
SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 01-1215
	:	
M&M PLASTERING, INC.,	:	
	:	
Respondent.	:	

ORDER

Before: RAILTON, Chairman; and ROGERS, Commissioner

BY THE COMMISSION:

On October 19, 2001, Administrative Law Judge Irving Sommer issued a decision dismissing the notice of contest in this case after Respondent failed to file an answer to the Secretary's complaint and then failed to respond to the judge's subsequent Order to Show Cause. The judge's decision was docketed with the Commission on October 23, 2001, and pursuant to section 12(j) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 661(j), became the final order of the Commission on November 23, 2001.

It has come to the Commission's attention that Respondent may not have received critical documents in this case. The Secretary's initial citation noted two addresses: (1) Respondent's business address at P.O. Box 8106, Amarillo, TX 79114, and (2) the location

of the inspection site at 1801 S. Lakeside Rd., Amarillo, TX 79118. The case file reveals that the citation was addressed and sent by certified mail to Respondent's business address at P.O. Box 8106, Amarillo, TX 79114. After receiving Respondent's Notice of Contest, the Commission sent its Notice of Docketing to the business address, but used the 79118 ZIP code instead of 79114. The Secretary subsequently also used the 79118 ZIP code when serving her complaint on Respondent. Thereafter, the Commission continued to send its correspondence, including the judge's show cause order, to the business address with the 79118 ZIP code. The show cause order, which was sent by certified mail with return receipt on September 13, 2001, was returned to the Commission on October 9, 2001. The envelope was stamped with "Return to Sender UNCLAIMED" and a chronology of handwritten dates: "first notice 9-18; second notice 9-22; return 10-2."¹ Thus, it appears that Respondent may not have received either the Secretary's complaint or the judge's show cause order because these documents may have been sent to Respondent's address with an incorrect ZIP code.

To permit appropriate inquiry into this matter, we refer the case to the judge to conduct further proceedings to determine whether Respondent'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, or on equitable grounds, *see Atlantic Marine, Inc. v. OSHRC*, 524 F.2d 476 [3 BNA OSHC 1755, 1975-76 CCH OSHD ¶ 20,257] (5th Cir. 1975),

¹The ZIP code of 79114 was written on the cellophane part of the envelope containing the show cause order, with a line over the address section of the letter that was showing through the cellophane and a line partially crossing out the 79118 ZIP code. It is not known when or by whom this correction was made.

and if so, whether reinstatement of the employer's notice of contest would be appropriate relief.²

/s/
W. Scott Railton
Chairman

/s/
Thomasina V. Rogers
Commissioner

Dated: September 30, 2002

²Rule 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 where a default judgment has been issued based on the mistake or inadvertence of the court or judge. *See B. A. Ward, Inc.*, 18 BNA OSHC 1941, 1999 CCH OSHD ¶ 31,934 (No. 98-1651, 1999).

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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ORDER

On 9/13/01 the undersigned issued an ORDER TO SHOW CAUSE to the Respondent as to why his Notice of Contest should not be dismissed for failure to file an answer to the complaint as required by the Commission Rules of Procedure. The Respondent failed to reply to the ORDER. His actions demonstrate either that he has abandoned the case or treats the Rules of Procedure of the Commission with disdain. This cannot be countenanced as it seriously impedes the administration of justice.

Accordingly, the Notice of Contest filed by the Respondent is dismissed. The Secretary's citation(s) and proposed penalties are AFFIRMED in all respects.

/s/

IRVING SOMMER
Chief Judge

DATE: 19 OCT 2001
Washington, D.C.