



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,

Complainant,

v.

MONTFORT OF COLORADO -
GREELEY LAMB

Respondent.

Docket No. 93-2614

ORDER

This matter is before the Commission on a direction for review entered by Commissioner Edwin G. Foulke, Jr., on January 21, 1994. The parties have now filed a stipulation and settlement agreement.

Having reviewed the record, and based upon the representations appearing in the stipulation and settlement agreement, we conclude that this case raises no matters warranting further review by the Commission. The terms of the stipulation and settlement agreement do not appear to be contrary to the purposes of the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the stipulation and settlement agreement into this order, and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the stipulation and settlement agreement. This is the final order of the Commission in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).

BY DIRECTION OF THE COMMISSION

Dated 1-26-95

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on January 26, 1995.

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

Tedrick A. Housh, Jr., Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
1210 City Center Square
1100 Main Street
Kansas City, MO 64105

Rodney L. Smith, Esquire
Eiberger, Stacy, Smith & Martin
3500 Republic Plaza
370 Seventeenth Street
Denver, CO. 80202-5635

James Barkley
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204-3582

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT REICH, SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket
	:	No. 93-2614
	:	
MONFORT OF COLORADO - GREELEY LAMB,	:	
	:	
Respondent.	:	

STIPULATION AND SETTLEMENT AGREEMENT

The parties have reached agreement on a full and complete settlement and disposition of the issues in this proceeding which are currently pending before the Commission. It is hereby stipulated and agreed between the Complainant, Secretary of Labor, and the Respondent, Monfort of Colorado - Greeley Lamb, that:

1. The Secretary hereby amends Citation Number 2, Items 1a through 1d and Items 2a through 2c, to reclassify the alleged

violations of 29 C.F.R. §§ 1910.120(q)(2)(ii), (iii), (vii), and (x), and 29 C.F.R. §§ 1910.1200(h)(1)(ii), (2)(ii), and (2)(iv), as serious rather than repeat violations.

2. Respondent hereby withdraws its notice of contest to the citation as amended above.

3. Respondent certifies that the abatement of all items of Citation Number 1 for serious violations, Citation Number 2 for repeat violations as amended above, and Citation Number 3 for other-than-serious violations, was accomplished by November 15, 1994, the final abatement date.

4. Respondent certifies that it has provided Bobby Glover, Area Director of the Denver Office of the Occupational Safety and Health Administration, with written verification that abatement has been completed and the manner in which it had been accomplished for all items of the above citations.

5. Respondent certifies that it has submitted payment of \$37,500.00 to the OSHA Area Office, in full and complete payment of the penalty.

6. Respondent certifies that a copy of this Stipulation and Settlement Agreement was posted at the workplace on December 19, 1994, in accordance with Rules 7 and 100 of the Commission's Rules of Procedures, and will remain posted for a period of ten days.

7. There is no authorized employee representative to have elected party status in this case.

8. Each party agrees to bear its own costs.

9. None of the foregoing agreements, statements, stipulations, or actions taken by respondent shall be deemed an admission by respondent of the allegations contained in the citations or the complaint herein. The agreements, statements, stipulations, and actions herein are made solely for the purpose of settling this matter economically and amicably and they shall not be used for any other purpose, except for subsequent proceedings and matters brought by the Secretary of Labor directly under the provisions of the Occupational Safety and

Health Act of 1970.

Dated this 15th day of December, 1994.

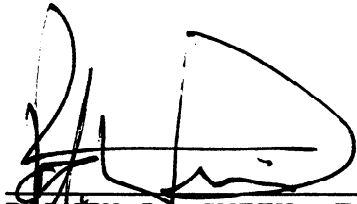
Respectfully submitted,

THOMAS S. WILLIAMSON, Jr.
Solicitor of Labor

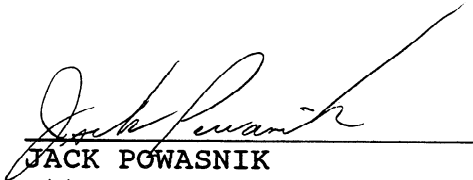
JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

TEDRICK A. HOUSH, Jr.
Regional Solicitor

DANIEL J. MICK
Counsel for Regional
Trial Litigation



ROONEY L. SMITH, Esq.
Eiberger, Stacy, Smith
& Martin, P.C.
Attorney for Respondent



JACK POWASNIK
Attorney for the
Secretary of Labor

KATHLEEN BUTTERFIELD
Attorney for the
Secretary of Labor

NOTICE TO EMPLOYEES OR EMPLOYEE REPRESENTATIVE

The attached Stipulation and Settlement Agreement has been entered into by the parties and is being submitted to the Occupational Safety and Health Review Commission for entry as a Final Order. If you have any comments on the Stipulation and Settlement Agreement, you may submit them within ten days of service or posting of the Stipulation to:

Ray H. Darling, Jr.
Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St., N.W., #980
Washington, D.C. 20036

A copy of the comments should also be sent to:

Rodney L. Smith, Esq.
Eiberger, Stacy, Smith & Martin, P.C.
3500 Republic Plaza
370 17th Street
Denver, CO 80202

Served and/or posted this 19th day of December, 1994.



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SECRETARY OF LABOR
Complainant,

v.

MONFORT OF COLORADO, GREELEY LAMB
Respondent.

OSHR DOCKET
NO. 93-2614

**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 December 22, 1993. The decision of the Judge will become a final order of the Commission on January 21, 1994 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 January 11, 1994 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: December 22, 1993

DOCKET NO. 93-2614

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

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v.

MONFORT OF COLORADO -
GREELEY LAMB,

Respondent.

OSHRC DOCKET
NO. 93-2614

ORDER DISMISSING NOTICE OF CONTEST

Between May 10 and May 24, 1993, Monfort was inspected by OSHA. As a result of that inspection, on May 24, 1993 Monfort was issued one "serious" citation and one "other than serious" citation, alleging violations of 29 C.F.R. §§1910.212(a)(3)(ii) and 119(f)(1)(i), respectively. On June 7, 1993, Monfort's attorney filed a timely notice of contest to the citations. On July 14, 1993, the parties were notified that the case had been docketed and assigned the docket number 93-1806.

On August 5, 1993, Monfort was issued three more citations arising out of the same inspection. The August 5 citations included three items alleging "serious" violations of §1910.1200 *et seq.*, "repeated" and "other than serious" violations of §§1910.120 *et seq.* and "repeat" violations of §1910.1200 *et seq.* Monfort did not forward the citation to its attorney until September 28, 1993; on which date the attorney immediately filed a notice of contest. The latter case was docketed as case number 93-2614.

Complainant moves to vacate the notice of contest as untimely based on §10(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, *et seq.*) which provides that a citation uncontested within 15 days automatically becomes a final order of

the Commission. Monfort does not deny the notice of contest was untimely. However, Monfort moves for relief under Fed.R.Civ.P. 60(b).

A party filing a late notice of contest may also obtain Commission review by filing a motion for relief from judgment or order under Rule 60(b), which allows for such relief in cases of “mistake, inadvertence, surprise, or excusable neglect”. The burden is on the Respondent to prove itself “justified in failing to avoid its error,” in order to show its entitlement to relief under Rule 60(b). *Keefe Earth Boring Company, Inc. (KEBCO)*, 14 BNA OSHC 2187, 2192, 1991 CCH OSHD ¶29,277 (No. 88-2521, 1991). In *KEBCO*, the Commission noted that mere carelessness or negligence, even by a layman, is not excusable. *Id.*

Monfort alleges that the employee who received the second citation thought it was part of the previously contested case because of the common ID number on the citation and the merged inspection. Monfort argues that its mistake entitles it to relief under rule 60(b).

This judge does not agree. Monfort’s misunderstanding, if any, does not merit relief under Rule 60(b). OSHA citations and documents received from the Commission are important legal documents that are to be carefully read and understood. Here the two citations are so dissimilar that a reasonable person could not conclude that the second citation was part of the first case. Significantly, the first citation had been contested and docketed before the second citation was issued. The different issuance dates, types of violations, descriptions of the violations and proposed penalties would all have alerted a reasonable person to the existence of a second citation requiring a second notice of contest. Moreover, an affidavit filed by OSHA supervisor, Herb Gibson, indicates Respondent was aware that two separate citations were generated by the March inspection. Monfort is not inexperienced in OSHA matters, having been cited previously. A client’s lack of diligence in informing his attorney regarding matters relevant to the suit does not entitle the client to 60(b) relief. *See; KEBCO, supra*, citing with approval *National Bank of Joliet v. W.H. Barber Oil Co.*, 69 F.R.D. 107, 109 (N.D.Ill. 1975).

Respondent has not demonstrated entitlement to relief under Fed.R.Civ.P. 60(b). Its notice of contest is vacated, and the citation and proposed penalties are affirmed.


James H. Barkley
Judge, OSHRC

Dated: December 10, 1993