographs back to Homer. At that point the 15 days allowed prior to contesting had expired.

We submit that due to the logistics of the remoteness of our worksite on Adak that contesting of this alleged violation was not possible within the 15 day time frame allowed.

7. In an affidavit dated January 28, 1991, Contestant's president, Tony Neal, states that he was away from Homer on business when the citation was received and did not return to his office until November 18, 1990. Upon his return, he immediately instructed his staff to investigate the alleged violations and gather evidence to challenge the citations.

8. Neal's affidavit also states that telephone communications between the Homer office and its representative in Adak were irregular because its representative's duties were in the field many miles away from the construction camp where the telephone line was located.

9. Neal's affidavit further indicates that Contestant's notice of contest was additionally delayed due to the need to have certain photographs supporting its position developed in San Francisco.

#### CONCLUSIONS OF LAW

A. A Late-Filed Notice of Contest May Be Allowed By the Board Under Rule 60(b) of the Rules of Civil Procedure

AS 18.60.093(a) of the Alaska OSH Act provides that if an employer fails to notify the Board of its intention to contest a citation within 15 working days after receipt of the citation, the citation and any proposed penalty are considered final and are not subject to review by any court. See also 8 AAC 61.150.

AS 18.60.093(a) is substantially the same as § 10(a) of the federal OSH Act, 29 U.S.C. § 659(a).<sup>1</sup> Until 1981, § 10(a) was strictly construed by the federal Occupational Safety and Health Review Commission (OSHRC). Rothstein, Occupational Safety and Health Law, § 274, at 308 (3d ed. 1990). However, in Branciforte Builders, Inc., 9 OSHC 2113, 1981 OSHD ¶ 25,591 (1981), the OSHRC overruled prior decisions and held that Rule 60(b) of the Federal Rules of Civil Procedure could be used as a basis for setting aside a final order under § 10(a) and allowing a late notice of contest. See also J.I. Hass Co., Inc. v. OSHRC, 648 F.2d 190 (3d Cir. 1981). Federal Rule 60(b) is comparable to Alaska Civil Rule 60(b) which provides that a party may obtain relief from a final judgment or order upon a showing of, among other things, mistake, inadvertence, surprise, excusable neglect or any other reason justifying relief from the judgment.<sup>2</sup>

We agree with the reasoning of the OSHRC and the federal courts regarding the treatment of late notices of contest and we adopt it for analysis under the Alaska OSH Act. Thus, each

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<sup>1</sup> Section 10(a) of the federal Act provides that uncontested citations are not subject to review "by any court or agency" whereas AS 18.60.093(a) limits review "by any court." We are unable to determine from the legislative history of the Alaska OSH Act whether this difference was intentional or inadvertent.

<sup>2</sup> The only other grounds recognized by the OSHRC and the courts to allow a late notice of contest were in cases where the Department of Labor affirmatively misled the employer as to its contest rights or failed to follow proper procedures in issuing a citation. See Rothstein, Occupational Safety and Health Law § 274, at 309-10. There has been no showing in this case that Contestant's late notice of contest was caused by the Department's deceptive practices or failure to follow proper procedures in the issuance of the citation.

petition to accept a late-filed notice of contest must be evaluated by the Board on a case-by-case basis.

B. The Facts of This Case Do Not Justify Allowing Contestant's Late-Filed Notice of Contest

In this case, the 15 working day contest period expired on November 28, 1990. Accordingly, under AS 18.60.093(a) the citation and penalty became final on that date by operation of law. We must decide whether there are any grounds under Rule 60(b) to warrant setting aside the automatic final order and proceed to a hearing of the case on its merits.

First, it should be noted that the Department's citation clearly notifies employers of their right to contest citations within 15 working days. The citation cover page, as well as each individual citation, contain clear language to this effect. There is no basis for Contestant to claim that it was unaware of its contest rights or that it was surprised or confused by the citation documents.

Contestant's contest letter was dated December 19, 1990, approximately three weeks after the expiration of the contest period. Contestant claims that prior to December 19 one of its employees verbally notified the Department that Contestant would be challenging the citation. Contestant's Reply Brief at 1. However, no competent evidence of such communication was presented and it is unclear whether such alleged notification took place before the expiration of the contest period. More importantly,

verbal notices of contest are not legally sufficient. Under 8 AAC 61.150(b), notices of contest must be in writing.

Contestant states that one reason for its delay was that there was no one in authority at its head office in Homer to act on the citation until November 19, 1990. Affidavit of Tony Neal at 2. Even if this were true, Contestant still would have had approximately nine days to notify the Department in writing of its desire to contest. Moreover, federal courts have rejected the notion that the contest period should begin running when appropriate corporate officials receive the citation rather than when the citation was actually received at the company's office. See Capital City Excavating Co. v. Donovan, 679 F.2d 105 (6th Cir. 1982).

Contestant also maintains that its contest was delayed by irregular communications with its project engineer in Adak and by the need to send photographs to San Francisco for developing prior to submitting them to the Board. While it may be true that telephone communications between Contestant's head office in Homer and its field representative in Adak were irregular, this would not have prevented Contestant's Homer office from notifying the Department that it wished to contest the citation. Tony Neal's "action request" to his subordinates on November 19, 1990, indicates a clear desire to contest the Department's citation nine days before the contest period expired. Contestant easily could have notified the Department of its contest without waiting for its engineer in Adak to gather evidence. Nor were the photographs

essential to the filing of a timely notice of contest. An employer is not required to gather or present evidence in order to file its notice of contest. All that is required is a written notice of the employer's desire to contest. See 8 AAC 61.150(b).

Finally, Contestant asserts that it was unable to timely respond to the citation because of a jurisdictional issue involving the applicability of U.S. Army Corps of Engineers regulations to the excavation in question. The existence of a jurisdictional question, however, did not prevent Contestant from timely notifying the Department of its desire to contest the citation.<sup>3</sup>

For the foregoing reasons, we conclude that no grounds exist under Civil Rule 60(b) to set aside the automatic final order under AS 18.60.093(a).

#### ORDER

Based on the foregoing findings of fact and conclusions of law, the Board denies Contestant's request to file a late notice of contest. The Department's citation and penalty are affirmed by operation of law pursuant to AS 18.60.093(a).

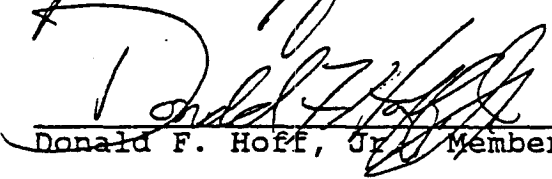
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<sup>3</sup> The OSHRC has declined to consider an employer's asserted jurisdictional defense where it failed to timely contest a citation. Penn Central Transportation Co., 2 OSHC 1379, 1974-75 OSHD ¶¶ 19, 133 (1974), aff'd sub nom. Blanchett v. OSHRC, 535 F.2d 1249 (4th Cir. 1976).

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1991.

ALASKA OCCUPATIONAL SAFETY  
AND HEALTH REVIEW BOARD

  
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