

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.	:	OSHRC DOCKET NO. 2000-0624
	:	
VON BODKIN,	:	
d/b/a ECLIPSE COATING SYSTEMS,	:	
	:	
RESPONDENT.	:	

**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”). On May 18, 1999, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a work site of Respondent, Eclipse Coating Systems (“Eclipse”), located in Hailey, Idaho. As a result of the inspection, on July 27, 1999, OSHA issued Eclipse a one-item serious citation alleging a violation of 29 C.F.R. 1926.501(b)(10). 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 mailed the citation by certified mail, that Eclipse received it on July 27, 1999, and that the notice of contest period expired on August 19, 1999. The record also shows that Eclipse did not file a notice of contest until March 16, 2000. OSHA answered the letter on March 22, 2000, and Eclipse responded to OSHA’s letter on March 28, 2000. The Secretary filed a motion to dismiss the notice of contest as untimely on April 6, 2000, and Eclipse has filed a response to the motion.

**Discussion**

The record plainly shows that Eclipse did not file a notice of contest until well after the 15-day contest period had ended. 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 that 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). There is no indication and no contention that the Secretary was deceptive or failed to follow proper procedures in this matter. Eclipse contends, rather, that it was denied due process because it was never afforded a hearing. However, the record clearly shows that the company was, in fact, given the opportunity to contest the citation and to have a hearing. As indicated above, an agent of the company signed for the citation on July 27, 1999.<sup>1</sup> The citation itself explained the 15-day contest period in the first paragraph on the first page, 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 citation further explained the contest period 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.**

Eclipse does not assert any reasons for not filing its notice of contest within the 15-day period. In any case, the Commission has held that the OSHA citation plainly states the requirement to file a notice of contest within the prescribed period and 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." *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Acrom Constr. Serv.*,

---

<sup>1</sup>Kortnie Bodkin, who signed the certified mail return receipt, is presumably a relative of Von Bodkin, the owner of Eclipse and the author of the response to the Secretary's motion, and Everett Bodkin, Eclipse's financial officer and the author of the notice of contest.

*Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). The Commission has also held that ignorance of procedural rules does not constitute “excusable neglect” and that mere carelessness or negligence, even by a layman, does not justify relief. *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). Finally, the Commission has held that Rule 60(b) 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.” *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

Although the foregoing is sufficient to dispose of this matter in its entirety, Eclipse raises other arguments. Eclipse contends, for example, that the Commission has no jurisdiction because there is no evidence that its business affects interstate commerce. Eclipse also contends that the cited standard was not duly promulgated and that OSHA failed to obtain a warrant prior to the inspection. However, it requires little effort to show that an employer is engaged in a business affecting interstate commerce, and the use of the telephone and mails, or the purchase of items from out of state, has been held sufficient to establish Commission jurisdiction. *See, e.g., Marshall v. Anchorage Plastering Co.*, 570 F.2d 351 (9th Cir. 1978) (unpublished decision reported at 6 BNA OSHC 1318); *Avalotis Painting Co.*, 9 BNA OSHC 1226 (No. 76-4774, 1981). Moreover, the Secretary’s authority to promulgate and enforce standards is specifically set out in the Act. *See* 29 C.F.R. §§ 655-659. Finally, the Secretary’s authority to enter onto a work site to conduct an inspection is also set out in the Act, and the employer’s right to object and to insist upon a warrant must be asserted before the inspection takes place. *See* 29 C.F.R. § 657; *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575 (D.C. Cir. 1985). Regardless, in view of the record and the foregoing Commission precedent, there is no basis for granting Rule 60(b) relief and accepting the late-filed notice of contest in this case. The Secretary’s motion is accordingly GRANTED, the notice of contest is DISMISSED, and the citation and penalty are AFFIRMED in all respects. So ORDERED.

/s/

---

Irving Sommer  
Chief Judge

Date: May 22, 2000