

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 01-0098
	:	
WEATHERPROOFING SYSTEMS,	:	
	:	
Respondent.	:	

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***ORDER***

Before: ROGERS, Chairman; and EISENBREY, Commissioner.

BY THE COMMISSION:

On May 4, 2001, Chief Administrative Law Judge Irving Sommer issued a decision dismissing the notice of contest in this case because Weatherproofing Systems (“Weatherproofing”) failed to file an answer to the Secretary’s complaint and then failed to respond to the judge’s subsequent Order to Show Cause. Pursuant to section 12(j) of the Occupational Safety and Health Act of 1970 (“the Act”), 29 U.S.C. § 661(j), the judge’s decision became the final order of the Commission on June 4, 2001.

On June 13, 2001, the envelope containing Weatherproofing’s copy of the Notice of Docketing of Administrative Law Judge’s Decision, which was sent to Weatherproofing by first-class mail on May 4, 2001, was returned to the Commission and marked “unable to forward as addressed” by the Postal Service. Examination of the case file revealed that the

judge's Order to Show Cause, which had been sent by certified mail with return receipt on March 29, 2001, had also been returned to the Commission, but on that envelope were the following notations from the Postal Service: the word "unclaimed" partially obscured and rubber-stamped twice; and this chronology with the dates hand-written-- "1st Notice 4-5; 2nd Notice 4-10; Return 4-20."

Further examination of the file revealed that the Commission may have sent its correspondence to an incorrect address. The Secretary's original citation had been sent to an address in New Hampshire, but the company letterhead on which Weatherproofing later submitted its notice of contest showed a Massachusetts address. Weatherproofing never formally notified the Commission of a change of address, but the Commission nevertheless sent all its correspondence, including the Order to Show Cause, to the Massachusetts address on the letterhead. The documents in the file also show that, although the Secretary sent the original citation to the New Hampshire address, she later sent her complaint to the Massachusetts address printed on the notice of contest letterhead. We note, however, that the complaint, the Commission's Notice of Docketing and Instructions to Employer, the Commission's Posting and Service Order, another order from the judge, and the judge's decision were sent to the Massachusetts address by first class mail with no indication in the file that they were returned as undeliverable.

Based on this record, it appears that Weatherproofing may not have received critical documents in this case because the Commission sent its correspondence to the Massachusetts address. To permit appropriate inquiry into this matter, we refer the case to the judge to conduct further proceedings to determine whether Weatherproofing's failure to file an answer to the complaint and respond to the show cause order may be excused under Rule

60(b) of the Federal Rules of Civil Procedure, and if so, whether reinstatement of the employer's notice of contest would be appropriate relief.<sup>1</sup>

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/s/  
Thomasina V. Rogers  
Chairman

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/s/  
Ross Eisenbrey  
Commissioner

Dated: September 11, 2001

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<sup>1</sup>Rule 60(b)(1) provides that a court may relieve a party from a final judgment for “mistake, inadvertence, surprise, or excusable neglect.” Such relief has been found appropriate on a court’s own motion, *see, e.g., Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999), and where a default judgment has been issued based on the mistake or inadvertence of the court or judge, *see, e.g., id.; B. A. Ward, Inc.*, 18 BNA OSHC 1941, 1999 CCH OSHD ¶ 31,934 (No. 98-1651, 1999).