

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. :
 :
M.B. CONSTRUCTION COMPANY, :
 :
Respondent. :

OSHRC DOCKET NO. 96-1092

APPEARANCES:

Sabina Rezza
New York, New York
For the Complainant.

Matthew R. Newborn, Esquire
New York, 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 work site of Respondent in Brooklyn, New York, on May 16, 1995, resulting in the issuance of a serious citation with ten items on June 2, 1995. Respondent filed a notice of contest on May 10, 1996, which the Secretary moved to dismiss as untimely, and a hearing was held on December 5, 1996, for the purpose of addressing the Secretary’s motion to dismiss.¹ Both of the parties have filed post-hearing briefs in this matter.

¹The undersigned heard another case on December 5, 1996, captioned *M.B. Waterproofing, Inc.*, No. 96-1093; that case involved the same company principals and the same issue but a different OSHA inspection. A decision in that case is also being issued on this date.

Background

The citation in this case was issued on June 2, 1995, and was mailed to Respondent on the same day by certified mail, return receipt requested. When the return receipt card was not received OSHA called the company on July 20, 1995, to make sure it had the right address and then faxed the citation and also remailed it to the company that same day; the mailing was again by certified mail, return receipt requested, and the company received the citation on July 21, 1995. Respondent failed to file a notice of contest within fifteen working days of its receipt of the citation, as required by section 10(a) of the Act, resulting in the citation becoming a final order of the Commission on August 11, 1995, and on September 14, 1995, OSHA sent the company a demand letter with respect to the penalties and interest owed. On May 10, 1996, the company filed a notice of contest, noting it had just recently retained counsel and was requesting relief on the grounds that it had not been able previously to represent itself effectively. The Secretary filed a motion to dismiss the notice of contest as untimely, contending there was no basis for granting relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The company's response, in the form of an affidavit, was that it had been misled by the late receipt of the citation and the fact that the abatement date on the citation was July 20, 1995, the day before it had received the citation. Before reaching the Rule 60(b) question, however, the following preliminary issue will be addressed.

Whether OSHA Cited the Wrong Company

Sanjay Shah, the company's manager and bookkeeper and the only individual to appear on behalf of Respondent at the hearing, testified that the company's name was M.B. Waterproofing and that it had never been known as M.B. Construction. (Tr. 32-33; 36-37). Based on this testimony and Respondent's statement in its brief that the company was "incorrectly named," Respondent is evidently contending OSHA cited the wrong company. However, in the above-noted affidavit, Sanjay Shah, the affiant, specifically identified himself as the manager and bookkeeper of M.B. Construction Company and Masood Bhutta as the president of that company, and at the hearing Shah conceded he had signed the affidavit and sworn to its contents. (Tr. 41). Moreover, Robert Stewart, the OSHA compliance officer ("CO") who conducted the inspection, testified an individual named Mohamed Uddin identified himself as the foreman and the person in charge at the site. Stewart further testified he saw a sign on the job with the name M.B. Waterproofing on it but that when he

started to write down that name Uddin stopped him, saying the correct name was M.B. Construction; Stewart also interviewed employees at the site who told him they worked for Uddin and that his company was M.B. without specifying the rest of the name. Stewart called the company on May 17 and spoke with Shah, repeating the business name he had been given, and Shah acknowledged there was a job at the site. On May 18, Masood Bhutta called the CO and said that M.B. Construction was not his business and that he had no job at that site, to which Stewart replied that he had spoken with the foreman and workers on the job, and with Shah, and that it was up to Bhutta to establish he did not have a job there. (Tr. 4-5; 13-16; 19-20). In view of the record, I find no basis for concluding OSHA cited the wrong company, and to the extent that this is Respondent's contention it is rejected.

Whether Respondent is Entitled to Rule 60(b) Relief

The record here plainly shows that Respondent did not file a notification of its intent to contest the citation until nine months after the expiration of the fifteen-day statutory period. The issue in this case is whether the untimely filing may be excused under the circumstances. Rule 60(b) provides for relief from a final judgment for various reasons, including mistake, inadvertence, surprise or excusable neglect; fraud, misrepresentation or other misconduct; or any other reason justifying relief. The moving party has the burden of showing it is entitled to Rule 60(b) relief, and ignorance of procedural rules does not constitute excusable neglect for purposes of such relief. *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). Carelessness or negligence likewise does not constitute excusable neglect, and an employer who does not carefully read the OSHA materials is not entitled to relief. *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991); *Jackson Assoc.*, 16 BNA OSHC 1261, 1266 (No. 91-0438, 1993). Further, a party claiming misconduct on the part of the Secretary must show clear and convincing evidence of material misrepresentations. *Jackson Assoc.*, 16 BNA OSHC 1261, 1267 n.10 (No. 91-0438, 1993).

The background portion of this decision sets out the undisputed facts of this case. Sanjay Shah testified he received C-1, the citation and notification of penalty, on July 21, 1995, which was almost two months after the issuance date, and that he noticed the abatement date of July 20, 1995, which was confusing and deceiving to him as he could not understand how he could do something by a date that had already passed; he further testified that although he looked at certain parts of C-1, such as the inspection date and site and the citation items, his main concern was the penalties, which

were highlighted, and he did not really read pages 1-4 of the package. Shah said that the only time he spoke with OSHA was when the agency called to verify the address before remailing the citation and that in his previous experience with OSHA he had had an informal conference; he also said that after receiving C-4, the OSHA demand letter, the company obtained an attorney. (Tr. 34-40).

Based on the foregoing, Respondent has not shown that it is entitled to Rule 60(b) relief. Shah's own testimony establishes that he did not carefully read pages 1-4 of the citation package, and the "Right to Contest" section set out on page 2 states in relevant part as follows:

If you decide to contest, please keep in mind that a written letter of intent to contest must be submitted to the Area Director at the U.S. Department of Labor Area Office, at the address above, within 15 working days (excluding weekends and Federal Holidays) of your receipt of this citation. **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.**

This admonition is repeated in C-2, the "OSHA 3000" pamphlet enclosed with all citations which fully explains the employer's rights and responsibilities, and the Commission has noted the sufficiency of the admonition in both the citation and the pamphlet. *Roy Kay, Inc.*, 13 BNA 2021, 2022 (No. 88-1748, 1989); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). In addition, Shah's prior experience with OSHA is detailed in *M.B. Waterproofing, Inc.*, No. 96-1093, which, as indicated above, was also heard on December 5, 1996, and is a companion case to this matter. It is apparent from the record in No. 96-1093 that Shah called OSHA after receiving the citations and had an informal phone conference on January 20, 1995, resulting in an informal settlement agreement and a significant penalty reduction. In light of Shah's experience with OSHA six months before receiving the subject citation, Respondent's contention that it could not effectively represent itself in this matter is unpersuasive. The late receipt of the citation and the abatement date may have confused Shah but hardly constitute misconduct on the part of the Secretary. Moreover, a simple phone call to OSHA, like the one Shah made upon receiving the earlier citations, would have resolved the matter, and the company's failure to obtain legal counsel until nearly eight months after the receipt of the OSHA demand letter renders its position even less tenable. On the basis of the record and Commission precedent, Respondent's failure to file a timely notice of contest in this case

was due to its own negligence and not by excusable neglect or any misconduct on the part of the Secretary. *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1127 (No. 88-2291, 1991). Respondent's request for relief pursuant to Rule 60(b) is accordingly denied.

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: