

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. 01-0172
	:	
CASHIOLA CONSTRUCTION,	:	
	:	
Respondent.	:	
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**DECISION AND ORDER**

This case 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. sec. 651 et seq (the Act) to determine whether the Secretary's motion to dismiss Respondent's untimely notice of contest should be granted. The Respondent has filed no response to the motion.

**BACKGROUND**

The Occupational Safety and Health Administration (OSHA) inspected a work site of Respondent, resulting in the issuance of a citation and notification of proposed penalty on November 8, 2000. Respondent was required to notify OSHA of its intent to contest the citation within 15 working days of its receipt, and failure to do so would result in the citation and penalty becoming a final judgment of the Commission by operation of law. The citation setting forth the alleged violations and the proposed penalty was sent by certified mail and received by the Respondent on November 9, 2000. The statutory notice of contest period ended on December 1, 2000 and a notice of contest was not filed by the Respondent on or before said date. By letter received by OSHA on January 22, 2001, the Respondent indicated he desired to contest the case alleging he was not the proper party herein.

The record plainly shows that the Respondent did not file its notice of contest within the 15 day period. An otherwise untimely notice of contest may be accepted where the delay in filing was caused by deception on the part of the Secretary or by the Secretary's failure to follow proper procedures. An employer is also entitled to relief under the Federal Rules of Civil Procedure 60 if it establishes that the Commission's final order was entered as a result of ``mistake, inadvertence,

surprise or excusable neglect", or for "any other reason justifying relief", including mitigating circumstances such as illness, or a disability which would prevent a party from protecting its interests. *Branciforte Builders*, 9 BNA OSHC 2113. There is no contention that the Secretary acted improperly in this matter.

The cover letter accompanying the citation states on page 2 under the heading RIGHT TO CONTEST as follows: You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates without contesting underlying violations. 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.

The Commission has held that the OSHA citation "plainly state(s) the requirement to file a notice of contest within the prescribed period. Additionally, the Commission has held that an employer "must bear the burden of its own lack of diligence in failing to carefully read and act upon the information contained in the citations", and 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 to a lack of care." *Accrom Constr. Serv.* 15 BNA 1123,1126.

The Respondent had clear notice of the need to contest within the 15 working day period and it is responsible for its failure to act promptly in response to its governmental mail. The circumstances here are insufficient to establish entitlement to relief under Rule 60(b).

### **ORDER**

For the reasons stated above, The Secretary's notion to dismiss the notice of contest of the Respondent is GRANTED, and the citation and notification of penalties is AFFIRMED in all respects.

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/s/  
IRVING SOMMER  
Chief Judge

DATED: 26 MAR 2001  
Washington, D.C.