

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

MARIANAS GARMENT
MANUFACTURING, and its successors,

Respondent.

OSHRC DOCKET NO. 02-0129

DECISION AND ORDER

This matter comes up on Complainant's motion to dismiss Respondent's late notice of contest. Complainant maintains that Respondent failed to file its notice of contest within 15 days of its receipt of the subject OSHA citation as required under §10(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").¹ In its opposition to Complainant's motion, Respondent admits that its filing was untimely, but asks that the Commission grant relief under Rule 60(b) of the Federal Rules of Civil Procedure.

The Commission has previously granted relief from judgment or order under Fed. R. Civ. P. 60(b)(1), where the Respondent has shown a sufficient basis for relief under the rule. *See, Branciforte Builders Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). *Keefe Earth Boring Company, Inc.*, 14 BNA OSHC 2187, 1991-93 CCH OSHD ¶29,277 (No. 88-2521, 1991).² Fed.R.Civ.P. 60(b) also permits discretionary relief from final orders that have been entered where "(4) the judgment is void. . . or (6) [for] any other reason justifying relief from the operation of the judgment."

¹ §10(a) of the Occupational Safety and Health Act, 29 U.S.C. §659(a) states that ". . .the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty. . . the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

²But see, *Chao v. Russell P. Le Frois Builder, Inc.*, 2nd Cir., No. 00-4057, 5/10/02 [OSHRC lacks jurisdiction to reopen late notices of contest under Fed.R.Civ.P. 60(b)(1)]

Respondent suggests that the default judgment in this action is void because OSHA lacks subject matter jurisdiction over the site, *i.e.* Respondent's residential dormitories, in which the cited conditions were located. Respondent confuses the issue of coverage with that of subject matter jurisdiction. Subject matter jurisdiction "refers to a *court's* competence to hear and determine cases of the general class to which proceedings in questions belong;. . ." BLACK'S LAW DICTIONARY(1979)[emphasis added]. Primary jurisdiction to determine questions of the Act's *coverage* is vested in the Commission. *Godwin v. OSHRC*, 540 F.2d 1013 (9th Cir. 1976). Whether or not the cited dormitories are covered by the Act is clearly within the competence of this court. Subject matter jurisdiction, therefore, is not an issue in this matter, and default judgment is not void.

Respondent further suggests that the coverage issue is of such "broad social importance" that this case should be reinstated so that the matter may be resolved. Respondent further notes, however, that the issue of coverage has arisen "repeatedly" over the past several years, that various employers have challenged OSHA's right to inspect residential barracks, and that the District Courts have consistently issued and enforced warrants authorizing such inspections. (Respondent's Opposition to Motion to Dismiss, p. 3). Under the circumstances, this judge finds that the opportunity to revisit this issue does not justify granting relief under Fed.R.Civ.P. 60(b)(6).

Complainant's motion to dismiss Respondent's notice of contest is GRANTED, and the citation in this matter is AFFIRMED. No penalty was proposed, and none is ASSESSED.

/S/

Benjamin R. Loye
Judge, OSHRC

Dated: June 12, 2002