SECRETARY OF LABOR, Complainant, v. HRH CONSTRUCTION CORP., Respondent.	OSHRC Docket No. 99-1614

DECISION

Before: RAILTON, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

On June 29, 1999, HRH Construction Corp. ("HRH") received a citation from the Occupational Safety and Health Administration ("OSHA") by certified mail. HRH filed a notice of contest on September 3, 1999, well beyond the 15-day notice of contest period which ended on July 21, 1999. See § 10(a), 29 U.S.C. § 659(a), of the Occupational Safety and Health Act, 29 U.S.C. §§ 651-78 ("the Act") (an employer has fifteen working days within which to notify the Secretary of its intent to contest a citation or proposed penalty). On October 26, 1999, the Secretary filed a motion to dismiss HRH's notice of contest as untimely, and on January 5, 2000, Administrative Law Judge Irving Sommer held a hearing on this limited issue.

In a decision dated February 19, 2000, Judge Sommer concluded that HRH's untimely notice of contest was not due to excusable neglect or any other reason justifying relief under Federal Rule of Civil Procedure 60(b)(1).[1] Based on the testimony of Trish McCloskey, the

[1] Rule 60(b)(1) provides in relevant part:

Rule 60. Relief from Judgment or Order.

(continued...)

administrative assistant to HRH Vice President Harry Weidmyer, the judge found that HRH's procedure for handling OSHA citations was deficient. Specifically, he noted that although HRH had posted sample envelopes and citations in its mail room, along with written instructions to deliver all OSHA correspondence to Weidmyer's office, "the employee who received and signed for the citation evidently did not follow the instruction and McCloskey did not testify about whether she or anyone else had actually brought the instruction to the attention of the mail room employees to ensure they were aware of it and were consistently following it."

Judge Sommer was also not persuaded by HRH's claim that its untimely notice of contest was due to Vice President Weidmyer's "justifiable belief" that the only citation issued as a result of OSHA's inspection was to the project's developer, Davis Construction ("Davis").[2] In rejecting this argument, the judge credited the rebuttal testimony of Assistant

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[1](...continued)

* * *

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . .[.]

Under Commission precedent, relief may be granted under Rule 60(b) in certain situations involving noncompliance with the contest period set forth under § 10(a) of the Act. *See, e.g., Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1999 CCH OSHD ¶ 31,949 (No. 97-851, 1999); *Jackson Assocs. of Nassau*, 16 BNA OSHC 1261, 1993-95 CCH OSHD ¶ 30,140 (No. 91-438, 1993); *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 1981 CCH OSHD ¶ 25,591 (No. 80-1920, 1981). See also § 12(g), 29 U.S.C. § 661(g), of the Act ("Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure."); Commission Rule of Procedure 2(b), 29 C.F.R. § 2200.2(b) ("In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure.").

[2] The citation issued to Davis was mailed to HRH, who was hired by Davis to serve as the (continued...)

Area Director Kay Gee, who stated that the compliance officer who conducted the subject inspection had informed her that Weidmyer was advised at the closing conference that HRH would receive a citation. Accordingly, Judge Sommer granted the Secretary's motion to dismiss the notice of contest and affirmed the citation.

On review, HRH argues that the judge failed to consider all of the "relevant circumstances" surrounding its failure to file a timely notice of contest and therefore, erred in denying HRH relief under Rule 60(b)(1). According to HRH, the Secretary "mis-mail[ed]" the Davis citation to HRH, creating "mutual confusion" on the part of both parties as to whether HRH or Davis was the subject of the citation in question. As a result, HRH claims that it was "under the reasonable impression that receipt of the [Davis] citation constituted all of the paper work" associated with the subject inspection.

In response, the Secretary contends that the Commission lacks the authority to grant relief under Rule 60(b)(1) from a § 10(a) final order because Rule 60(b)(1) is not applicable. The Secretary notes that under § 12(g) of the Act, the Federal Rules of Civil Procedure apply to Commission "proceedings," but in the case of a late notice of contest, there has been no Commission "proceeding" to which Rule 60(b)(1) can be applied. This is so, the Secretary contends, because, under the Act, the failure to file a notice of contest within the fifteen-day period automatically results, by operation of law, in a "deemed" final order of the Commission not subject to review by any court or agency. *See* § 10(a) of the Act. According to the Secretary, the fifteen-day period is "in the nature of a statute of limitations which is subject to the traditional equitable doctrines of tolling and estoppel."[3] *See, e.g., Irwin v.*

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[2](...continued)
project's construction manager. On behalf of its client, HRH settled the Davis citation and also paid the required penalty.

[3] The Secretary had previously argued that the fifteen-day period in which to file a notice of contest was jurisdictional and thus not subject to tolling or extension under any (continued...)

Dept. of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct. 453 (1990) (statutory filing deadline viewed as statute of limitations subject to equitable tolling). Even if Rule 60(b)(1) were to apply here, the Secretary maintains HRH has not established that it is entitled to relief.

We affirm the judge insofar as the Secretary's motion to dismiss HRH's notice of contest is granted, and the citation and notification of penalty are affirmed. However, Chairman Railton and Commissioner Rogers reach this result for different reasons.

Commissioner Rogers affirms based on applying the law of the Circuit where this case arises. The Court of Appeals for the Second Circuit – the circuit in which this case arises – recently deferred to the Secretary's interpretation of the Act on the applicability of Rule 60(b) and held that the Commission lacks jurisdiction to grant an employer relief under Rule 60(b) for failing to file a timely notice of contest. *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 227-28 [19 BNA OSHC 1897, 2002 CCH OSHD ¶ 32,568] (2nd Cir. 2002) ("*Le Frois*"), *rev'g*, 18 BNA OSHC 1978, 1999 CCH OSHD ¶ 31,950 (No. 98-1099, 1999). According to the court, section 12(g) of the Act "provides for application of the Federal Rules of Civil Procedure only when the Commission has already commenced 'proceedings[,]'" an event which does not occur when a cited employer has failed to file a timely notice of contest. *Id.* at 228-29. The court also noted that Rule 60(b) cannot be used to "bootstrap jurisdiction into existence[.]" *Id.* at 229.

"Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the law of that circuit in deciding the case, even though it may clearly differ from the Commission's law." *D.M. Sabia Co.*, 17 BNA OSHC 1413, 1414, 1995-97 CCH OSHD ¶ 30,930, p. 43,058 (No. 93-3274, 1995), *vacated and remanded on other grounds*, 90 F.3d 854 [17 BNA OSHC 1680, 1995-97 CCH OSHD ¶ 31,117] (3rd Cir. 1996). Here, Commissioner Rogers notes it is highly probable that any decision to grant

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[3](...continued)
circumstances. *See Capital City Excavating Co. v. Donovan*, 679 F.2d 105, 109 [10 BNA OSHC 1625, 1982 CCH OSHD ¶ 26,062] (6th Cir. 1982).

relief under Rule 60(b)(1) would be appealed by the Secretary to the Second Circuit. Therefore, applying the law of the Second Circuit in *Le Frois*, Commissioner Rogers would affirm without considering the merits of the arguments raised here by the parties regarding the application of Rule 60(b)(1) to this case.[4]

Based upon his review of the judge's findings, as well as the parties' arguments on review, Chairman Railton agrees with the judge that under Commission precedent, HRH has failed to adequately explain how the company's failure to timely file a notice of contest is entitled to relief under Rule 60(b)(1). HRH's argument that confusion existed is simply not convincing. Accordingly, the Chairman would affirm the judge's decision to deny HRH relief under Rule 60(b)(1) and affirm the subject citation. In view of this conclusion, Chairman Railton believes it is unlikely such a decision would be appealed to the Second

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[4] Commissioner Rogers notes that in *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1999 CCH OSHD ¶ 31,949 (No. 97-851, 1999), an earlier 60(b) case, she expressed the view that the Secretary's statutory limitation argument was "a substantial one, particularly in light of the language of sections 10(a) and 12(g) of the Act." *Id.* at 1950 n.7, 1999 CCH OSHD at p. 47,457 n.7. However, in that case, she declined to resolve the argument at that time, choosing instead to apply the Commission's long-standing precedent that Rule 60(b)(1) was applicable to late notices of contest. Since then, the Second Circuit, in *Le Frois*, has basically endorsed the Secretary's construction of the statute, noting that the "Secretary's view merits deference" and was "persuasive." *Le Frois*, 291 F.3d at 228. Commissioner Rogers notes that since this case can be resolved through the application of Second Circuit law, there is no need to reconsider the Commission's precedent at this time. However, Commissioner Rogers believes *Le Frois* calls into question the continued viability of our precedent and notes that the Commission will have the opportunity to examine this issue comprehensively in a non-Second Circuit 60(b) case currently under review, *Villa Marina Yacht Harbor, Inc.*, No. 01-0830 (ALJ, July 15, 2002), *directed for review* (Aug. 14, 2002). Commissioner Rogers also points out that the only Circuit Court case contrary to *LeFrois* directly on point – affirming the Commission's use of Rule 60(b) in the context of a late notice of contest – is *J.I. Hass Co., Inc. v. OSHRC*, 648 F.2d 190 [9 BNA OSHC 1712, 1981 CCH OSHD ¶ 25,375] (3rd Cir. 1981).

Circuit.[5] Therefore, he finds it unnecessary to consider Second Circuit precedent in this case.[6]

Accordingly, we affirm the judge's decision to the extent that it renders the subject citation a final order.

/s/
W. Scott Railton
Chairman

/s/
Thomasina V. Rogers
Commissioner

Dated: September 27, 2002

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[5] Chairman Railton notes that HRH could appeal this case to the D.C. Circuit. See 29 U.S.C. § 660(a) (employer may appeal adverse decision to D.C. Circuit).

[6] The Chairman further notes that there remains disagreement between the Circuit Courts as to whether Rule 60(b) applies in cases involving a late notice of contest. *See J.I. Hass Co., Inc. v. OSHRC*, 648 F.2d 190, 195 (3rd Cir. 1981) (Commission "has jurisdiction to entertain a late notice of contest" under Rule 60(b)). Accordingly, Chairman Railton would hold decision on reconsideration of the Commission's Rule 60(b) precedent until an appropriate case is presented for review.

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. 99-1614
	:	
HRH CONSTRUCTION CORPORATION,	:	
	:	
Respondent.	:	

Appearances:

John S. Ho, Esquire New York, New York For the Secretary.	Glenn A. Monk, Esquire White Plains, New York For the Respondent.

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"). The Occupational Safety and Health Administration ("OSHA") inspected a construction site of Respondent, HRH Construction Corporation ("HRH"), in New York, New York in May of 1999. As a result of the inspection, OSHA issued HRH a citation and notification of penalty alleging a serious violation of the Act. Section 10(a) of the Act requires an employer to notify OSHA of the intent to contest a citation within 15 working days of receiving it, and the failure to file a timely notice of contest results in the citation and penalty becoming a final judgment of the Commission by operation of law. The record shows that OSHA mailed the citation by certified mail, that Respondent received it on June 29, 1999, and that the notice of contest period ended on July 21, 1999. The record also shows that HRH did not file a notice of contest in this case until September 3, 1999. The Secretary filed a motion to dismiss the notice of contest as untimely on October 26,

1999, and the hearing in this matter was held in New York, New York on January 5, 2000. Both parties have filed post-hearing submissions.

The Testimony

Trisha McCloskey, the administrative assistant to Harry Weidmyer, the vice-president of risk management for HRH, testified that the procedure for the three years she had worked for Weidmyer was for the mail room to deliver all OSHA correspondence to her, after which she passed it on to Weidmyer; to ensure the procedure was followed, she had posted sample envelopes and citations in the mail room along with a written instruction to deliver such correspondence to Weidmyer's office. McCloskey further testified that HRH had been cited in the past, that all of those citations had been delivered properly, and that HRH had responded promptly. She was unaware of the subject citation until the OSHA compliance officer ("CO") who conducted the inspection called on August 26, 1999; Weidmyer told the CO he had no knowledge of the citation, after which the CO faxed him a copy that same day. McCloskey said OSHA had issued another citation in regard to the subject site to Davis Construction, the project developer, and that HRH, as the construction manager of the project, had settled that citation and written a check for it. She also said that Weidmyer had believed at first that the CO was calling about the Davis citation; however, she and Weidmyer noted that the inspection number was different upon receiving the faxed copy, and although they checked with the mail room employee who had signed for the citation he could not remember that particular piece of mail, and they were unable to determine what had happened to the original citation. (Tr. 31-46).

Discussion

The record clearly establishes that the notice of contest in this matter was filed after the 15-day contest period had 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 shows 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 was deceptive

or failed to follow proper procedures in this matter. Rather, HRH is requesting that its late filing be excused under the circumstances, pursuant to Rule 60(b). Specifically, HRH contends that it had a reliable procedure for handling OSHA matters and that the untimely filing was due both to OSHA's

failure to address the citation to the appropriate HRH official and to Weidmyer's justifiable belief that the Davis citation was the only citation that was issued as a result of the inspection. I disagree.

The Commission has held that OSHA's practice of addressing the citation to the cited employer and not to any particular company official is sufficient service. *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830, 1989). The Commission has also held that a company must maintain orderly procedures for handling important documents and that the failure of the employee who received the mailed citation to bring it to the attention of the proper officer of the company does not constitute "excusable neglect" or "any other reason justifying relief." *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991); *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830, 1989). Finally, the Commission has held 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." *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

In view of the foregoing Commission precedent, OSHA's mailing of the citation in this case constituted proper service. Moreover, while HRH had a procedure for the handling of OSHA matters, it would appear that the procedure was deficient. Although sample envelopes and citations were posted in the mail room together with a written instruction to deliver such correspondence to Weidmyer's office, the employee who received and signed for the citation evidently did not follow the instruction and McCloskey did not testify about whether she or anyone else had actually brought the instruction to the attention of the mail room employees to ensure they were aware of it and were consistently following it. In addition, to refute HRH's contention that Weidmyer believed that the Davis citation was the only citation that had been issued as a result of the inspection, the Secretary presented as a rebuttal witness the Assistant Area Director ("AAD") of the OSHA office that issued the citation. The AAD testified that the CO who conducted the inspection told her that Weidmyer had been present at the closing conference and had been specifically advised that HRH would be

cited; the CO also told the AAD that he had learned through his phone conversations with HRH that Weidmyer had been involved in settling the Davis citation and that he had inadvertently forgotten

about the subject citation.[7] (Tr. 47-54).

Based upon the evidence of record and the Commission precedent set out above, I conclude that the untimely filing of the notice of contest in this case was not due to "excusable neglect" or "any other reason justifying [Rule 60(b)] relief." The Secretary's motion to dismiss Respondent's notice of contest is accordingly GRANTED, and the citation and notification of penalty is AFFIRMED in its entirety. So ORDERED.

/s/

Irving Sommer
Chief Judge

Date: 29 FEB 2000

[7]C-3, the diary sheet from OSHA's HRH case file, shows that on August 25, 1999, the CO spoke to Guy Penna, an HRH safety coordinator in Weidmyer's office, who told him that Weidmyer thought he had signed a settlement in regard to the HRH citation. (Tr. 22-25; 38-39; 45-46).