



UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building – Room 2R90, 100 Alabama Street, S.W.  
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant

v.

E. C. Stokes Mechanical Contractor, Inc.

Respondent.

OSHRC Docket No. **12-0776**

Appearances:

Monica Moukalif, Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia  
For Complainant

Susan Stokes, President, *pro se*, E. C. Stokes Mechanical Contractor, Inc., Lake Worth, Florida  
For Respondent

Before: Administrative Law Judge Ken S. Welsh

**DECISION AND ORDER**

This late notice of contest is before the Review Commission pursuant to § 10(a) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. § 659(a). The Secretary of Labor moves to dismiss, as untimely, E. C. Stokes Mechanical Contractor, Inc.'s (ECS) notice of contest dated April 3, 2012, to the serious citation issued by the Occupational Safety and Health Administrative (OSHA) on March 1, 2012. The citation was issued after an OSHA inspection of an ECS worksite in Boynton Beach, Florida, on November 16, 2011. The citation proposed a total penalty of \$ 4,760.00.

ECS opposes the Secretary's motion to dismiss and seeks relief under Rule 60(b), Federal Rules of Civil Procedure (Fed.R.Civ.P.). ECS claims an office employee mistakenly failed to notify the president of receipt of the citation until after the expiration of the 15-work day contest period. The employee, after scanning the citation and considering it not urgent, placed it on her desk and forgot about it.

The hearing, on whether ECS is entitled to relief under Rule 60(b), was held on July 2, 2012, in West Palm Beach, Florida. ECS is represented *pro se* by its president/owner Susan Stokes (Tr. 4). ECS agrees that as a plumbing and air conditioning contractor, it is in a business affecting commerce within the Act (Tr. 5). In lieu of briefs, the parties made closing arguments.

For the reasons discussed, ECS is not entitled to Rule 60(b) relief.

***Statement of Undisputed Facts***

ECS is a commercial plumbing and air conditioning contractor in Palm Beach County, Florida. Its office is located in Lake Worth, Florida. ECS is a family owned company which has been in business for almost 50 years. Started by her father, the company has been owned by Ms. Stokes for 23 years. Throughout its almost 50 years in business, ECS has never received an OSHA citation although its projects have been inspected. In November 2011, ECS employed approximately 55 employees including 10 office employees (Tr. 54, 65-69, 72).

On November 16, 2011, ECS was installing air conditioning and plumbing at the new Bethesda Hospital in Boynton Beach, Florida, when the project was inspected by an OSHA safety compliance officer (Tr. 54-55). The hospital is the largest project undertaken by ECS and is scheduled to take three years (Tr. 71-72).

As a result of the inspection, ECS was issued a serious citation on March 1, 2012 (Exh. C-1; Tr. 6). The citation alleges that ECS failed to secure and properly store oxygen and acetylene cylinders in violation of 29 C.F.R. § 1926.350(a)(9) (item 1) and 29 C.F.R. § 1926.350(a)(10) (item 2). The citation proposes a penalty of \$ 2,380.00 for each alleged violation.

The citation was mailed by OSHA via certified mail to ECS on March 5, 2012. The return receipt was signed by an ECS office employee on March 7, 2012 (Tr. 6). The envelope contained the citation and the OSHA 3000 pamphlet entitled “*Employer Rights and Responsibilities*” (Exh. C-2; Tr. 31, 55-56).

The office employee, who was referred to as a secretary, has responsibilities beyond typical clerical duties. She handles the company’s accounting, human resources, payroll, and accounts receivables. She has been employed by ECS for 19 years and is considered in charge of the office when Ms. Stokes is unavailable (Tr. 39-40, 70).

After opening the envelope from OSHA, the employee scanned its contents including the citation. Believing the citation only related to abatement which she knew had already been accomplished, the employee placed the OSHA envelope on her desk and forgot about it (Tr. 44).

On March 29, 2012, when she re-read the citation, the employee realized her error and determined that the 15-work day notice of contest period had expired on March 28, 2012 (Tr. 57). Because Ms. Stokes was away from the office for her daughter's wedding, the employee waited until April 2, 2012, to inform her of receiving the OSHA citation (Tr. 45).

On April 2, 2012, the employee, as instructed by Ms. Stokes, telephoned the OSHA Fort Lauderdale Assistant Area Director who informed her that the contest period had expired and that OSHA considered the citation a final order (Tr. 33-34, 46). The Assistant Area Director gave the employee the address and telephone number of the Review Commission in Washington, D.C. The following day, after speaking to the Executive Director of the Review Commission, the employee, signing on behalf of ECS as Human Resources, filed ECS's notice of contest. In the contest letter, the employee acknowledged that "through my own oversight, I failed to see the 15 working day requirement to contest this citation" (Tr. 46).

After the contest was docketed by the Review Commission, the Secretary of Labor filed a motion to dismiss ECS's notice of contest on May 24, 2012. ECS filed its response in opposition to the motion to dismiss on June 21, 2012. ECS argues that the motion should be denied because the missed deadline was unintentional and was the result of a mistake or excusable neglect under Rule 60(b).

## **DISCUSSION**

Section 10(a) of the Act provides that unless an employer's notice of contest is filed within 15 working days of receipt of the citation and 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." 29 U.S.C. 659(a)

ECS does not dispute that its contest was not timely filed within 15 working days from receipt of the citation. The citation was issued on March 1, 2012, and received and signed by ECS on March 7, 2012. ECS filed its notice of contest on April 3, 2012. The last day for ECS to timely file a notice of contest was March 28, 2012 (Tr. 6-7).

An otherwise untimely notice of contest is, however, accepted by the Review Commission, if an employer can establish relief under Rule 60(b), or show the delay in filing was caused by deception on the part of OSHA or OSHA failed to follow proper procedures. The employer has the burden of proving entitlement to equitable relief for a late-filed notice of contest. *Burrows Paper Corp.*, 23 BNA OSHC 1131 (No. 09-1559, 2010).

The Rule 60(b) bases for relief of inadvertence, surprise, or other mitigating circumstances such as absence, illness or disability are not alleged or shown to have prevented ECS from timely filing its notice of contest. ECS asserts no claim of deception or failure to follow procedures by OSHA.

ECS seeks Rule 60(b) relief based on “mistake” or “excusable neglect.” ECS claims the office employee failed to see the 15-work day requirement to contest the citation and failed to immediately notify Ms. Stokes. Ms. Stokes had instructed the employee “that we are going to be getting some kind of documentation in the mail from OSHA, and that when it came in, I needed to have it immediately” (Tr. 76). ECS also claims the timing of the citation was unfortunate because ECS was engaged in a number of projects that kept Ms. Stokes away from the office. Also, the office employee was very busy with other matters including preparing for the year end audit (Tr. 42, 71).

The Review Commission has long determined that OSHA’s requirement for contesting a citation is not onerous and an employer is repeatedly cautioned that the 15-work day contest period is critical. There are at least six references in the citation regarding 15-day contest period. The requirement is most clearly spelled out on the second page of the citation in bold and underlined text in the section entitled “Right to Contest” which provides that “**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 OSHA 3000 booklet which accompanied the citation also advises the employer of its obligation to timely contest a citation within 15 working days (Exh. C-1, p. 11). The Commission has found that the booklet provides an “additional, straightforward explanation” of the need to file a timely contest. *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991).

Despite the numerous written references to the 15-day contest period, the office employee stated in her affidavit to ECS's response that "In scanning through the first paragraph I read abatement and 15 working days. Knowing the corrections had already been done on the same date of the site inspection, November 16, 2011, I did not believe there was an immediate urgency to this matter" (Tr. 44). Therefore, she placed the OSHA envelope on her desk and forgot about it for 22 days without any action. Although she knew an OSHA citation may be issued as a result of the November 16 inspection, Ms. Stokes stopped asking her office about it after the first of the year. The Act provides a 6-month statute of limitation to issue a citation. 29 U.S.C. 658(c) (Tr. 78-79).

ECS's claim for Rule 60(b) relief based on "mistake" or "excusable neglect" is not established. The record fails to show that ECS acted with reasonable diligence in ensuring its rights were preserved and to discover the purported mistake. The employee's failure to fully read the citation and bring it to the attention of Ms. Stokes was certainly careless but not a mistake or excusable neglect as contemplated by Rule 60(b). Even a cursory reading of the citation shows the abatement date is distinguished from the contest period. If anyone had read the citation and written instructions, ECS would have known how to proceed.

The employee's failure to take any action until she contacted OSHA on April 2, 2012, 26 days after receipt, shows poor judgment and a reckless choice for which ECS is now bound. Only the lack of care and culpable conduct explains the failure to act timely. Ms. Stokes was regularly in the office and was always available by cell phone, text, or e-mail during the contest period of March 7 through March 28 (Tr. 50, 62). The employee is an experienced employee who acted on behalf of ECS. Her duties, as evident by her signature on the contest letter, included the handling of OSHA matters. According to Ms. Stokes, the employee "has virtually run all the business of the office while I have been out in the field myself (Tr. 70).

Although it is a harsh result to hold ECS responsible for the employee's carelessness, it was ECS that assigned her the greater responsibilities. The employee's recklessness in "scanning" the citation and concluding that no further action was required was not justified. *Keefe Earth Boring Co., Inc.*, 14 BNA OSHC *id* at 2192 (To qualify for relief under Rule 60(b) because of mistake or a similar error, a party must show itself justified in failing to avoid its error).

To allow important mail, received via certified, to stay on a desk for more than 15 working days without action is simple negligence, not excusable neglect.

The Commission has held that a key factor in determining whether a late filing was due to excusable neglect is the reason for the delay, including whether it was within the reasonable control of the movant. *CalHar Construction, Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-367, 2000), citing to *Pioneer Inv. Serv. v. Brunswick Assoc. Ltd Partnership*, 507 U.S. 380, 395 (1993). A business, such as ECS, must maintain orderly procedures for the handling of important documents. When the lack of such procedures results in an untimely notice of contest, the late filing is deemed simple negligence and not excusable neglect. *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989).

The Commission has accordingly denied Rule 60(b) relief to employers, such as in this case, where the late filing was due to an employee's mishandling or misplacing the citation or the failure of the employee who received the citation to bring it to the attention of proper company official. *J.F. Shea Co.*, 15 BNA OSHC 1092, 1094 (No. 89-976, 1991) (Rule 60(b) relief not granted when the negligent handling of the citation occurred in the employer's office). Also, see *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830, 1989) (the failure of a company employee who received the citation to bring it to the attention of the company officer does not constitute a reason for justifying relief); *Jackson Associates of Nassau*, 16 BNA OSHC 1261, 1265 (No. 91-0438, 1993) (although the owner was preoccupied with husband's illness, the administrative assistant's failure to read and comprehend the citation did not entitle employer to Rule 60(b) relief); *Hills Brothers Construction Inc.*, 20 BNA OSHC 1157 (No. 02-1893, 2003) (failure to give more than a cursory reading of a citation is not excusable neglect); and *Erickson Hall Construction Co.*, 20 BNA OSHC 1159 (No. 02-1694, 2003) (a mislaid citation does not constitute basis for Rule 60(b) relief).

OSHA is not to blame for ECS's late contest. It was under ECS's control to comply and nothing about the contest process precluded it from timely submitting a written notice of contest. *Janusz Szydlowski d/b/a/ J Home Improvement, Inc.*, 19 BNA OSHC 1670, 1671 (No. 01-0980, 2001) (negligent handling of citation does not entitle employer from late filing of contest). See also, *Mohegan Glass & Window Co., Inc.*, 18 BNA OSHC 2045 (No. 99-0483, 1999) (an

employer's "inexperience with OSHA, his limited understanding of written English, and the absence of his business consultants" do not constitute grounds for Rule 60(b) relief).

Leaving the OSHA envelope on her desk for more than 15 working days without action establishes ECS's failure to maintain an orderly procedure for handling important documents. ECS has placed multiple responsibilities on the office employee (Tr. 39). The employee ran the office when Ms. Stokes was unavailable. Her failure to act is not a mistake but a careless choice. The employee's delegation of responsibility now binds ECS with its choice.

The onus is on ECS to take the necessary steps to ensure that OSHA matters are handled properly. ECS is accountable for its own employee's act or omission. It was solely within ECS's control. ECS bears the burden of its lack of diligence. *Acrom Construction Services, Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991).

While sympathetic to ECS's situation and its desire to maintain a good safety record, the circumstances here are not sufficient to establish entitlement to Rule 60(b) relief. The court is impressed with the company's goal to maintain a good safety program by the use of a written safety manual, safety meetings, and personal protective equipment (Tr. 47). It is clear that ECS strives to be a safety conscious company and is proud of its record. The result in this case does not diminish ECS's commitment to safety nor should it adversely affect the company's safety record. However, the office employee's conscious and deliberate decision to wait until April 3, 2012, to seek relief from the citation was neither a mistake nor justified.

Accordingly, the Secretary of Labor's motion to dismiss, as untimely, ECS's notice of contest is **GRANTED**. The violations identified in the serious citation issued to ECS on March 1, 2012, are affirmed, and the total proposed penalties of \$ 4,760.00, are assessed.

SO ORDERED.

Date: August 2, 2012

/s/  
**KEN S. WELSCH**  
Administrative Law Judge