



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1120 20th Street, N.W., Ninth Floor
 Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 97-0706
	:	
SCANDIA PACKAGING MACHINERY COMPANY,	:	
	:	
Respondent.	:	

APPEARANCES:

William G. Staton, Esquire
 New York, New York
 For the Complainant.

Charles Van Riper
 Clifton, New Jersey
 For the Respondent, *pro se.*

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”), to determine whether Respondent filed a timely notice of contest of a citation and notification of penalty issued by the Occupational Safety and Health Administration (“OSHA”). A hearing was held on October 23, 1997, on the Secretary’s motion to dismiss Respondent’s notice of contest.

Background

The citation setting forth the alleged violations and proposed penalties was issued on December 16, 1996, and sent by certified mail to Respondent. Pursuant to section 10(a) of the Act, Respondent was required to notify OSHA of its intent to contest the citation within 15 working days of its receipt of the citation, and failure to file a timely notice of contest would result in the citation and proposed penalties becoming a final judgment of the Commission by operation of law. It is

undisputed that Respondent received the citation on December 20, 1996, and that January 14, 1997, was the date the notice of contest was due. It is also undisputed that on April 3, 1997, Respondent filed a letter requesting an informal conference and objecting to the proposed penalties, and that on May 15, 1997, Respondent filed another letter requesting that its case be docketed with the Commission. The Secretary filed her motion to dismiss on June 18, 1997.

Discussion

The record plainly shows that Respondent did not provide notice of its intent to contest the citation and proposed penalties until well after the expiration of the 15-working-day period. The issue in this case is whether the untimely filing may be excused under the circumstances. An otherwise untimely notice of contest may be accepted where the delay in filing was caused by deception on the part of the Secretary or by the Secretary's failure to follow proper procedures. An employer is also entitled to relief under Federal Rule of Civil Procedure 60(b)(1) if it demonstrates that the Commission's final order was entered as a result of "mistake, inadvertence, surprise, or excusable neglect," or under Federal Rule of Civil Procedure 60(b)(6) for mitigating circumstances such as absence, illness, or a disability which would prevent a party from protecting its interests. *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no contention and no evidence in this case that the Secretary acted improperly or that any Rule 60(b)(6) factors are present. Rather, Respondent asserts that the wording in the citation was confusing, that it did not understand that not filing a notice of contest would result in the penalties being assessed, and that the penalties represented a significant financial burden. *See C-3*, Respondent's April 3, 1997 letter. The question to be answered, therefore, is whether Respondent is entitled to relief pursuant to Rule 60(b)(1).

Charles VanRiper, Respondent's plant manager and the individual authorized to appear on the company's behalf, testified that the subject inspection was the first that the plant had ever experienced and that neither he nor anyone else at the facility was familiar with the process. He further testified that he focused on abating the cited conditions, some of which were corrected while the OSHA compliance officer was still there, that he assumed that as long as all of the alleged violations were abated the company would not be further penalized, and that he was not aware of the notice of contest filing requirement until he received a past-due notice from OSHA in regard to the penalties. VanRiper initially indicated his belief that the citation forms were unclear with respect to

the consequences of failing to file a notice of contest within 15 days; however, he then conceded that a careful reading of the forms rendered their meaning “crystal clear” and that the failure to comply with the filing requirement had been his mistake. (Tr. 27-36).

The cover letter to the citation issued to Respondent states, in the first paragraph, as follows:

You must abate the violations referred to in this Citation by the dates listed and pay the penalties proposed, unless within 15 working days ... from your receipt of this Citation and Notification of Penalty you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above. Please refer to the enclosed booklet (OSHA 3000) which outlines your rights and responsibilities and which should be read in conjunction with this form.

In addition, page 2 of the cover letter has a paragraph which provides as follows:

Right to Contest - You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates without contesting the underlying violations. **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.**

On the basis of the record, Respondent is not entitled to Rule 60(b)(1) relief. The Commission has held that the OSHA citation “plainly state(s) the requirement to file a notice of contest within the prescribed time period.” *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). *See also Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). The Commission has further held that the OSHA 3000 booklet, noted above, also provides an “additional, straightforward explanation” of the need to file a timely contest.¹ *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). Finally, it is well settled that ignorance of procedural rules does not constitute “excusable neglect” within the meaning of Rule 60(b) and that, moreover, 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.” *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989) (citations omitted). While I am sympathetic

¹The record shows that the OSHA 3000 booklet was included with the citations sent to Respondent, and that the compliance officer who conducted the inspection advised VanRiper of the 15-day notice of contest filing requirement during the closing conference. (Tr. 7-9; 19).

to Respondent's plight in this matter, I am constrained by the record and Commission precedent to hold the company responsible for not filing its notice of contest in a timely manner. Respondent had clear notice of the need to contest the citation within the 15-working-day period, and its failure to do so was not excusable neglect within the meaning of Rule 60(b).

Order

The Secretary's motion to dismiss is granted, and the citation and notification of penalty is affirmed in all respects.

Irving Sommer
Chief Judge

Date: