

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 North Speer Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409

Fax: (303) 844-3759

SECRETARY OF LABOR,

Complainant,

v.

OSHRC DOCKET NO. 99-1087

SEVEN SEVENTEEN HBE COLORADO
CORPORATION
d/b/a ANTLER'S ADAM'S MARK,

Respondent.

APPEARANCES:

For the Complainant:

Susan J. Willer, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:

Robert Parmer, General Manager, Antler's Adam's Mark, Colorado Springs, Colorado

Before:

Administrative Law Judge: Sidney J. Goldstein

DECISION AND ORDER

After a compliance officer for the Occupational Safety and Health Administration inspected Respondent's workplace, that Agency issued two citations to the employer, listing a number of safety violations with a recommended penalty of \$9,000.00. The citations were issued on January 29, 1999, and contained information to the effect that the employer had 15 days from the receipt of the citations to file a notice of contest if it disagreed with them. There was also an insert (OSHA Form 3000) reminding employers of their rights and responsibilities following an OSHA inspection.

The Respondent did not request an informal conference with OSHA officials, but it did correct and abate the alleged violations and submitted a check for \$9,000.00 in full payment of the penalty.

The Administration thereupon closed the file in this matter.

On April 19, 1999, the Respondent made an inquiry concerning the citation and penalty. The Administration treated this letter as a notice of contest, but it denied a request for the refund of the penalty because the notice of contest was filed well after the fifteen-day period. After a complaint and answer were filed with this Commission, a hearing was held in connection with the Respondent's request that its \$9,000.00 payment be refunded.

There is no serious dispute with the facts in this case. The Respondent failed to file a notice of contest within 15 days of the receipt of the citations and did not participate in an informal settlement process. Nevertheless, the Respondent requests that the Commission order the Secretary of Labor to return its \$9,000.00 payment, or a portion thereof. The basis of the request includes (1) that the Respondent did not own or operate the premises at the time of the inspection; and (2) that the company controller was denied a right to file a notice of contest.

In its brief the Respondent alleges that the controller of the hotel was told by OSHA that the penalty was non-negotiable; and that the company did not have a right to contest. There is nothing in the record to support these assertions. The Respondent was duly notified at the time of the issuance of the citation that it had the right to file a notice of contest. Also, there is nothing in the OSHA Case File Diary Sheet to indicate that there was any oral or written communication to dissuade the Respondent from filing any objection to the citations. Indeed, the Respondent reviewed the citations and abated the safety infractions. I conclude that the Respondent was duly informed of its right to file a notice of contest.

Although the Respondent alleges that it did not acquire the property until January 11, 1999, this assertion is contrary to the evidence in this case. In an employer OSHA Employer Questionnaire, HBE Corporation is listed as the name of the company as of December 29, 1998. In a Safety Policy Statement dated January 1, 1999, General Manager Bacher wrote that it was the policy of Antler's Adam's Mark Hotel to maintain a safe workplace. Also, in a letter from Mr. Bacher to OSHA dated April 19, 1999, he wrote that Adam's Mark Hotel and Resorts had assumed ownership of the property only one week prior (December 22, 1998) to the inspection. Finally, on June 8, 1999, Robert Parmer, Respondent's general manager, confirmed that the company completed the purchase and acquisition of Antler's just one week prior to the inspection. I therefore conclude that the Respondent was the responsible operator of the property at the time of the inspection.

The record discloses that Respondent did not file its notice of contest until well after the 15-day

contest period ended. An otherwise untimely notice of contest may be accepted where the Secretary's deception or failure to follow proper procedures caused the delay in filing. An employer is also entitled to relief if it demonstrates that the Commission's final order was entered as a result of "mistake, inadvertence, surprise, or excusable neglect" or "any other reason justifying relief," including mitigating circumstances such as absence, illness or a disability that would prevent a party from protecting its interests. *See* Fed.R.Civ.P.60(b); *Branciforte Builders, Inc.* 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no evidence and no contention that the Secretary failed to follow proper procedures in this matter. Rather, Respondent is requesting, in essence, that the late filing be excused under the circumstances.

The Commission has held that the OSHA citation plainly states the requirement to file a notice of contest within the prescribed period and that ignorance of procedural rules, even on the part of a layman, does not constitute "excusable neglect" for purposes of Rule 60(b), *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). The Commission has also held that a business must have orderly procedures for handling important documents and has denied Rule 60(b) relief where the employer has asserted that the late filing was due to events such as changes in management, misplacing the citation, or the absence of the person responsible for OSHA matters. *See Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989). 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).

Based upon the record and Commission precedent, I conclude that the untimely filing of the notice of contest in this case was due to simple negligence and not to excusable neglect or "any other reason justifying relief" pursuant to Rule 60(b). Accordingly, the Secretary's Motion to Dismiss the notice of contest is GRANTED. The citations and notification of penalty are therefore AFFIRMED.

Sidney J. Goldstein
Judge, OSHRC

Dated: March 13, 2000