

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3419

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SECRETARY OF LABOR, :  
 :  
 Complainant, :  
 :  
 v. :  
 :  
 G.S. GARCIA CONSTRUCTION, INC., :  
 :  
 Respondent. :

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OSHRC DOCKET NO. 00-0941

Appearances:

Sheryl L. Vieyra, Esquire  
Dallas, Texas  
For the Secretary.

Thomas H. Scott  
Humble, Texas  
For the Respondent.

Before: Chief Judge Irving Sommer

**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”), for the purpose of determining whether the Secretary’s motion to dismiss Respondent’s notice of contest as untimely should be granted.

On January 19, 1999, the Occupational Safety and Health Administration (“OSHA”) inspected a construction project in Houston, Texas, where Respondent was a subcontractor. As a result, OSHA issued Respondent a citation and notification of penalty alleging a “repeat” violation of the Act. 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. OSHA sent the citation to Respondent by Federal Express on March 15, 2000, and, according to the records of Federal Express, the citation was delivered to Respondent on March 16, 2000. Based on this delivery date, OSHA determined that the notice of contest period ended on April 6, 2000, and

on April 7, 2000, OSHA sent Respondent a letter advising that the citation had become a final order and that the proposed penalty had become due. On April 24, 2000, Respondent's representative sent a letter to OSHA advising that the company had not received the citation and that it was attaching a copy of the notice of contest it was filing with the Commission.<sup>1</sup> The Secretary filed her motion to dismiss on June 2, 2000, Respondent objected to the motion, and a hearing was held in Houston, Texas on September 14, 2000. Both parties have filed post-hearing submissions.

### **The Relevant Testimony**

The OSHA compliance officer ("CO") who inspected the site testified that during the closing conference on January 19, 2000, he indicated to Respondent's foreman that a citation would issue and that the company had the right to an informal conference and the right to contest the citation; the CO held a telephonic closing conference with Respondent's president and owner on January 24, 2000, and he mentioned again the right to an informal conference and to contest the citation. The CO stated that his office delivered citations by one of two methods, either Federal Express or registered mail, but that he had no actual knowledge of how the citation in this case was delivered. (Tr. 9-16).

The OSHA assistant area director who signed the citation testified his office sent the citation by Federal Express. He identified C-4 as the air bill used to send the citation on March 15, 2000, and C-5 as the Federal Express tracking results that verified the delivery of the package on March 16, 2000; he noted the tracking numbers on C-4 and C-5 matched and that, according to C-5, "L. Sabza" signed for the citation on March 16, 2000.<sup>2</sup> The assistant area director identified C-6 as the letter his office sent to Respondent on April 7, 2000. He said that he received a call from Respondent on April 11, 2000, that he told the caller the citation was sent by Federal Express, and that to his recollection the caller did not request a copy of the citation. (Tr. 19-26; 30).

Respondent's president testified that he, an office manager and a project manager were the only employees of his company and the only three individuals who worked in his office. He further testified that while he had had subcontractors at the site he had had no employees on the job, that the

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<sup>1</sup>The notice of contest, also dated April 24, 2000, was actually sent to OSHA. *See* C-7.

<sup>2</sup>The assistant area director said his office obtained C-5 by accessing the computerized tracking system utilized by Federal Express. (Tr. 21-22).

person the CO had talked to at the site was a subcontractor, and that when the CO had called he had asked about one of the subcontractors but had never indicated that his company would be cited.<sup>3</sup> The president said he knew no one named “L. Sabza” and that the office manager was the person who handled the mail; he also said he did not know before the April 7 letter that his company had been cited and that although the address was correct on C-4 and C-6 the zip code was wrong. (Tr. 35-45).

Respondent’s office manager testified she had worked for Respondent for three years and that she was responsible for all paperwork, including the mail. She said she had never received the OSHA citation and that if she had she would have told the company president as soon as he was in the office; she also said she knew no one named “L. Sabza” and that only she herself, the president and the project manager worked in the office. The office manager noted that the zip code on C-4 was incorrect and that mail was occasionally delayed due to improper addresses. (Tr. 53-61).

#### **Discussion**

The record establishes that Respondent did not file its notice of contest in this case until 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). Respondent contends that OSHA did not properly address or deliver the citation and that it never received the citation. However, the evidence above persuades me otherwise.

The OSHA assistant area director described how his office sent out the citation by Federal Express and how it verified that the citation was delivered to Respondent’s office, and he noted that the tracking numbers on C-4 and C-5, the air bill and the tracking results, matched. He also noted the phone call he had received from Respondent on April 11, 2000, four days after his office had sent out C-6, the letter advising the company that the citation had become final and that the penalty was due. The assistant area director did not recall who he spoke to; however, he testified that he had

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<sup>3</sup>Respondent’s president stated that the subcontractor the CO spoke to at the site had the same last name he did but was neither an employee nor a relative. (Tr. 36).

explained that the citation had been sent by Federal Express and that the caller did not request a copy of the citation. (Tr. 25-26; 30). I observed the demeanor of the assistant area director on the witness stand and found his testimony credible and convincing. Further, Respondent did not question the witness in this regard or make any attempt to rebut his testimony. In my view, that the caller did not ask for a copy of the citation, together with C-4 and C-5, is persuasive evidence that Respondent did in fact receive the citation. Respondent's contention is accordingly rejected.<sup>4</sup>

Based on the testimony of its president, Respondent also suggests it was misled because the CO never indicated it would be cited. However, the CO testified that he told Respondent's foreman and its president that the company would be cited; he also testified that he advised both individuals of the right to an informal conference and the right to contest the citation. (Tr. 9-13). The company president denied this was the case. (Tr. 40-42). Regardless, I observed the CO's demeanor as he testified and found him a sincere and believable witness. The CO's testimony is therefore credited over that of the company president, and I find as fact that the CO informed Respondent that it would be cited and that he also advised it of its right to an informal conference and to contest the citation.<sup>5</sup>

In light of the foregoing, there was no deception or failure to follow proper procedures on the part of the Secretary. The final issue requiring resolution is whether the untimely notice of contest in this case was due to "mistake, inadvertence, surprise, or excusable neglect" or "any other reason justifying [Rule 60(b)] relief." The citation issued to Respondent explains 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

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<sup>4</sup>In so doing, I have noted the testimony of the company's witnesses that they did not know who "L. Sabza" was. (Tr. 37-39; 57; 61). Regardless, based on the record as a whole, I conclude that the citation was delivered to Respondent's office and that someone in that office signed for it.

<sup>5</sup>I have noted the CO's testimony that the individual he spoke to at the site represented himself to be Respondent's foreman and the testimony of the company president that that individual was not his foreman or employee but a subcontractor. (Tr. 9; 36). Even assuming *arguendo* that that individual misstated his relationship to Respondent or that the CO misunderstood what he said, I nonetheless credit the CO's testimony about what he told the company president.

enclosed booklet (OSHA 3000) which outlines your rights and responsibilities and which should be read in conjunction with this form.

The citation further explains 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.**

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., Inc.*, 15 BNA OSHC 1123, 1126-27 (No. 88-2291, 1991). The Commission has also held that a business must have orderly procedures for handling important documents and has denied Rule 60(b) relief when the untimely notice of contest was due to the absence or illness of the person who handled the mail, the failure of that person to bring the citation to the attention of the proper officer of the company, or the citation being misplaced. *See, e.g., E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991), and cases cited therein. Finally, the Commission has held that mere carelessness or negligence, even by a layman, does not justify relief and 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.” *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126-27 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991); *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

I conclude there is no basis for granting Rule 60(b) relief in this case. C-5 shows the citation was delivered to the reception or front desk area of Respondent’s office on March 16, 2000, and that an individual named “L. Sabza” signed for it. In these circumstances, Respondent’s failure to file a timely notice of contest indicates either the lack of an orderly procedure for handling mail, such that the proper company official was not aware of the citation, or that that official did not exercise due diligence after becoming aware of the citation. Given the Commission precedent set out above,

neither of these reasons constitutes “mistake, inadvertence, surprise, or excusable neglect” or “any other reason justifying relief.” My conclusion that Respondent is not entitled to Rule 60(b) relief is also supported by the fact that, although someone from the company called OSHA on April 11, 2000, after receiving C-6, OSHA’s letter of April 7, 2000, the company did not submit its late notice of contest until almost two weeks later, on April 24, 2000. Finally, my conclusion is supported by the fact that Respondent has had previous dealings with OSHA. The CO identified C-3 as a computer printout of the company’s OSHA history showing that on December 17, 1999, it had settled three citations involving another work site through an informal conference. (Tr. 13-14). In addition, I note that Respondent itself states, on the first page of its response to the Secretary’s motion to dismiss, that “[a] lost citation has only happened once or twice in the past 29 years.”

On the basis of the evidence of record, the Secretary’s motion to dismiss is GRANTED, Respondent’s request for relief is DENIED, and the citation and notification of penalty is AFFIRMED in all respects.

So ORDERED.

/s/

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Irving Sommer  
Chief Judge

Date: 30 OCT 2000