



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.

PRIME ROOFING CORPORATION,

Respondent.

OSHRC DOCKET NO. 07-1409

Appearances: Christine Eskelson, Esq.
U.S. Department of Labor
Office of the Solicitor
Boston, MA.
For the Complainant

Richard C. Gagliuso, Esq.
Corey N. Giroux, Esq.
Gagliuso & Gagliuso
Merrimack, NH.
For the Respondent

Before: COVETTE ROONEY
Administrative Law Judge

DECISION AND ORDER ON REMAND

By order dated September 16, 2009, the Review Commission remanded this matter with direction to conduct an evidentiary hearing to determine whether Respondent should be granted relief from final judgment pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure for filing its notice of contest three days beyond the statutory fifteen working day period for contesting citations and proposed penalties (section 10(a), OSH Act, 29 U.S.C. §659(a)). In its remand order the Commission noted "several factual disputes regarding the circumstances of (Respondent's) delay in filing its 'notice of contest' as well as whether Respondent 'acted in good faith'". Specifically, the Commission directed that evidence be developed with respect to the following matters:

According to Prime, OSHA agreed to withdraw the citation if Prime provided certain documentation showing that a different company was the employer responsible for the alleged violation. Prime contends that it provided the requested documentation to OSHA and, therefore, it believed the citation would be withdrawn. The Secretary contends, however, that Prime did not submit all the requested documentation to OSHA before expiration of the contest period, and that statements made by employees to the compliance officer refuted Prime's denial of responsibility. The parties also disagree about what precisely was stated at the informal conference and during an April 25, 2006 telephone call between the AAD and Prime, including whether OSHA had told Prime that April 25 was the last day of the contest period.

Finally, the Commission directed that evidence be developed to resolve not only factual disputes between the parties, but also "any issues that may be relevant to whether Prime is entitled to Rule 60(b) relief".

BACKGROUND

On February 1, 2006, the Occupational Safety and Health Administration conducted an inspection of a worksite located at Hanover, New Hampshire. Thereafter, on April 3, 2006, a citation was mailed to Respondent which was received and signed for by Respondent's President, William Seppala, on April 4, 2006. Upon receipt of the citation, Respondent had fifteen working days to file a notice contesting the citation and proposed penalty. The last day for filing the notice of contest was April 25, 2006. On April 5, 2006, Mr. Seppala telephoned the area office which issued the citation and requested an informal conference. The conference was conducted eight days later at the area office and Mr. Michael Goen, Respondent's vice president, met with Assistant Area Director Stephen Rook and Compliance Officer John Scrocca who conducted the inspection. Mr. Goen claimed that the workers at the site were not employed by Respondent. This claim was contrary to the government's position and Mr. Rook requested that Mr. Goen produce additional information in support of his claim. On April 24, 2006, the area officer received a letter dated April 21 from Mr. Goen in which additional information was provided in support of Respondent's claim that Respondent was not responsible for the alleged violations at the work site. Mr. Rook was not satisfied that the additional information was sufficient to support Respondent's claim and, late afternoon on April 25, telephoned Mr. Goen to

inform him of that fact and to reemphasize that the notice of contest was due that day. Mr. Goen was not in the office and Mr. Rook left a voice mail message for him stating his concerns as well as reiterating that April 25 was the final day for filing a notice of contest. On April 26, Goen telephoned Mr. Rook regarding the matter and was told by Mr. Rook that the time for filing a notice of contest had expired and nothing further could be done by him to resolve the matter. The Commission in its order has found that a letter dated April 28 sent to the area office and received on May 1, 2006 was a valid notice of contest. The issue to be resolved on remand is whether Respondent should be granted relief from judgment for filing a notice of contest three days beyond the filing deadline.¹

FACTS

In accordance with the direction of the Commission, an evidentiary hearing was conducted on April 15, 2010. The relevant and material facts elicited at that hearing are as follows:

I. Stephen Rook

Stephen Rook is employed at the Concord, New Hampshire area office of OSHA as an Assistant Area Director and has been so employed since 2005. He supervises a staff of compliance officers including the assignment and oversight of inspections. He is also responsible for issuing citations in the absence of the area director (Exhibit C-1). He was a compliance officer prior to becoming an assistant area director. Mr. Rook reviewed the inspection file compiled by Compliance Office John Scrocca² of an inspection of a worksite at Hanover, New Hampshire and concluded that four employees working at the site were employed by Respondent and, during their work activity, were exposed to a falling hazard in violation of 29 CFR 1926.501(b)(10). Mr. Rook issued a citation to Respondent alleging the aforesaid violation on April 3, 2006 and proposed a penalty of \$2,000.00 for the violation (Exhibit C-1).

¹ This is the second remand by the Commission dealing with this issue. As a result of the first remand, the trial judge determined that a letter dated April 21, 2006 from Respondent and received by OSHA on April 24, was a valid notice of contest. However, the Commission rejected that determination.

² Mr. Scrocca retired during 2007 and died shortly thereafter.

The citation was received by Respondent on April 4, 2006 (Tr. 25, Exhibit C-2). Based upon the receipt of the citation, Mr. Rook calculated the expiration date for filing a notice of contest to be April 25, 2006 (Tr. 25).

On April 5, 2006, Respondent's president, William Seppala, requested and was granted an informal conference to discuss the citation. The conference was held at the area office on April 13, and Mr. Michael Goen attended on behalf of Respondent. Mr. Rook and Mr. Scrocca represented OSHA (Tr. 26, 27). Mr. Rook stated that he told Mr. Goen that the last day for filing a notice of contest was April 25 (Tr. 27). Mr. Goen stated that the workers at the inspection site were not employed by Respondent (Tr. 28) and gave Mr. Rook a copy of a "generic" contract between Respondent and Clement Vautour (Ex. c-4) wherein Mr. Vautour was to perform as a roofing subcontractor to Respondent at the Hanover worksite (Tr. 35). Mr. Rook was previously unaware of the subcontract; however he was not surprised that the issue had not been raised in the inspection report (Tr. 36, 53, 54). The notes in the inspection file indicated that the four employees were employed by Respondent (Tr. 30).³

Mr. Rook was skeptical of Mr. Goen's claim that the exposed workers were not Respondent's employees and requested that Mr. Goen provide additional information in support of his position (Tr. 37, 38). Specifically, Mr. Rook requested that Mr. Goen provide six additional items: (1) a copy of the contract between Respondent and the general contractor, Echman Construction (Tr. 38). (This document was required to determine whether the general contractor reserved the right to reject a sub-contractor's sub-contracts) (Tr. 39); (2) copies of all contracts between Mr. Vautour and Respondent for all of 2005 and 2006. Rook requested this information to determine whether there was "a lengthy period of time of which Mr. Vautour had worked for Prime Roofing" (Tr. 39); (3) Mr. Vautour's address (Tr. 40); (4) a list of other employees who were on the job site "as evidence that the individual worked for one entity or the other" (Tr. 40); (5) a list of the days which roofing work had occurred on the job site (Tr. 40); and (6) information establishing that Mr. Vautour had complied with article 6 of the contract by obtaining worker's compensation insurance (Tr. 40). Mr. Rook told Mr. Goen that he needed these six items at a minimum (Tr. 41, 42). Although Mr. Rook did not give Mr. Goen any

³ The inspection file notes were not offered into evidence.

assurances that the citation would be dismissed (Tr. 41), he stated “if sufficient and adequate information provided to me indicated that the individuals on the job site were not Prime Roofing employees, (he) would change (the citation) as appropriate” (Tr. 42). Mr. Rook, after the informal conference, attempted to determine whether Mr. Vautour was registered as a company within the state of New Hampshire without success (Tr. 42).

On April 24, the area office received, by letter dated April 21, additional information from Mr. Goen (Exhibit C-5). Mr. Rook did not review the documents until the morning of April 25 (Tr. 47). This information was provided by Mr. Goen in response to the informal conference (Tr. 43) and consisted of Mr. Vautour’s address and six invoices from Vautour to Respondent listing payment due for work performed at the worksite during the period December 23, 2005 to February 10, 2006. Mr. Goen did not provide the contract between the general contractor and Respondent nor was any information provided regarding the names of employees at the worksite, whether worker’s compensation insurance had been obtained by Vautour, the length of the job or copies of other contracts between Respondent and Vautour (Tr. 44-45).⁴

At approximately 3:35 pm, April 25, Mr. Rook telephoned Mr. Goen at Respondent’s place of business. He spoke with an individual later identified as Kerri Bertram, a secretary employed by Respondent. When informed that Mr. Goen was not in the office Rook requested to be connected to his voice mail and left a message that the information sent to him was incomplete and “I also left a message for Mr. Goen that I did not have evidence of which (sic) to change the citation and I informed Mr. Goen on the voice mail that we either needed to reach an informal settlement or I needed to receive a letter of contest on the day I was calling which was April 25th” (Tr. 47-48, 88, 103). After completing the voice mail message Mr. Rook again telephoned Ms. Bertram and informed her of the substance of the message he had left and told her “that (Goen) needed to sign an informal settlement (agreement) or get a letter of contest” filed that day (Tr. 48). Mr. Goen telephoned Rook during the morning of April 26th and “requested an informal settlement agreement, that I have an agreement with him” (Tr. 48). Rook

⁴ Mr. Rook testified that the invoices did not contain information which he believed was necessary in order to evaluate whether Mr. Vautour was a subcontractor. This information consisted of a listing of equipment needed to complete the job, roofing materials to build the roof, whether a crane was utilized, and if yes, who paid for the crane, and other expenses that Vautour incurred as a subcontractor. Mr. Rook did not request Mr. Goen to provide any of this information at the informal conference.

told Goen that he could not enter into an informal agreement because the period in which to file a notice of contest had expired (Tr. 49). On cross examination Rook testified that OSHA did not communicate with any of Respondent's representatives during the inspection or prior to the informal conference other than Mr. Vautour (Tr. 54) nor is he aware of whether the compliance officer interviewed any representative of the general contractor (Tr. 68). Moreover, during the informal conference he was "looking for facts" to "validate or discredit Mr. Goen's claim that the (exposed employees) were not Prime Roofing employees" (Tr. 65). Rook stated "I had a lot of work to do before I could make the decision on whether these individuals were, in fact, Mr. Vautour's employees..." (Tr. 68). Although the original assessment that the exposed workers at the site were Respondent's employees was based upon "interviews with Mr. Scrocca and the individuals on the job site" (Tr. 69), Mr. Rook told Goen at the informal conference that "it's a complicated process of which (sic) to evaluate whether...who individuals worked for" (Tr. 69). Rook stated that he told Goen "that these first six items would be the beginning of which to potentially show that the individuals were independent contractors" (Tr. 71, 107). Mr. Rook agreed that he told Mr. Goen during the informal conference that there was a possibility of changing or rescinding the citation (Tr. 71, 104). Although not required to do so, Mr. Rook telephoned Mr. Goen on the afternoon of April 25 to inform him that the information provided was incomplete and the time to file a notice of contest expired that day (Tr. 77, 80). Mr. Rook reaffirmed that he telephoned Ms. Bertram twice on April 25th (Tr. 88); however, he did not ask to speak to another member of management other than Mr. Goen (Tr. 88).

II. Michael Goen

Mr. Goen has been employed by Respondent for approximately twenty years and during that time has been the vice president of operations (Tr. 111). He is responsible for hiring and firing employees, visiting job sites, ordering and delivering of materials, and selecting and hiring subcontractors (Tr. 112). He recalled that the job at the Hanover High School called for roofing and associated sheet metal work to be performed from the fall of 2005 through 2007 (Tr. 113). He was the operations/project manager and visited the site once every week (Tr. 113). Mr. Vautour was to perform the roofing activities (Tr. 117).

Mr. Goen stated that Respondent did not have any employees at the worksite on February 1, 2006, the date of the inspection (Tr. 123). He attended the informal conference on April 13th as the only representative of Respondent (Tr. 117). He informed Mr. Rook that the workers at the site were employees of a subcontractor (Tr. 128-129) and he handed Mr. Rook a copy of the contract with Mr. Vautour and “billings that showed that Clement Vautour was on site prior, during and after the citation was issued” (Tr. 129, Exhibit C-4). Goen believed that the documents he presented to Rook established that Vautour was a subcontractor at the site (Tr. 132).

Goen testified that Rook was “surprised and upset” by the documents and the compliance officer was “taken aback by it” (Tr. 133). Moreover, the compliance officer did not challenge his assertion that Vautour was an independent contractor (Tr. 133). Mr. Goen has a recollection of Mr. Rook asking for Mr. Vautour’s address (Tr. 134). He does not recall Rook asking for a copy of the contract between the prime contractor and Respondent nor did Rook ask for additional invoices (Tr. 134). Rook did not ask for a list of the people at the site on February 1, 2006 (Tr. 135) nor did he ask for “insurance information about Mr. Vautour” (Tr. 135). Mr. Goen recalls that the only information that Rook asked him to produce was Mr. Vautour’s address (Tr. 136). Moreover, he does not recall either Mr. Rook or the compliance officer informing him of the deadline to file a notice of contest (Tr. 136) nor did they state a date by which time he had to provide Mr. Vautour’s address (Tr. 158).

Goen stated that during the informal conference he had a discussion with Mr. Rook regarding the status of the citation. Goen testified “[t]he discussion that I remember was that if I provided the additional information that we had come to an agreement and that the violation would basically go away” (Tr. 137). He reported to Respondent’s owner, William Seppala, that he had reached an agreement with OSHA that Clement Vautour was a subcontractor on the site and upon sending OSHA the additional information the citation “would expire or be rescinded” (Tr. 139). He sent the additional information to OSHA on Friday, April 21, and listened to the voice mail from Rook during the morning of April 26.

According to Goen, most of his work activity requires him to be out of the office for considerable periods of time. He typically goes to the office once every week or two weeks

depending upon the work load (Tr. 144). He did not listen to Rook's voice mail on April 25 (Tr. 145). He does not recall Rook telling him on the voice mail that the information he provided on April 21 was not sufficient (Tr. 146). The "gist" of the message was that time to file a notice of contest had "lapsed" (Tr. 145). He telephoned Mr. Rook on April 26 and was told by him that the time to file a notice of contest had passed (Tr. 147).

On cross examination Mr. Goen stated that he did not read the entire citation and did not read the section regarding the period of time to file a notice of contest before the hearing (Tr. 153). He is not aware of Respondent filing a late notice of contest in a previous case (Tr. 155).

III. William Seppala

Mr. Seppala is Respondent's president. The business, which Mr. Seppala described as small, was founded in 1991 and is engaged primarily in commercial roofing with sheet metal work and drive way sealing as additional work activities. During December 2005 to February 2006 the firm had a "project" at the Hanover High School and Clement Vautour "was on the job" (Tr. 162). Seppala described Voutour as an "independent contractor that we hire from time to time when our work load is busy" (Tr. 162).

Seppala first became aware of an OSHA visit to the Hanover worksite when he received the citation in the mail (Tr. 163). Upon receipt of the citation, Seppala spoke with Mr. Goen to verify that Respondent did not have employees working at that site. Goen agreed and stated that Clement Vautour was "doing the job" (Tr. 165). Seppala and Goen agreed that an informal conference should be scheduled with the OSHA area office "due to the fact that it's not our employees" (Tr. 166). It was agreed that Mr. Goen would attend the conference and present the contract with Vautour and "associated billings" (Tr. 167). He spoke with Goen after the conference and, based upon what Goen told him, Seppala believed that the citation would be rescinded when additional information sent by Goen was received by OSHA (Tr. 169). He is aware of the need to file a notice of contest within fifteen working days of receipt of the citation but he did not do so because, based upon his conversation with Goen, he believed the citation would be dropped. He would have filed a notice of contest if he believed the citation would not be dropped (Tr. 170)

On April 26, Seppala was informed by Goen that the period for filing a notice of contest had expired and the citation was not rescinded. He directed Goen to write a letter to OSHA stating that he believed that he had reached an agreement with OSHA (Tr. 173).

IV. Kerri Bertram

Ms. Bertram is Respondent's secretary/bookkeeper and her job duties include answering the telephone, typing as needed, payroll and invoicing. She has been employed by Respondent for sixteen years (Tr. 180). Ms. Bertram recalled the job site at the Hanover High School but she played no role in that project. She remembers receiving a telephone call from Mr. Rook asking to speak to Mr. Goen. Mr. Goen was out of town and out of reach by telephone and she offered Mr. Goen's voicemail. Rook accepted the offer (Tr. 181). Ms. Bertram stated that Rook did not tell her about any deadlines or other filings with OSHA nor did he telephone a second time (Tr. 182, 183). She would have notified Seppala if Rook had told her of the deadline for filing a notice of contest (Tr. 183).

V. Clement Vautour

Mr. Vautour was previously employed by Respondent during the early to mid 1980's (Tr. 185). He was not an employee of Respondent during February 2006 (Tr. 185). Mr. Vautour was at the Hanover High School when the OSHA compliance officer came on the site. Upon questioning by the compliance officer, Mr. Vautour stated that he was doing a job for Prime Roofing (Tr. 186). The compliance officer asked for his name and the names of the other workers. The compliance officer did not talk to the other four employees nor did he ask Vautour whether he was an employee of Prime Roofing. Vautour stated that he did not tell the compliance officer that he was Respondent's employee (Tr. 186).

DISCUSSION

As previously noted the Commission directed this remand to "resolve the parties' factual disputes" as well as any issue relevant to "whether Prime is entitled to Rule 60 (b) relief". Rule 60 (b) of the Federal Rules of Civil Procedure provides six broad categories of grounds for relief

of final judgment or, in this case, grounds for allowing Respondent to file a notice of contest beyond the statutory fifteen working day period. Rule 60 (b) reads as follows:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

1. mistake, inadvertence, surprise, or excusable neglect;
2. newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
3. fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
4. the judgment is void
5. the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
6. any other reason that justifies relief.

The Commission has found that a letter dated April 28, 2006 from Respondent to Complainant was a notice of contest within the meaning of the Act, albeit, filed three days beyond the filing deadline. The Commission has directed a determination as to whether, based upon the facts elicited at the hearing in this matter, Respondent should be granted relief from the fifteen day filing period and allowed to dispute the merits of the citation at an evidentiary hearing. Based upon the directions from the Commission as well as the memoranda of law filed by the parties, Rule 60 (b)(2), (b)(4), (b)(5) and (b)(6) do not provide sufficient grounds for granting the relief sought by Respondent. Thus, the evidence will be analyzed to determine whether Rule 60 (b)(1) or (b)(3) provide sufficient grounds for relief.

Rule 60 (b)(1)

Under section 10(a) of the Act, the failure to file a notice of contest results in the citation and proposed penalty becoming a final order of the Commission “not subject to review by any court or agency”. The Secretary, at 29 CFR §1903.17 has proscribed that the notice of contest must be in writing and “such notice of intention to contest shall be postmarked within fifteen working days of the receipt by the employer of the notice of proposed penalty”. As noted by the Secretary, the requirement that the letter of contest must be filed within fifteen working days of

receipt is printed clearly on the face of the citation received by Respondent. Moreover, Respondent's President Seppala was well aware of the time limit based upon previous experience with OSHA. As determined by the Commission, the notice of contest in this case was not filed within the fifteen day period.

The determination of excusable neglect pursuant to Rule 60 (b)(1) is an equitable one, taking account of all relevant circumstances surrounding Respondent's failure to file a timely notice of contest, including the danger of prejudice to the Secretary, the length of delay and its potential impact on the judicial proceedings, the reason for the delay and whether Respondent acted in good faith. *Secretary of Labor v. Barretto Granite Corporation*, 830 F 2d 396 (1st Cir., 1987); *Secretary of Labor v. Craig Mechanical, Inc.*, 16 BNA OSHC 1763 (No. 92-0372) (1994); *Merritt Electric Company*, 9 BNA OSHC 2088 (No. 77-3772)(1981); *Henry C. Beck Co.*, 8 BNA OSHC 1395 (No. 11864)(1980). However, neither a lack of prejudice to the Secretary nor good faith on the part of Respondent in attempting to comply with the statutory filing requirement alone will excuse a late filing. *Fitchburg Foundry Inc.*, 7 BNA OSHC 1516 (Nos.77-520 & 76-1073)(1979). The Commission has held that whether the reason for the delay was within the control of the Respondent is a "key factor" in determining the presence of "excusable neglect". *A. S. Ross, Inc.*, 19 BNA OSHC 1147 (No. 99-0945) (2000); *See also Calhar Constr., Inc.*, 18 BNA OSHC 2151 (No. 98-0367)(2000).

In *Barretto Granite Corporation*, the United States Court of Appeals for the First Circuit, the circuit in which this matter arose, determined that a late notice of contest filed by an employer who had orally expressed an intent to file a notice of contest during an informal conference would not be granted relief from final judgment due to excusable neglect. The court stated, "Section 1903.17 (a) states unequivocally that the notice of contest must be made *in writing* within 15 days of receipt by the employer of his notice of penalty. Significant reasons exist in support of the requirement of a writing. Failure to contest a citation in a timely fashion results in the citation becoming a final order of the Commission, not subject to review by any court or agency. Timely contest requires the Secretary to notify the Review Commission promptly, a period which has been defined as 15 days under recently amended regulations. The Secretary must file a complaint within 20 days of the time the notice of contest has been received, and may be subject to

dismissal of the case if any employer can establish that he was prejudiced by a delay in filing the complaint. Thus, ‘timely receipt by the Secretary of a writing from an employer is an effective and accurate method for determining [whether and] when a notice is actually filed and when a notice must be transmitted to the Commission from the Secretary...’. Additionally, ensuring employer compliance with the notice of contest deadline fixes the length of time employees may be exposed to a potentially hazardous situation by compelling prompt confrontation and abatement of violative conditions”. 830 at 398-399 (*emphasis in original*) (*citations omitted*).

In this case, Respondent had the ability and knowledge necessary to file a timely notice of contest. There is nothing on the record of this case that supports the conclusion that the Secretary explicitly or implicitly led Respondent to believe that the 15 day filing deadline could or would be extended. On this basis, Respondent may not be granted relief from judgment on the basis of excusable neglect.

Rule 60 (b)(3).

Pursuant to this provision, a party may be granted relief from final judgment when it has been demonstrated that the opposing party has engaged in fraud, misrepresentation or misconduct. The Commission has noted in its remand order “several factual disputes” between the parties which must be resolved by the evidentiary hearing to determine whether Rule 60 (b) (3) applies to this case. After a thorough review of the transcript, the following “disputes” remain to be resolved:

1. Assistant Area Director Rook at the informal conference requested that Mr. Goen produce six specific categories of information in order to determine the subcontractor status at the worksite. Mr. Goen testified that Rook only asked for the address of the alleged subcontractor Vautour (Tr. 38-40, 134-136).

2. Rook stated that no promises were made to Mr. Goen at the informal conference regarding the status of the citation. Goen testified that Rook told him the “citation would go away” upon sending Vautour’s address to OSHA (Tr. 42, 71, 104, 137).

3. Rook told Goen at the informal conference that the last day to file a notice of contest was April 25, 2006. Goen denies that Rook told him of the filing deadline (Tr. 27, 136).

4. Rook testified that the citation was based upon employee statements taken by the compliance officer. Mr. Clement Vautour stated that the compliance officer did not talk to the employees during the inspection (Tr.30, 69, 186).

5. Rook was not “surprised” to hear at the informal conference that Vautour was a subcontractor. Goen states that Rook was “surprised” and “upset” (Tr. 53, 54, 133).

6. Goen stated that he had an agreement with OSHA when he left the informal conference that the citation would be dropped. Rook states that no agreement was reached at the meeting (Tr. 71, 139, 169).

7. Rook testified that he telephoned Respondent twice on April 25, 2006 and spoke with the Secretary Kerri Bertram both times. Ms. Bertram testified that Rook called only one time and left a message for Goen. She also testified that Rook did not inform her of the deadline to file a notice of contest (Tr. 48, 182, 183).

8. Rook states that the inspection file compiled by the compliance officer indicates that Vautour was Respondent’s foreman. Vautour testified that he did not tell the compliance officer that he was Respondent’s employee (Tr. 30, 186).

For purposes of this case, credibility of witnesses and whether testimony is credible is governed by Rules 607 and 608 of the Federal Rules of Evidence. Credibility is “dependent upon the willingness of the witness to tell the truth and upon his ability to do so. His ability to tell the truth as to an event of which he purports to possess personal knowledge is the product in turn of the physical and mental capacity and actuality of his powers of perception, recollection, and his ability to narrate”. M. Graham, *Federal Rules of Evidence*, §607.1 (4th ed. 1996). A witness may be impeached on cross examination by attacking one or more of the aforesaid components of credibility. In this case, neither counsel made an attempt to impeach the witnesses on cross examination or, alternatively, any attempt to do so was ineffective. There is nothing on this record that would lead to the inference or presumption⁵ that any of the witnesses were untruthful; rather, their perception of “truth” differs.

However, there is sufficient evidence on the record of this case to support the conclusion

⁵ Presumption is a rule of law which requires that the existence of a presumed fact be taken as established when underlying facts are established. An inference is a conclusion as to the existence of a particular fact reached by considering other facts in the course of human understanding. (Graham, *supra* at §301)

that relief should be granted pursuant to Rule 60 (b)(3). As the moving party seeking relief, Respondent had the burden to establish “fraud, misrepresentation, or misconduct” on the part of the Secretary. The un rebutted evidence establishes that Respondent first became aware of the inspection at the worksite when it received the citation. According to the firm’s president, no opening or closing conference was held by an OSHA representative as required by 29 C.F.R. § 1903.7(e). That section provides as follows:

(e) At the conclusion of an inspection, the Compliance Safety and Health Officer shall confer with the employer or his representative and informally advise him of any apparent safety or health violations disclosed by the inspection. During such conference, the employer shall be afforded an opportunity to bring to the attention of the Compliance Safety and Health Officer any pertinent information regarding conditions in the workplace.

Moreover, according to Vautour, the compliance officer failed to interview the workers at the site and he (Vautour) testified that he was not an employee of Respondent at the time of the inspection (Tr. 185). Respondent has consistently maintained that it had no employees at the site during the inspection. Immediately upon receiving the citation, it arranged for an informal conference wherein it provided a written contract with Vautour to perform “roofing” and “vouchers” which Respondent believed supported its position that it had no employees at the job site. The record supports the inference that Assistant Area Director Rook was “surprised” by this turn of events and attempted to obtain from Respondent the information that should have been in the file in support of the government’s position that Respondent’s employees were at the work site. No employee statements were produced either at the informal conference or at the hearing regarding their employment status. As pointed out by Rook, the determination of employer-employee status is “complicated” and the six items that he requested were “just the beginning” of his investigation to determine whether Vautour was a subcontractor. In other words, Rook was attempting to correct an incomplete inspection by placing the burden on Respondent to establish that it was not the employer with less than half of the fifteen day filing period remaining.

The record in this case supports the conclusion that it is more likely than not, that Respondent was not the employer of the workers at the inspection site. The actions of Rook clearly establish an effort on his part to salvage a citation that was issued by him based upon an

incomplete inspection that was not conducted in accordance with regulations or the Field Inspection Reference Manual. The inadequacies of the inspection were highlighted by the comment of Complainant's counsel at the hearing that "[t]o this day I don't know whether Clement Vautour was an independent contractor or not" (Tr. 28). Information in support of that employment relationship should have been included in the file. The evidence on this record supports the conclusion that the file did not contain sufficient evidence that Respondent's employees were at the site. Notwithstanding an admitted inability to establish that Respondent's employees were on site and exposed to hazards, Complainant has relentlessly pursued this matter to establish Respondent's culpability and extract payment of a fine without a hearing on the merits.

The United States Court of Appeals for the Fifth Circuit in *Atlantic Marine Inc.*, 524 F.2d 476, 478 (1975) stated: [t]his circuit has recently held that the Secretary's violation of the Act or his own regulations may void a citation of violation if a petitioner can show actual prejudice from such violations. In light of this we have to recognize that a powerful argument can be generated that a petitioner should not be denied review altogether of a citation of violation for not having filed a notice of contest within the fifteen day limit prescribed in the Act if the Secretary's deception or failure to follow proper procedures is responsible for the late filing" (*citation omitted*). In *Karak v. Bursaw Oil*, 288 F.3d 15, 21 (1st Cir. 2002) the court stated that, "Rule 60 (b) (3) is designed to afford protection against judgments that are unfairly obtained rather than against judgments that are factually suspect". See also *Ince M v Peacock*, 809 F.2d 1403 (9th Cir. 1987); *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978).

The record here supports the conclusion that Complainant's inadequate inspection and deception at the informal conference regarding the results of that inspection has resulted in a final order "unfairly obtained" despite Respondent's efforts to comply in good faith with the Secretary's demands. To allow the citation to become a final order without a hearing on the merits will result in a serious injustice and the public's interest in safety and health will not suffer if a hearing on the merits is allowed. See *U. S. v Ulysses Salazar*, 28 F.3d 932 (9th Cir 1994), *cert. denied* 514 U. S. 1020 (1995). Accordingly, Respondent's written notice of contest filed

three days beyond the expiration of the filing deadline is valid and Respondent is entitled to a hearing on the merits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes my findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

In its remand order the Commission stated “regardless of the judge’s ruling on the question of Rule 60 (b) relief, the Secretary has waived the right to a hearing on the merits of the citation”. As found above, Respondent is entitled to relief from final judgment pursuant to Rule 60 (b)(3) of the Federal Rules of Civil Procedure. In accordance with the Commission’s directive, it is **HEREBY ORDERED THAT** the citation and proposed penalty are **DISMISSED**.

/s/

Covette Rooney
Judge, OSHRC

Dated: September 3, 2010
Washington, D.C.