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<b>SECRETARY OF LABOR,</b>	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 00-1098
	:	
<b>SUN ROOFING,</b>	:	
and its successors,	:	
	:	
Respondent.	:	

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**DECISION AND ORDER**

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Secretary's motion to dismiss Respondent's notice of contest as untimely under section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

**FACTS**

Respondent Sun Roofing at all times relevant to this action maintained a roofing business in Appleton, Wisconsin. On August 6, 1999, Safety Compliance Officer Susan Guinn (CO) conducted an inspection of an Appleton, Wisconsin work site of Respondent. That day, the CO held a closing conference with Dan Heller, who was at the site. Respondent disputes that Mr. Heller was its representative at the site. The CO informed Heller of apparent violations observed during the inspection and gave Heller an OSHA 3000 booklet that outlined employers' contest rights. Mr. Heller was told that in order to contest an issued citation, a notice of contest must be sent in writing within 15 days. During the closing conference, the CO also explained the various options available to cited employers. Respondent asserts that Mr. Heller did not inform Respondent of the substance of the closing conference.

Pursuant to that inspection, the Secretary of Labor issued a citation alleging a serious violation of 29 C.F.R. § 1926.501(b)(13). The citation was issued on August 27, 1999 via certified mail, and the receipt shows that Sun Roofing received it on August 31, 1999. The contest period ended on September 22, 1999.

On October 28, 1999, Respondent was sent a certified letter demanding payment of overdue penalties as a result of Respondent's failure to challenge the citation within 15 working days of its issuance. Receipts show that Respondent received the letter on November 8, 1999. Respondent sent a notice of contest dated May 31, 2000 to Mr. Melvin R. Lischefski, Area Director for OSHA in Appleton, Wisconsin. On July 6, 2000, the Chicago Regional Office of the Solicitor received and forwarded the notice of contest to the Review Commission. This case has been designated for E-Z Trial pursuant to Commission Rule 203. Pursuant to Commission Rule 207, a pretrial conference was held in this case via telephone on August 4, 2000.

### **DISCUSSION**

The evidence establishes without dispute that Respondent did not file a notice of contest within the 15-day contest period as required by Section 10(a) of the Act. However, an otherwise untimely notice of contest may be accepted where (a) the Secretary's deception or failure to follow proper procedures caused the delay in filing or (b) if 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).

As stated previously, the Compliance Officer who conducted the inspection stated that he explained the apparent violations to Dan Heller and provided the OSHA-3000 pamphlet, outlining the employer's contest rights. (Secretary's motion to dismiss, exhibit A). Although it is alleged that Heller was not the Respondent's representative, there is no evidence and no contention that the Secretary was deceptive, nor is there any evidence that Respondent relied upon assurances or statements from OSHA which resulted in its

failure to timely reply to the citation. Respondent contends, rather, that the late filing should be deemed excusable neglect under the circumstances.

As stated above, the certified mail receipt establishes that Sun Roofing received the citation at its office on August 31, 1999. In his Response to the Secretary's motion to dismiss late notice of contest ("Response"), Sun-Roofing President, John Sramkoski, admits that he received the citation and delegated it to Brad Durbin, who was Sun Roofing's product manager at that time. He further states that he did not directly tell Durbin to dispute the citation, but believed that was the action Durbin was going to take. (Response, p. 1, #2) Mr. Sramkoski also states he believed that Michael Van Hoof at Old Time Roofing (a subcontractor) was "working with OSHA in respect to this matter." (Response, p.1, #2) For reasons which are not clear, Mr. Sramkoski believes that the citation is wholly the responsibility of Old Time Roofing.

The Commission has held that the OSHA citation plainly states the requirement to file a notice of contest within the prescribed period and 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." Roy Kay, Inc., 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); Acrom Constr. Serv., Inc., 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). The Commission has also held that ignorance of procedural rules does not constitute "excusable neglect" and that mere carelessness or negligence, even by a layman, does not justify relief. Acrom Constr. Serv., Inc., 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); Keefe Earth Boring Co., 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). 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).

On the basis of the record and the foregoing Commission precedent, the untimely filing of the notice of contest in this case was not a result of excusable neglect. Respondent failed to institute orderly procedures for handling important documents and demonstrated a lack of care in complying with filing requirements. Respondent admits to receiving the citation, but states that he believed either his project manager or the subcontractor were responsible for taking care of it. However, Rule 60(b) does not entitle Respondent to relief under these circumstances *see; Stroudsburg Dyeing and Finishing Co.* 1987-1990 CCH OSHD P28, 443. *See also: RCS Rizzoli Corp.* 1993-95 CCH OSHD P30, 240; *Robert F. Wilson, Inc.* 1983-84 CCCH OSHD P26,572; *Safeway Stores* 1978 CCH OSHD P23,096. Further, there is no indication as to why Respondent waited for six months to respond to the penalty payment demand letter which he received on November 8, 1999. Respondent's decision to ignore the citation, as well as the penalty letter, does not constitute excusable neglect. Moreover, the fact that a closing conference was not conducted with Respondent's representative does not relieve Respondent of its responsibility to comply with the statutory 15 day filing requirement.

### **CONCLUSION**

Based upon the circumstances of this case and the Commission precedent set out *supra*, Respondent is not entitled to relief pursuant to Rule 60(b). The Secretary's motion to dismiss is accordingly GRANTED, Respondent's notice of contest is DISMISSED, and the citation and notification of penalty is AFFIRMED in all respects.

So ORDERED.

### **ORDER**

1. Serious Citation 1, item 1 alleging a violation of 29 CFR 1926.501 (b)(13) is AFFIRMED and a penalty in the amount of \$800.00 is ASSESSED.

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Robert A. Yetman  
Judge, OSHRC

Dated: October 10, 2000