

SECRETARY OF LABOR,
Complainant,

v.

GUERRERO MASONRY, INC.
and its successors,
Respondent.

OSHRC DOCKET
NO. 00-2091

APPEARANCES:

Aaron R. Ramirez, Esq. and Madeleine T. Le, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas

Tola Oresusi, Esq., Tola and Associates, Houston, Texas

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to the Secretary of Labor's motion to dismiss Respondent's notice of contest as untimely under Section 10 of the Occupational Safety and Health Act of 1970. A hearing on the Secretary's motion was held on February 15, 2001, in Houston, Texas.

The record discloses that a compliance officer for the Occupational Safety and Health Administration inspected a Respondent's worksite. As a result of this inspection, the Administration issued two citations to this employer. Citation 1 was listed as serious and carried a suggested penalty of \$16,800.00; Citation 2 was designated non-serious with a recommended penalty of \$300.00. The citations were dated November 19, 1998, were received on November 23, 1998 and contained information to the effect that the employer had 15 days from the receipt of the citations to file a notice of contest if he 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 until July 24, 2000, relying upon the general contractor's superintendent who told Mr. Guerrero that he would take care of the paperwork. Mr.

Guerrero was aware that there was a fifteen-day time limitation for the company to file a notice of contest.

Section 10(a) of the Act provides in part that, if the Secretary issues a citation, the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation. If, within fifteen working days, the employer fails to notify the Secretary that he intends to contest the citation, the citation and the assessment, as proposed, shall be deemed the final order of the Commission and not subject to review by any court or agency.

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 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 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 notification of penalty are therefore AFFIRMED.

/s/
Sidney J. Goldstein
Judge, OSHRC

Dated: April 26, 2001

