

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)
 DIRECTOR, DEPARTMENT OF LABOR)
 AND INDUSTRIAL RELATIONS,)
 Complainant,)
 vs.)
 MAUI COLORS CONSTRUCTION CO.,)
 Respondent.)

CASE NO. OSAB 96-044 (M)
 (OSHCO No. M2732)
 (Rep. No. 120597562)

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 STATE OF HAWAII
 97 MAR 18 A9:07

DECISION AND ORDER

This occupational safety and health case is before the Board on a written Notice of Contest, filed on July 5, 1996, by MAUI COLORS CONSTRUCTION CO. ("Respondent"), to contest a Citation and Notification of Penalty issued to it by the Director of Labor and Industrial Relations, via the Division of Occupational Safety and Health ("Complainant").

On February 19, 1997, Complainant filed a motion to dismiss the Notice of Contest for untimeliness.

For the reasons stated below, we grant Complainant's motion to dismiss Respondent's Notice of Contest.

FINDINGS OF FACT

1. On March 25, 1996, Complainant inspected Respondent's job site in Kauai.
2. As a result of the inspection, Complainant issued to Respondent a Citation and Notification of Penalty on June 7, 1996, for violations of the Hawaii Occupational Safety and Health standards.
3. Respondent is in the business of painting.



4. At all relevant times, Respondent's address was 1215 S. Kihei Rd., #0-148, Kihei, Hawaii, 96753, which was the physical street address of a private mail receiving service called "Mail Boxes, Etc."

5. Respondent was a customer or client of Mail Boxes, Etc.

6. #0-148 is the number of the mailbox assigned to Respondent.

7. Mail Boxes, Etc. was authorized to accept certified mail for Respondent.

8. Complainant sent the June 7, 1996 Citation and Notification of Penalty to Respondent's address at Mail Boxes, Etc. by certified mail.

9. On June 11, 1996, Mail Boxes, Etc. accepted the certified letter from Complainant, with a return receipt signed by an authorized employee of Mail Boxes, Etc.

10. It was the policy of Mail Boxes, Etc. to return a certified letter to the U.S. Postal Service if the letter was not claimed within fifteen days of its receipt.

11. Respondent did not claim the certified letter that was received by Mail Boxes, Etc. within fifteen days of its receipt.

12. Mail Boxes, Etc. returned the certified letter to the U.S. Postal Service. The U.S. Postal Service then forwarded the certified letter back to Complainant, the sender of the letter.

13. Complainant received the returned certified letter on July 12, 1996.

14. Respondent filed a written Notice of Contest to appeal the Citation and Notification of Penalty on July 5, 1996, twenty four days after the receipt of the Citation and Notification of Penalty, via certified mail, by Mail Boxes, Etc.

15. Respondent's Notice of Contest was filed four days late.

16. Because of business pressures, Respondent neglected to pick up its mail or to advise Mail Boxes, Etc. to forward any mail that it has received on its behalf.

CONCLUSIONS OF LAW

Hawaii Revised Statutes ("HRS") §396-11(a) states in pertinent part, as follows:

Any citation, proposed penalty, or order of the director shall be final and conclusive against the employer unless the employer files with the director a written notice of contest of the citation, the abatement periods stated in the citation, the proposed penalty, or order within twenty days after receipt of the citation, proposed penalty, or order.

Respondent contends that its late filing should be excused because of mistake, inadvertence, surprise, and excusable neglect. Respondent relied on several federal occupational safety and health cases, and the standard enunciated in Rule 60(b) of the Hawaii Rules of Civil Procedure for relief from judgment or order.

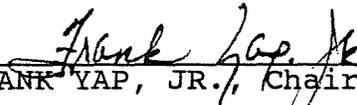
For the reasons stated in Complainant's reply memorandum, we conclude that neither the federal caselaw cited by Respondent nor Rule 60(b) of the Hawaii Rules of Civil Procedure is applicable to this case.

Accordingly, since Respondent's notice of contest was filed more than twenty days after its receipt of the Citation and Notification of Penalty, and the time for filing an appeal is mandatory, see In the Matter of the Director, Department of Labor and Ind. Rel. v. Quality Sheetmetal & Air Conditioning Company, Ltd., OSAB 96-046 (Oct. 29, 1996) (citations omitted), we conclude that Respondent's Notice of Contest shall be dismissed for untimeliness.

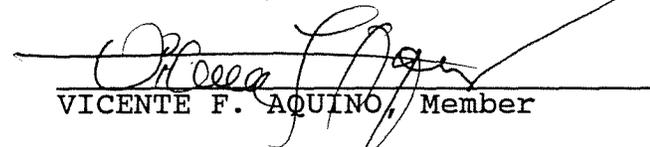
ORDER

Respondent's Notice of Contest of Complainant's Citation and Notification of Penalty is dismissed.

Dated: Honolulu, Hawaii, MAR 18 1997.


FRANK YAP, JR., Chairman


CAROL K. YAMAMOTO, Member


VICENTE F. AQUINO, Member

Herbert B.K. Lau, Esq., for
Complainant

Jack L. Phillips for
Respondent

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.



NOTICE TO EMPLOYER:

You are required to post a copy of this Decision and Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted. Further, you are required to furnish a copy of this Decision and Order to a duly recognized representative of the employees.