

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. 01-0068
	:	
QUALITY BUILDERS, INC.,	:	
	:	
Respondent.	:	

DECISION AND ORDER

This matter is before 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. 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 two citations and notification of penalties on September 5, 2000. Pursuant to Section 10(a) of the Act, Respondent was required to notify OSHA of its intent to contest the citations within 15 working days of its receipt of the citations, and failure to file a timely notice of contest would result in the citations and penalties becoming a final judgment of the Commission by operation of law. It is undisputed that the citations setting forth the alleged violations and proposed penalties were sent by certified mail and received by the Respondent on September 12, 2000. The statutory notice of contest period ended on October 3, 2000 and a notice of contest was not filed by the Respondent on or before said date. By letter dated October 12, 2000 which was received by OSHA on October 13, 2000, the Respondent requested an informal conference to discuss the citations and proposed penalties.

DISCUSSION

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(b)(1) if it establishes that the Commission's final order was entered as a result of "mistake, inadvertence, surprise, or excusable neglect", or under 60(b)(6) 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, Inc.* 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no contention that the Secretary acted improperly in this matter.

The cover letter accompanying the citations 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", and that the OSHA 3000 booklet accompanying the citation "provide(s) additional straightforward explanations." *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1989); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). Finally, 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 (No. 88-2291, 1991).

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 on its government mail. The circumstances here are insufficient to establish entitlement to relief under Rule 60(b).

ORDER

For the reasons set out above, the Secretary's motion to dismiss the notice of contest of the Respondent is GRANTED, and the citations and notification of penalties is AFFIRMED in all respects.

/s/
IRVING SOMMER
Chief Judge

DATED: 19 MAR 2001
Washington, D.C.

