



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

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SECRETARY OF LABOR, :

Complainant, :

v. :

HARPIS EXTERIORS, :

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Respondent. :

OSHRC DOCKET NO. 98-0175

APPEARANCES:

Susan B. Jacobs, Esquire  
 New York, New York  
 For the Complainant.

Paul F. Harpis, Jr.  
 Hudson, New York  
 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”). The Secretary filed a motion to dismiss the notice of contest on April 2, 1998, and the hearing in this matter was held on May 19, 1998. Neither party has filed a post-hearing brief.

Background

The citation setting forth the alleged violations and proposed penalties was issued to Respondent on October 6, 1997. 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 penalties becoming a final judgment of the Commission by operation of law. It is undisputed that OSHA mailed the citation by certified mail, that Respondent received the citation on October 8, 1997, and that the 15-day notice

of contest period ended on October 30, 1997. It is also undisputed that Respondent did not file a notice of contest until it received a letter from OSHA dated December 10, 1997, advising that the penalties reflected in the citation were past due; Respondent's notice of contest letter to the Commission was not dated, but the Commission received it on January 5, 1998. (Tr. 5-15; C-1-5).

### Discussion

The record plainly shows that Respondent did not provide notice of its intent to contest the citation and proposed penalty until after the expiration of the 15-working-day period. The issue to be resolved 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 establishes 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 "any other reason justifying relief," including mitigating circumstances such as absence, illness, or a disability which would prevent a party from protecting its interests. *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no contention and no evidence that the Secretary acted improperly in this matter; rather, Respondent is requesting, in effect, that its untimely filing of the notice of contest be excused on the basis that it was unaware of the 15-day filing requirement.

Paul Harpis, Respondent's sole owner, testified that his construction company has been in business for three years, and that the largest number of employees he has had, including himself, is six; he further testified that he has an office but not a secretary, and that he himself takes care of all of the company's billing and contracting. Harpis said that the late filing was an oversight due to his misreading the citation, but that he did not ignore the citation; based on his testimony and on C-5, his notice of contest letter, he abated the cited conditions within 48 hours and also made numerous contacts with OSHA and the Commission in an effort to resolve this matter. (Tr. 16-19).

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.**

The Commission has held that the OSHA citation “plainly state(s) the requirement to file a notice of contest within the prescribed time period,” and that the OSHA 3000 booklet accompanying the citation “provide[s] additional, straightforward explanations.”<sup>1</sup> *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). The Commission has additionally held that ignorance of procedural rules due to inexperience in OSHA matters does not constitute excusable neglect for purposes of Rule 60(b) relief. *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). Finally, the Commission has held that an employer “must bear the burden of its own lack of diligence in failing to carefully read and act upon the information contained in the citations,” and that 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.” *Acrom Constr. Serv.*, 15 BNA 1123, 1126 (No. 88-2291, 1991); *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

Based on the foregoing and the facts of this case, Respondent is not entitled to Rule 60(b) relief. The citation itself clearly warned that the citation and penalties would become a final, non-reviewable order unless a written notice of contest was timely filed, and this warning is also set forth in the OSHA 3000 booklet which accompanied the citation. Moreover, CO Wigger testified that he advised Paul Harpis of the 15-day notice of contest filing period at the closing conference after the inspection. (Tr. 8). I have noted the statements of Harpis that the cited conditions were promptly

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<sup>1</sup>According to Paul Wigger, the OSHA compliance officer (“CO”) who inspected the site, the practice of his area office is to send an OSHA 3000 booklet with the citation. (Tr.8-9).

abated and that his concern at the hearing was the penalties. (Tr. 20; C-5). However, as explained to Harpis on the record, the only issue before the undersigned is whether the Secretary's motion to dismiss the untimely notice of contest should be granted. (Tr. 4; 14; 20). Although I am sympathetic to Respondent's plight, I am constrained by the foregoing Commission precedent and the record in this case to conclude that Respondent's failure to file a timely notice of contest was not due to excusable neglect or any other reason justifying relief pursuant to Rule 60(b).

Order

For the reasons set out above, the Secretary's motion to dismiss the notice of contest is GRANTED, and the citation and notification of penalty is AFFIRMED in all respects.

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Irving Sommer  
Chief Judge

Date: