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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 92-0372-S
CRAIG MECHANICAL, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on May 18, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

May 18, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-0372-S

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SECRETARY OF LABOR,	
Complainant,	
v.	OSHRC Docket No. 92-0372-S
CRAIG MECHANICAL, INC.,	
Respondent.	

DECISION

BEFORE: WEISBERG, Chairman, FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

At issue in this case is whether the Respondent's failure to file a written notice of contest within the 15-day statutory period[1] was the result of excusable neglect or was due to misrepresentations by the Secretary, thus entitling the Respondent to relief from a Commission final order under Fed. R. Civ. P. 60(b).[2] The judge granted relief. For the

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[1]Section 10(a) of the Occupational Safety and Health Act ("the Act"), 29 U.S.C. § 659(a), provides in relevant part:

> If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation . . . the citation and the [penalty] assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

[2] Fed. R. Civ. P. 60(b) provides in relevant part that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[;] . . . (3) fraud . . . misrepresentation, or other misconduct of an adverse party[;] . . . or (6) any other reason justifying relief from the operation of the judgment."

reasons stated below, we find that the judge erred and that the Respondent is not entitled to relief.

BACKGROUND

Craig Mechanical, Inc., a small mechanical contractor, was among a number of employers working at a construction site in Houston, Texas. On August 12, 1991, following an inspection by the Occupational Safety and Health Administration ("OSHA"), the Secretary of Labor issued two citations to Craig Mechanical, including one serious citation alleging a failure to guard a floor opening and several other-than-serious citations alleging recordkeeping and hazard communication violations. Penalties amounting to $825 were proposed.

Freddie Craig, who owned the company, telephoned twice to complain to the OSHA area office in August 1991, within the statutory 15-business-day period, leaving messages for the area director both times. He testified that during his conversations with the person on the other end of the line, he made clear that he was not interested only in an informal conference; he wanted to contest the citations. He stated that "I asked them . . . What do I do with these . . . they are not a just charge . . . Tell me what I have to do to have these dismissed. . . . I am not an attorney; I need someone that can read this and tell me what it actually says and means. . . . I see the part where I have to pay the fines, and . . . what you are saying we did wrong or were in fault. But [the citations] are not true."

Both times, OSHA personnel took his name and number and a brief description of the purpose of his call and assured him that the area director, who was "out of town," knew about this problem and that Craig should just wait and speak with him when he returned. Craig learned later that the area director was at this time in the process of being transferred to another nearby OSHA office in Houston. Craig further testified that the second time he called, he said "my time is running out."[3] He stated that although he understood that he

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[3]We note that the cover letter accompanying the citations advises Craig that he may request an informal conference to discuss the citations but that in so doing, Craig should "keep in mind that a *written* letter of intent to contest" [emphasis supplied] must still be submitted in fifteen working days and that, specifically, the contest period is "not interrupted by an informal conference."

had fifteen days to contest, he did not realize that his protest had to be in writing. In his own words, it was true that the people on the other end of the line did not tell him "just relax," but they also did not say "no matter what, by such-and-such a date, you better file, or you are going to lose your rights." At the same time, there is no evidence that Craig specifically asked whether he still had to file a written notice of contest, nor is there any indication that any OSHA representative told him that the telephone call could serve as a substitute for a written letter. Craig testified that after leaving the second message, "I was thinking since I had . . . contacted his office prior to this time that I was in the legal realm of what I needed to do . . . ."

No one from OSHA called Craig back, before or after the deadline. "At this time -- and to tell you the honest truth, after this -- these calls, and I didn't get my call returned back, I didn't think any more about it. I just -- went on about my business. I never once again thought anything about it . . . ." He testified that whenever he received a penalty collection notice from OSHA (October 29 and November 26, 1991), he "got right back on the phone with the Houston office here." He did not elaborate on the nature of these calls. When the January 14, 1992 notice from a collection agency arrived, he visited the OSHA area office in person. He was instructed to write a letter to the Commission explaining his position.

On January 28, 1992, five months after the citations had been issued, Craig Mechanical sent a letter contesting the citations directly to the Review Commission. The case was docketed, but on April 6, 1992, the Secretary filed a motion to dismiss the notice of contest as untimely. Representing his company *pro se*, Craig requested simplified proceedings, and a hearing was held on May 26, 1992. In a July 20, 1992 decision, an administrative law judge granted Craig Mechanical relief from the final order under Fed. R. Civ. P. 60(b), finding that the untimely notice of contest was due to excusable neglect. In granting relief, the judge relied on *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 1991 CCH OSHD ¶ 29,277 (No. 88-2521, 1991).

The Secretary petitioned for review, arguing that Rule 60(b) does not apply because section 10(a) of the Act deprives the Commission of jurisdiction, and that even if Rule 60(b) does apply, Craig's conduct, attributable to Craig Mechanical, did not constitute excusable

neglect. The Secretary adds that this is not a case in which government misconduct estops the Secretary from claiming the notice of contest was untimely.

DISCUSSION

In *Jackson Assocs.*, 16 BNA OSHC 1261, 1993 CCH OSHD ¶ 30,140 (No. 91-0438, 1993), the Commission reaffirmed its authority to grant relief from a final order under Rule 60(b). In order for Craig Mechanical to be entitled to relief here, the facts would have to show that its failure to file a timely written notice of contest was due to excusable neglect or was the result of misrepresentation or other misconduct on the Secretary's part warranting relief. The burden is on the Respondent to show sufficient basis for the relief. *Roy Kay, Inc.*, 13 BNA OSHC 2021, 1989 CCH OSHD ¶ 28,406 (No. 88-1748, 1989) and cases cited.

When the 15-day deadline passes without a dissatisfied employer having filed a written notice of contest, the failure to file is very often traceable to the fact that it did not read the face of the citation with sufficient care. *E.g., Keefe; Secretary of Labor v. Barretto Granite*, 830 F.2d 396 (1st Cir. 1987); *Pav-Saver Mfg. Co.*, 12 BNA OSHC 2001, 2006-07, 1986-87 CCH OSHD ¶ 27,676, pp. 36,104-05 (No. 84-733, 1986), *rev'd on other grounds*, 933 F.2d 528 (7th Cir. 1991); *Keppel's, Inc.*, 7 BNA OSHC 1442, 1979 CCH OSHD ¶ 23,622 (No. 77-3020, 1979).[4] On occasion, information or an impression generated by another source contradicts or overshadows the directions on the citation, or distracts the employer from ever reading it. If this other source is an OSHA representative, as alleged here, the case is analyzed under 60(b)(3) and the issue is whether the employer's failure to file was engendered by misconduct on OSHA's part. *See, e.g., Jackson* (compliance officers); *Elmer Constr. Corp.*, 12 BNA OSHC 1002, 1984-85 CCH OSHD ¶ 27,050 (No. 83-40, 1984) (OSHA supervisor); *Merritt Elec. Co.*, 9 BNA OSHC 2088, 1981 CCH OSHD ¶ 25,556 (No. 77-3772, 1981) (area director); *Henry C. Beck Co.*, 8 BNA OSHC 1395, 1980 CCH OSHD ¶ 24,484

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[4]Our dissenting colleague criticizes the clarity of the citation face page and other OSHA documents, claiming that the "tide" of late notice of contest problems proves her point. Commission records indicate, however, that between September 1993 and February 1994, of the approximately 1,650 cases assigned to the Chief Administrative Law Judge, only about thirty, or less than two percent, involved Rule 60(b) motions. All contested cases are initially assigned to the Chief Administrative Law Judge.

(No. 11864, 1980) (same); *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1979 CCH OSHD ¶ 23,675 (No. 76-2165, 1979) (same). If, on the other hand, the source is someone other than an OSHA representative, the case is analyzed under Rule 60(b)(1), and the issue is whether the employer's neglect in failing to file was excusable. *E.g.*, *Byrd Produce Co.*, 16 BNA OSHC 1268, 1993 CCH OSHD ¶ 30,139 (No. 91-0823, 1993) (consolidated) (attorney); *Jackson Assocs.* (clerical assistant); *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1991-93 CCH OSHD ¶ 29,412 (No. 90-2460, 1991) (person assigned to arrange the informal conference); *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1125, 1991 CCH OSHD ¶ 29,393, p. 39,563 (No. 88-2291, 1991) (project manager).

Relief under Rule 60(b)(1): Excusable Neglect

In this case, the judge found that Craig Mechanical's failure to file a timely notice of contest was due to excusable neglect. The reason offered by Craig Mechanical to excuse its neglect in timely filing a written notice of contest is Craig's reliance on the telephone calls to OSHA. He testified, "I know this is not a good excuse, probably. But I assume I am in good hands when I am speaking to the people that represent the Director there, saying he is aware of my problems." As the judge noted in his decision, however, we have held that lack of care or ignorance of procedural rules does not constitute excusable neglect. *See, e.g.*, *Roy Kay, Inc.* and cases cited. In this case, the only rule Craig had to know to protect his company's rights was the 15-day deadline for mailing notices of contest, and that "rule" was unequivocally stated on the face of the citation he received and which he acknowledges reading. Craig's concern, expressed during his second phone call, that he was "running out of time" belies his assertion that he believed he was "in the legal realm" where no further action was required on his part.[5] While Craig may have hoped that a message left for the area director and an assurance that the director was aware of his "problem" and would call him back would have disposed of the citation, nothing that he said, or heard, during those

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[5]Indeed, Craig testified that he had notes on the second call because "I am looking at the 29th [the notice was due one week later], and I am saying, you know, I better start documenting something here . . . ." Moreover, notwithstanding Craig's telephone calls reacting to two OSHA penalty collection notices, he waited five months to commit his protest to writing, thus exacerbating the effect of his initial failure to do so.

phone calls contradicted the plain language in the citation obliging him to file a timely written notice of contest or accept the finality of the terms of the citation. We therefore find that the judge erred in finding excusable neglect and in granting relief under Rule 60(b)(1).

Keefe, the case the judge relied on, does not require a different result. Contrary to the judge's interpretation, that case did not rest solely on the employer's receipt of explanatory literature accompanying the citation. The Commission did mention that "OSHA's booklet provided additional, straightforward explanations," but concluded that "[i]f President Keefe had carefully read even portions of the written instructions stated and reiterated *on the face* of the . . . citations . . . [and had exercised] due diligence, [he] could have avoided his errors." *Keefe*, 14 BNA OSHC at 2192, 1991 CCH OSHD at p. 39,270 (emphasis added). Due diligence requires that even a layman unfamiliar with OSHA procedures read the face of the citation carefully.[6] Receipt of additional explanatory materials is not a prerequisite for adequate notification under the Act. The citation itself bears the essential information alerting an employer how to preserve its rights.[7] Moreover, OSHA's failure to return an employer's calls does not serve as a basis for giving Craig Mechanical relief. The language on the citation does not provide for any exception to the requirement that an employer notify OSHA in accordance with its regulations, *i.e.*, in writing, if it wants to contest a citation.

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[6]In determining what constituted due diligence in this case, the judge focused on certain language in *Keefe*: "relief may be justified 'if the party offers a credible explanation for the delay that does not exhibit disregard for the judicial proceedings,' revealing 'no intent to thwart' or 'reckless disregard for the effect of its conduct.'" *Keefe*, 14 BNA OSHC at 2192, 1991 CCH OSHD at p. 39,270, citing *Shepard Claims Serv., Inc. v. William Darrah & Assocs.*, 796 F.2d 190, 194-95 (6th Cir. 1986). That language actually refers to an interpretation of the "good cause" standard set forth in Fed. R. Civ. P. 55(c), a "somewhat more lenient standard" than that employed in Rule 60(b) motions. Although the elements for relief under Rule 55(c) and Rule 60(b) are "substantially the same," the standards are applied "more stringently" in a Rule 60(b) motion. *Shepard Claims*, 796 F.2d at 193-94.

[7]In any event, it is not clear from the record that Craig did not receive additional OSHA explanatory materials. The citation he received referred to an "enclosed booklet" outlining employer rights and responsibilities. When asked whether he received the OSHA 3000 pamphlet at the time he received the citation, Craig responded, "I received about four pamphlets from OSHA," but he did not specify which ones.

In summary, Craig Mechanical's neglect was not excusable. *See, e.g., Jackson Assocs.* and *Byrd Produce*. We therefore find that Craig Mechanical is not entitled to relief under Rule 60(b)(1).

Relief under Rule 60(b)(3): *Atlantic Marine* Equitable Tolling

The judge further found that while Rule 60(b) relief may be granted due to misrepresentation or other misconduct of an adverse party, no such grounds existed in this case. We agree. As we observed in *Jackson*, the principle of equitable tolling set forth in *Atlantic Marine, Inc. v. OSHRC*, 524 F.2d 476 (5th Cir. 1975), is essentially embodied in Rule 60(b)(3).[8] We do not condone or approve of the OSHA area office's treatment of Craig in this case and the area director's failure to return Craig's calls, and expect not to see such conduct occur in the future.[9] However, we find that the vague assurances by clerical personnel here and failure to return telephone calls during an area director's transition do not rise to the level of conduct on the Government's part sufficient to warrant relief under Rule 60(b)(3).[10] *Cf. Schweiker v. Hansen*, 450 U.S. at 786, 789 (1981) (social security administration representative's conduct -- telling a claimant that she was not eligible for benefits when she was and neglecting to tell her to file a written application -- was determined to be minor and not the cause of claimant's failure to take action). Finally, our cases suggest that relief is appropriate only when prejudicial Government misconduct is coupled with a reasonable degree of diligence by the employer, and we do not find that

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[8]The Fifth Circuit never mentioned Rule 60(b)(3) in *Atlantic Marine*. However, the same equitable principles are reflected both in *Atlantic Marine*'s "deception or failure to follow proper procedures" language and in Rule 60(b)(3)'s "misrepresentation or other misconduct" language.

[9]Chairman Weisberg notes that the careless and unresponsive treatment of Craig in this case by the OSHA area office took place in August 1991. With a new, concerted government-wide effort to "reinvent government and improve customer service," he hopes and expects that this type of conduct will not occur in the future. While the customer is not always right, the customer does have a right to have phone calls to OSHA responded to promptly and courteously.

[10]Indeed, given the nature of this conduct, the logical limitations of our dissenting colleague's "exception" to the plain language of the citation and to the statutory deadline itself are unclear.

degree of diligence on the part of Craig here. *See e.g., Henry C. Beck*; *see also Irwin v. Veterans Admin.*, 111 S.Ct. 453, 457-58 (1990).

ORDER

Accordingly, we find that Craig Mechanical's notice of contest was untimely. The citations have become a final order of the Commission under section 10(a) of the Act, 29 U.S.C. § 659(a), and Craig Mechanical is not entitled under Rule 60(b) to relief from that final order.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Dated: May 18, 1994

MONTOYA, Commissioner, dissenting:

I agree with my colleagues that this case is governed by Fed. R. Civ. P. 60(b)(3) as opposed to Rule 60(b)(1). I disagree, however, that Craig Mechanical failed to establish a basis for relief under Rule 60(b)(3) and the principles of equitable tolling expressed in *Atlantic Marine, Inc. v. OSHRC*, 524 F.2d 476 (5th Cir. 1975).

The majority holds that the "vague assurances" by OSHA personnel and the "failure to return telephone calls" do not rise to the level of conduct on the Government's part sufficient to warrant relief under Rule 60(b)(3). In my view, however, Craig Mechanical has established far more than the majority seems to think. It has established that its failure to file a timely notice of contest resulted from, at least in part, "misrepresentations, or other misconduct" of OSHA personnel within the meaning of Rule 60(b)(3), as well as their "deception or failure to follow proper procedures" as stated in *Atlantic Marine;* id. at 478. Such a showing entitles Craig Mechanical to relief under both tests.

I. Relief under Rule 60(b)(3) and *Atlantic Marine*

The critical facts in this case are, of course, what the employer told OSHA and what OSHA told the employer. Mr. Craig, acting for his company *pro se* (without a lawyer), made it clear that he was not simply interested in arranging an informal conference; he wanted to contest the citations because the allegations "are not true." The purpose of his call was to obtain information about how to contest the citations: "Tell me what I have to do to have these dismissed." He explained that he was not a lawyer, did not understand the instructions on the citation, and needed someone to explain in plain English what "the citation actually says and means."[11]

In response to this unequivocal plea for help, OSHA told Craig, "Well, your best thing is just wait, and speak to Mr. Reina when he comes back." Given the information OSHA had in its possession about Craig's intention and the nature of his call, it was misrepresentation or misconduct for OSHA to tell him that he should wait until the area director got back. Not only was there no need for him to wait, but that instruction was the

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[11]Given this unrebutted testimony, the majority errs in suggesting that the fault lay in Craig's failure to carefully read the citation.

single most prejudicial piece of advice OSHA could have offered. All Craig wanted was an explanation of the procedures he was required to follow to contest the citations. Under the circumstances, OSHA's instructions were misleading because they implied that Craig was not required to file a written notice of contest until he heard from the area director. He should have been informed in a straightforward manner that if he wanted to contest he would have to put it in writing within the 15-working-day deadline.

The law supports granting relief on the facts of this case.

> In addition to fraud, 60(b)(3) includes "misrepresentation or other misconduct of an adverse party." Because Rule 60(b) is remedial and to be construed liberally, and because of the comprehensive sweep of 60(b)(3)[,] any fraud, misrepresentation, circumvention or other wrongful act of a party in obtaining a judgment so that it is inequitable for him to retain the benefit thereof, constitute[s] grounds for relief within the intendment of 60(b)(3).

Moore's Federal Practice, Vol. 7, ¶ 60.24[5] (2d Ed. 1993). In my view, once a response was promised, as it was here, OSHA's failure to assure that someone in a position of authority responded to Craig's straightforward request for help amounted to the sort of deceptive non-disclosure that Rule 60(b)(3) was meant to remedy.

We have in the past held OSHA responsible for "improper silence" when confronted with an employer whose misunderstanding of the contest process is unmistakable. *See Henry C. Beck Co.*, 8 BNA OSHC 1395, 1980 CCH OSHD ¶ 24,484 (No. 11864, 1980). A reasonable person unfamiliar with the legal technicalities of the contest process who trusts in the Government not to deliberately place him in a worse position might well regard OSHA's silence as a tacit agreement to preserve the status quo until further notice.[12] Moreover, nowhere in the materials OSHA sends to an employer does it warn that the statutory 15-day deadline cannot be extended. Similarly, we recently held in *Jackson Assoc.*, 16 BNA OSHC 1261, 1266, 1993 CCH OSHD ¶ 30,140, p. 41,452 (No. 91-0438, 1993), that "the possibility that [the employer] was misled into believing that a written notice of contest

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[12]Contrary to the majority, I interpret Craig's taking of careful notes, as well as his continued responding by telephone to OSHA when he began receiving penalty notices, as further indications of his good faith reliance on the original advice of OSHA personnel.

was not required, would, if proven, provide a basis for relief under *Atlantic Marine*." Here, Craig has proven that he was so misled.

The majority recognized in *Choice Electric Corp.*, 14 BNA OSHC 1899, 1900-1901, 1987-90 CCH OSHD ¶ 29,141, 38,942 (No. 88-1393, 1990), that the Commission is "sensitive to the needs of parties appearing *pro se* and recognizes that persons who are not trained in the law may require additional consideration of their circumstances." Particularly in light of Craig's *pro se* status, I find him deserving of relief.

While the discussion in Part I disposes of the issue before us, the recurring nature of the problems illustrated by this case calls for further comment.

II. OSHA Instructions as a Potential Source of Confusion

The potential for the instructions on OSHA's internally-developed citation and notification of penalty form to cause confusion was addressed by the Fifth Circuit in ***Brennan v. OSHRC (Bill Echols Trucking Co.)***, 487 F.2d 230 (5th Cir. 1973) ("*Echols*"), one of the earliest circuit court cases decided under the OSH Act, in which the court suggested the following:

> If each citation or notification of proposed penalty sent to an employer were accompanied by a reply form on which the employer could check boxes indicating intent to contest the citation or proposed penalty, or neither or both . . . no confusion need ever again arise on the part of either the Secretary or the Commission.

487 F.2d at 234 n.7. *See also Marshall v. Haugan*, 586 F.2d 1263 (8th Cir. 1978), which favorably quotes the language of the *Echols* court. *Id.* at 1266 n.2. Like *Echols*, the case now before us arises in the Fifth Circuit.[13]

I requested the cover letter sent from Mr. Reina to "Craig's Mechanical." It is a cordial letter which ends with, "If conditions warrant, we can enter into an informal

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[13]These two United States Courts of Appeals have thus recommended that OSHA include with its citation and notification of penalty form a separate form that can be easily filled out by the employer and returned to the agency if the employer wishes to contest any aspect of the citations or proposed penalty.

Another agency acting under a similar statutory scheme to that of OSHA, the Mine Safety and Health Administration, has provided for many years what it calls "Blue Card" Notices of Contest along with its citations.

settlement agreement which amicably resolves this matter without litigation or contest." The letterhead provides the area director's telephone number, and the third sentence of the three-sentence first paragraph invites clarification by OSHA personnel: "If you have any questions about the enclosed citations and penalties, I would welcome further discussion in person or by telephone."

As I see it, the issue is not the one raised by my colleagues, whether most laymen unfamiliar with OSHA procedures would necessarily have determined the notice of contest requirements solely from a careful reading of the citation and notification of penalty page sent to Craig.[14] Rather, it is what duty OSHA owes to employers who are not legally trained when they clearly reveal to OSHA that they do not understand OSHA's written instructions and that they need verbal clarification. They should not be given misleading advice by the Government agency from which they are requesting clarification. Such employers have the right to have their questions answered in a straightforward manner. A second issue is whether the employer should be the one that suffers the adverse consequences when OSHA fails to carry out its duty.

The 1984 version of the OSHA citation and notification of penalty form sent to Craig[15] incorporated the 15-working-day filing deadline for a notice of contest (with other information) in two blocks of fine print on its face, one just above the middle of the page, and the other in horizontal words marching vertically down the side. The requirement that the notice be in writing is mentioned *only* within the block in the middle of the page. Many

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[14]Essentially, the view here is that if employers only take the time to read what government lawyers have written often enough and hard enough, the employers will understand its meaning. This attitude makes light of the real resource costs of employers.

[15]The Citation and Notification of Penalty Form (OSHA-2) used by the Secretary in this case was last revised in 1984. Like all the forms sent to employers during the OSHA compliance process, it was internally developed by OSHA officials. None of these forms is assessed for clarity by the OSHA community by notice and comment rulemaking or even by the White House Office of Management and Budget, which generally oversees agency rulemaking. Indeed, in October 1993 the White House Office of Management and Budget announced that henceforward it will review only agency regulations that represent an annual cost to the U.S. economy of $100 million or more. 23 BNA OSHR 655 (October 27, 1993).

employers overlook these requirements, and thus generate a great deal of litigation for the Commission and its administrative law judges on the issue of whether circumstances exist that justify the Commission's accepting a late-filed notice of contest. When employers fail to understand the requirement to file a timely notice of contest in writing, they deprive themselves of their statutory right to a hearing before the Commission. Perhaps one clear statement in bold letters on OSHA's citation cover page would be preferable.

OSHA revised its citation and notification of penalty form in June 1993. The revised citation format mentions the 15-day deadline for a written notice of contest in several places and contains a separate paragraph titled "RIGHT TO CONTEST" in which the pertinent information is in boldface type and underlined. However, that paragraph is relegated to page 2 of three cover pages, and the critical phrase "in writing" does not stand out. I will reserve judgment on whether the new larger-print, but longer, form constitutes an improvement that will serve to stem the tide of late notice of contest problems. Even if it does prove helpful for employers being cited today, it arrived too late to benefit Craig in this case.

The problem of late-filed contests arises when a *pro se* employer, or a lawyer inexperienced with OSHA issues, requests an informal conference with OSHA representatives--*without at the same time filing a notice of contest.* The unwary party has usually requested such a conference to seek a reduction in the penalty without understanding that, should the OSHA conference not result in adequate relief, only the timely filing of a written notice of contest will preserve its rights.

OSHA elaborates on this procedure in its "red booklet" entitled *Employer Rights & Responsibilities Following an OSHA Inspection* (OSHA 3000, revised in 1990), which it supposedly sends to all employers along with its citations. The hearing testimony is unclear as to whether Craig received this booklet. Continuing litigation over the informal conference request now leads me to disagree with the Commission's 1991 statement in *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192, 1991-93 CCH OSHD ¶ 29,277, p. 39,270 (No. 88-2521, 1991), that "OSHA's booklet accompanying the citations provide[s] additional, straightforward explanations" about the informal conference request. In my opinion,

OSHA's red booklet could confuse anyone unfamiliar with OSHA procedures who requests such conferences to contest only the penalties. An examination of the booklet shows that it does not make the requirement to timely file a written notice of contest sufficiently clear. The proof of this proposition is that the problem has persisted over the years, as shown by the list of cases cited by the majority.

Indeed, the booklet's statement on page 6, that before deciding whether to pay the penalty or file a notice of contest the employer may request a conference with OSHA, could mislead an employer to conclude that a conference request alone will preserve the employer's rights. Only later, on page 9, is it made clear that a request for an informal conference does not extend the time to respond in writing with a notice of contest--or replace this requirement. One clear statement of the method for asking for a penalty-reduction conference would be preferable to two somewhat contradictory ones.

Furthermore, problems such as Craig's are not addressed by OSHA's current *Field Operations Manual* (FOM), OSHA's internally prepared handbook for its employees. Although Chapter XV(B)(1)(d) tells OSHA officials to deal with a *written* communication from an employer by contacting the employer as soon as possible to clarify whether the communication constitutes a notice of contest, the FOM is silent regarding verbal communications. Until recently, the Commission might have recognized an oral notice of contest in a situation such as Craig's. *See Acrom Construction Services, Inc.*, 15 BNA OSHC 1123, 1991-93 CCH OSHD ¶ 29,393 (No. 88-2291, 1991). And to this date, California, a state-plan state whose economy ranks eighth largest when compared to countries of the world, accepts oral notices of contest. These discrepancies emphasize the importance of returning phone calls from employers and employees.

My review of OSHA's *Field Operations Manual* leaves no doubt that an underlying policy discouraging contests pervades standard operating procedures from inspection through settlement to the attainment of an enforceable final order. I am not persuaded that a policy actively promoting *informed* decisions by employers would necessarily result in more needless, "protective" appeals or fewer settlements. Such a policy might in the long run cultivate a measure of good will in the business community.

OSHA is in the process of revising its *Field Operations Manual* as part of OSHA's effort to reinvent itself. 23 BNA OSHR 1329 (March 9, 1994). Noting that OSHA's new citation and notification of penalty form provides employers with the area director's phone number, as did the cover letter to Craig Mechanical in this case, I would certainly hope that the new manual instructs all OSHA personnel to tell any employer who calls, for whatever reason, that a *written* notice of contest is still required before the 15-working-day filing deadline.

Velma Montoya
Commissioner

Dated: May 18, 1994

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX:
COM (202) 634-4008
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SECRETARY OF LABOR
Complainant,
v.
CRAIG MECHANICAL, INC.
Respondent.

OSHRC DOCKET
NO. 92-0372

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 30, 1992. The decision of the Judge will become a final order of the Commission on August 31, 1992 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before August 19, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: July 30, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0372

NOTICE IS GIVEN TO THE FOLLOWING:

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Stanley M. Schwartz
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UNITED STATES OF AMERICA
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SECRETARY OF LABOR, Complainant, v. CRAIG MECHANICAL, INC., Respondent.	OSHRC DOCKET NO. 92-0372-S

APPEARANCES:

Sarah F. Strange
Dallas, Texas
For the Complainant.

Freddie G. Craig
Houston, Texas
For the Respondent, *pro se.*

Before: Administrative Law Judge Stanley M. Schwartz

DECISION AND ORDER

This is a proceeding brought 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").

From June 11-19, 1991, the Occupational Safety and Health Administration ("OSHA") inspected a worksite in downtown Houston, Texas, where Respondent and other contractors were engaged in a building renovation project; as a result, Respondent was issued a serious citation alleging a violation of 29 C.F.R. § 1926.500(b)(1) and an "other" citation alleging violations of 29 C.F.R. §§ 1904.2(a), 1910.20(g)(2), 1926.59(e)(1)(i) and 1926.59(e)(4).[1] The citations, dated August 12, 1991, were received by Respondent on

[1]The serious citation has a penalty of $375.00. Each item of the "other" citation has a penalty of $150.00, except for the item relating to 1910.20(g)(2), which has no penalty.

August 13, 1991. Respondent did not file a written notice of contest within fifteen days of the date it received the citations; however, it did file a letter with the Commission on January 28, 1992, in which it protested the citations and penalties and explained its attempts to discuss the citations with OSHA. The Secretary filed a motion to dismiss on April 6, 1992, based on Respondent's failure to file a timely notice of contest. A hearing regarding the motion was held on May 26, 1992.[2] The relevant evidence is set out below, followed by my decision and order.

The Evidence

Freddie Craig, Respondent's owner, has been in business since 1979 and maintains an office in Houston. He did not dispute that his secretary had signed the return receipt card showing that his office had received the citation on August 13, 1991, but testified that he himself had not become aware of it until August 18, 1991. Craig explained that his secretary was only responsible for opening mail and putting it in the appropriate employee file, and that she did not respond to mail or bring deadlines to his attention.

Craig further testified he thought the citation was a mistake because the compliance officer who conducted the inspection had talked to him, his son and his other three employees at the site and did not indicate a citation would be issued. Craig noted he had given the compliance officer his safety program and injury and illness records, and that his company neither knew about nor had employees working in the area of the unguarded hole created by the electrical contractor.

Craig phoned the OSHA office in Houston on August 18 or 19 and asked for the area director; he was advised the director was out of town, and when he asked what he should do, he was told to leave his name, number and a message regarding the purpose of the communication and that the director would call him back. When his call was not returned, Craig phoned the office again on August 28; he was again told the director was out of town, but that he would have the record of the previous communication and would call him back.

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[2]The Secretary stated at the hearing that she was addressing only the untimely notice issue, and that she would not pursue the merits of the citations. (Tr. 5).

Craig's call was never returned, and on January 14, 1992, he received a collection letter in regard to the penalties.[3] Craig phoned OSHA on January 22, 1992, and was advised the director was not in, to which Craig responded that he would go to the office in person. When he went to the office on January 23, 1992, the director met with him and told him that although he could do nothing himself, Craig should put everything in a letter and send it to the Commission. Craig did so on January 28, 1992.

Craig testified he had read the citations, and that he knew he had fifteen days to file a notice of contest. He said this was why he had called OSHA, and that he did not realize the notice had to be in writing. Craig indicated he told OSHA his time was running out and asked what he should do during both calls, and that the response was that he should wait for the director's call. He also indicated he believed he could rely on what OSHA told him, and said that while he was not advised he did not have to file a written notice within fifteen days, no one ever told him he should.

Decision and Order

Section 10(a) of the Act provides, in pertinent part, as follows:

> If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty ... the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

Previous Commission precedent held that the merits of a case should be heard when "due to confusion, uncertainty, or misunderstanding the employer fails to file its written notice of contest within the statutory time period, but orally disputes the validity of citations or penalties in a timely manner and in good faith believes by so doing it has perfected a valid contest." *Pac-Saver Mfg. Co.*, 12 BNA OSHC 2001, 2006-07, 1986-87 CCH OSHD ¶ 27,676, pp. 36,104-05 (No. 84-733, 1986). Under *Pac-Saver*, Craig's actions would have constituted a valid notice of contest. However, on June 28, 1991, the Commission overruled *Pac-Saver* and held that an oral notice was an insufficient means of contesting a citation.

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[3]Craig indicated he had received letters from OSHA dated October 29 and November 26, 1991, advising that the penalties were due.

Acrom Constr. Serv., Inc., 15 BNA OSHC 1123, 1125, 1991 CCH OSHD ¶ 29,393, p. 39,563 (No. 88-2291, 1991). Since it is clear Craig did not file a written notice within the statutory period, the issue is whether he is entitled to relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

The Commission may grant relief pursuant to Rule 60(b) when the failure to file a timely notice of contest is due to mistake, inadvertence, surprise or excusable neglect.[4] The Commission has held that employers, even those appearing *pro se*, must exercise reasonable diligence, and that carelessness or ignorance of procedural rules does not constitute excusable neglect, particularly since the citation and other information provided by OSHA give notice of the fifteen-day period. *Keefe Earth Boring Co., Inc.*, 14 BNA OSHC 2187, 2192, 1991 CCH OSHD ¶ 29,277, p. 39,269-70 (No. 88-2521, 1991). However, in so holding it pointed out that relief may be justified "if the party offers a credible explanation for the delay that does not exhibit disregard for the judicial proceedings," revealing no "intent to thwart" or "reckless disregard for the effect of its conduct." *Id.*, quoting from *Shepard Claims Serv., Inc. v. William Darrah & Assoc.*, 796 F.2d 190, 194-95 (6th Cir. 1986).

In this case, although Craig read the citations and knew he had to file a notice within fifteen days, he did not realize the notice had to be in writing. Moreover, the two times that Craig called OSHA to discuss the citations, he was advised to wait for the director to call him back and was never told to file a notice, despite his statements to OSHA that his time was running out. In my view, Craig exercised due diligence and did what was reasonable under the circumstances. Moreover, he offered a credible explanation for his delay which did not exhibit a disregard for the proceedings. I find, therefore, that his failure to file a timely notice of contest was due to excusable neglect. This conclusion is supported by *Keefe*, *supra*. There, the Commission found the failure to file a timely notice was not excusable neglect based on the explanatory literature accompanying the citation and the company's

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[4]Relief may also be granted due to misrepresentation or other misconduct of an adverse party; however, no such grounds exist in this case. Although OSHA advised Craig to wait for the director to call him back, it never told him to not file a notice. Moreover, the record shows that the individual with whom Craig met in January was a new director, and indicates that the previous director's failure to return the calls was due to his being in the process of transferring to a new OSHA office in north Houston. (Tr. 42-45; 61-62).

failure to contact OSHA. Here, there was no evidence that any explanatory literature accompanied the citations, and OSHA failed to return Craig's calls.

The undersigned is aware that based on *Keefe*, one could argue that relief ought not to be granted pursuant to Rule 60(b) for failure to file a timely notice of contest except in the most extraordinary of circumstances. Should the Secretary believe that such is the case, she may seek review of this matter, and should the Commission grant her petition, it may decide how strictly it wants to construe its decision in *Keefe*. Regardless, based on the foregoing, the Secretary's motion is DENIED. Moreover, based on her desire to not pursue the merits of the alleged violations, the citations and proposed penalties are VACATED.

Stanley M. Schwartz
Administrative Law Judge

DATE: JUL 20 1992