



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, DC 20036-3419

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SECRETARY OF LABOR
Complainant,

v.

SCHENECTADY HARDWARE & ELECTRIC CO.
Respondent.

OSHRC DOCKET
NO. 92-1849

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on May 25, 1993. The decision of the Judge will become a final order of the Commission on June 24, 1993 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before June 14, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: May 25, 1993

DOCKET NO. 92-1849

NOTICE IS GIVEN TO THE FOLLOWING:

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Richard W. Gordon
Administrative Law Judge
Occupational Safety and Health
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SECRETARY OF LABOR,

Complainant,

v.

SCHENECTADY HARDWARE &
 ELECTRIC CO., INC.

Respondent.

OSHRC
 Docket No. 92-1849

Appearances:

William Staton, Esq.
 Office of the Solicitor
 U.S. Department of Labor
 For Complainant

Lawrence Spraragen, Vice President
 Schenectady Hardware &
 Electrical Co., Inc.
 Schenectady, New York
 For Respondent

Before: Administrative Law Judge Richard W. Gordon

DECISION AND ORDER

This case is before me upon the Secretary's Motion to Dismiss Respondent's notice of contest as untimely filed and to affirm the citations and proposed penalties as issued. There is no dispute as to the essential facts in this case and the parties have requested that I decide this case on the record without a hearing.¹

On March 17, 1992, the Secretary issued to Respondent two citations, together with proposed penalties, for violations arising from Inspection No. 109115527. The citations and notifications of proposed penalty were mailed to Respondent by certified mail on March 18,

¹ On April 22, 1993, I conducted a telephonic prehearing conference with the parties. At that time, the parties informed me that they were in substantial agreement with the essential facts in this matter. The parties then agreed to submit this case to the undersigned for decision on the record without a hearing.

and were received by Respondent on March 20, 1992, as shown by the signed certified mail receipt card. The last day for Respondent to timely contest the citations was April 10, 1992.

By letter dated March 20, 1992, Respondent's vice-president, Lawrence Spraragen, requested an informal conference "before a decision is made to file a Notice of Intent to Contest". In response to this request, John J. Nead, safety supervisor in the Albany Area OSHA office, called Respondent's place of business at the number listed on Respondent's letterhead. Mr. Nead identified himself, and stated that he was calling on behalf of OSHA in response to Mr. Spraragen's request for an informal conference. The receptionist who answered the telephone told Mr. Nead that Mr. Spraragen was momentarily busy, but that he would return the call. Mr. Spraragen did not return the call prior to the expiration of the 15 working day contest period. As a result, the citations became final orders and OSHA sent a demand letter to Respondent on May 11, 1992, seeking payment of the penalties. After Respondent received the demand letter, Mr. Spraragen, by letter dated May 13, 1992, contacted the OSHA Area Office regarding the informal conference.

Respondent does not dispute the facts set forth by the Secretary. Respondent's position is that when the subject telephone was made to Respondent, Mr. Spraragen was personally unavailable to answer and fully intended to return the call as soon as possible. Unfortunately, Respondent forgot the entire matter until notification for payment was received. Respondent asserts that it did not purposely disregard the 15 day period to file a Notice of Contest, but "simply overlooked" the matter in missing the telephone connection with the OSHA Area Office in attempting to schedule the informal conference. Respondent's position is that it is a conscientious company and it would have timely responded to an informal conference had the OSHA Area Office followed up on the initial telephone call by providing verbal or written notice of the expiration of the applicable 15 working day period.

In the instant case, there is no doubt that Respondent failed to timely file a Notice of Contest and thus the citations became final orders of the Commission, entered by operation of law, pursuant to section 10(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651-678 ("the Act"). The Commission's authority to grant relief from final orders entered pursuant to section 10(a) of the Act comes from Rule 60(b) of the Federal

Rules of Civil Procedure and *Atlantic Marine, Inc. v. OSHRC*, 524 F.2d 476 (5th Cir. 1975). See *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 1989 CCH OSHD ¶ 28,409 (No. 86-1266, 1989).

Rule 60(b) permits relief for “mistake, inadvertence, surprise or excusable neglect,” for “misrepresentation, or other misconduct of an adverse party,” or for “any other reason justifying relief.” *Atlantic Marine* permits relief for OSHA misconduct, consisting of deceptive practices or noncompliance with required procedures. Under either theory, the employer has the burden to show a sufficient basis for relief from a final order.

Since there is no evidence of any OSHA misrepresentation or misconduct that would justify relief under Commission case law or the federal rule, I will discuss whether any mistake, inadvertence, surprise or excusable neglect justifies relief under the federal rule. 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. Mere carelessness or negligence, even by a layman, is not excusable. In short, a layman must exercise reasonable diligence.

In *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022, 1989 CCH OSHD ¶ 28, 406, p. 37,534 (No. 88-1748, 1989), the Commission declined to accept a late-filed notice of contest from an employer who, although unsophisticated in OSHA matters, had received the usual written instructions concerning the time period for contesting a citation. The employer had never before been cited, did not have a legal department, claimed not to have “appreciate[d] the essence of the fifteen day period it had to reply,” and therefore took too long gathering information that it wished to consider before deciding whether to contest. The Commission responded, “ignorance of procedural rules dose not constitute ‘excusable neglect’ within Federal Rule of Civil Procedure 60(b).” 13 BNA OSHC at 2022, 1989 CCH OSHD at p. 37,534. The employer “was explicitly told” of the fifteen working-day contest period by the citation itself and by OSHA’s letter that accompanied it. 13 BNA OSHC at 2033, 1989 CCH OSHD at p. 37,354. Moreover, the Commission continued, Rule 60(b) cannot be invoked

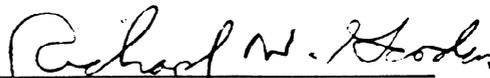
“to give relief to a party who has chosen a course of action which in retrospect appears unfortunate or where error or miscalculation is traceable really to a lack of care.” *Sadowski v. Bombardier ltd.*, 539 F.2d 615, 618 (7th Cir. 1976).

13 BNA OSHC at 2022, 1989 CCH OSHD at p. 37,354.

In this case, it is clear that Respondent has failed to show its entitlement to relief under Rule 60(b). The OSHA citations plainly stated that Respondent had fifteen (15) working days from the date of receipt to contest the citations. The cover letter, served together with the citations, also explained the 15 day contest period. Moreover, the cover letter specifically noted that the "running of this contest period is not interrupted by an informal conference." With the exercise of due diligence, Respondent could have avoided his error. OSHA was under no legal obligation to further contact Respondent to advise when the time to file a notice of contest would expire. Accordingly, I conclude and so find that Respondent has not demonstrated any circumstances that would justify a basis for relief under Rule 60(b) of the Federal Rules of Civil Procedure.

It is hereby ORDERED, that Respondent's notice of contest is DISMISSED,

It is further ORDERED that the citations, proposed penalties and abatement dates are AFFIRMED as issued.


RICHARD W. GORDON
Judge, OSHRC

DATED:

May 21, 1993

Boston, MA