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SECRETARY OF LABOR,  
Complainant,

v.

WILLIAM RHODES CONSTRUCTION  
COMPANY and its successors,  
Respondent.

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OSHRC DOCKET  
NO. 99-2028

APPEARANCES:

Raquel Tamez, Esq., Office of the Solicitor, U.S. Department of Labor,  
Dallas, Texas

William Rhodes, W. Rhodes Construction, Inc., Burleson, Texas

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

A compliance officer for the Occupational Safety and Health Administration inspected a construction worksite, spoke with the general contractor, and John Rhodes who identified himself as a foreman for the Respondent. As a result of this inspection, the Administration issued two citations to the Respondent on February 26, 1999. The citations 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 file a notice of contest within the time limitations. However, its President, William Rhodes, appeared at the OSHA office on April 27, 1999, requested and received permission to pay the penalties on a time basis. He also gave the OSHA office a check for \$1,000.00 as partial payment. On April 29, 1999 William Rhodes filed with OSHA a Certification of Corrective Action Worksheet wherein he wrote that he made sure that hand rails are always around stairs; that all people are wearing hard hats at all times; and that throw away and broken electrical cords were replaced with new ones. Shortly thereafter Mr. William Rhodes stopped

payment of the \$1,000.00 check and made no further payment. On October 28, 1999, Mr. Rhodes filed a notice of contest, alleging that his brother John was not his foreman; that he had no employees at the worksite; and that John was a subcontractor who employed the workers on the job.

The Secretary filed a motion with this Commission to dismiss the Respondent's notice of contest as untimely, and a hearing on the motion was held in Dallas, Texas.

At the hearing the compliance officer testified that John Rhodes identified himself as the Respondent's foreman and its representative at the inspection. At the hearing, however, he denied the compliance officer's version of the events and testified that he was a subcontractor for the Respondent; and that the workers at the jobsite were his employees. William Rhodes also testified to the same effect.

With this variance in the evidence I am placing more reliance upon the compliance officer's version of the facts for the following reasons:

1. No citation was issued to John Rhodes;
2. William Rhodes came to the OSHA office on April 27, 1999 and requested permission to pay the penalty on a part payment basis;
3. William Rhodes presented the OSHA office with a check for \$1,000.00;
4. William Rhodes certified that corrective action was taken as a result of the citation.

I therefore conclude that the citation was properly addressed to the Respondent.

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 it failed to file a notice of contest within the statutory 15 days was 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 penalty of \$3,850.00 are therefore AFFIRMED.

/s/

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Sidney J. Goldstein  
Judge, OSHRC

Dated: July 17, 2000