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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 98-2078
	:	
RBV, INC.,	:	
d/b/a R.B. VENTURES,	:	
	:	
Respondent.	:	

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APPEARANCES:

Suzanne F. Dunne, Esquire  
 Dallas, Texas  
 For the Complainant.

Roger E. Brackey  
 Danbury, Texas  
 For the Respondent, *pro se*.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding 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. § 651 *et seq.* (“the Act”), for the sole purpose of determining whether the Secretary’s motion to dismiss Respondent’s notice of contest as untimely should be granted.

Background

The Occupational Safety and Health Administration (“OSHA”) inspected Respondent’s facility in Houston, Texas, in June of 1998. As a result of the inspection, OSHA issued Respondent a citation and notification of penalty alleging a serious violation of the Act. Section 10(a) of the Act requires an employer to notify OSHA of the intent to contest a citation within 15 days of receiving it, and the employer’s failure to file a timely notice of contest results in the citation and penalty becoming a final judgment of the Commission by operation of law. The record shows that OSHA sent the citation by certified mail, that an officer of the company received the citation and signed for it on November 18, 1998, and that the notice of contest period ended on December 10, 1998.<sup>1</sup> The

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<sup>1</sup>Although the citation was issued on October 21, 1998, it was not delivered until November (continued...)

record further shows that Respondent did not file a notice of contest until December 14, 1998, when it sent a letter to the Commission that explained the circumstances surrounding the alleged violation and the reason for the late filing of the notice of contest. The Secretary filed her motion to dismiss Respondent's notice of contest as untimely on January 26, 1999. The hearing in this matter was held in Houston, Texas, on March 14, 1999.

#### Discussion

The record plainly shows that Respondent did not file its notice of contest until after the 15-day contest period had 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 shows 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 which 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 was deceptive or failed to follow proper procedures in this matter. Rather, Respondent concedes its fault and, in essence, requests that the late filing of the notice of contest be excused under the circumstances.

Roger Brackey, Respondent's president, testified that he is in the business of buying fresh shrimp and packaging and freezing it for sale to his customers. He further testified that his business is small, that Judy Brackey, his wife, is the secretary and treasurer, and that they are the only two officers of the company. Brackey said that his wife is responsible for billing, record keeping and all other paperwork, including the receipt and handling of mail, that she advised him when she received the citation, and that he told her he wanted to contest it. He also said that he had assumed she would take care of it, even though this was the company's first citation, because she is very competent, and that the reason she had not was due to her having had to go into the hospital towards the end of November 1998; he explained that she had had cancer for over a year, that her admission to the

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<sup>1</sup>(...continued)  
18, 1998, because of the company's change of address.

hospital was related to that condition, and that she had not been released until December 13, 1998.<sup>2</sup> Brackey noted that R.B. Ventures had been formed in 1990; he additionally noted that although he had had 60 to 80 employees in 1997 and 1998 he had been forced to vacate his place of business in the fall of 1998, resulting in his going out of business. (Tr. 13-21).

The citation issued to Respondent, and the cover letter accompanying it, explain the 15-day contest period. The cover letter states, in the first paragraph on page 1, that:

You must abate the violations referred to in this Citation by the dates listed and pay the penalties proposed, unless within 15 working days ... from your receipt of this Citation and Notification of Penalty you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above. Please refer to the enclosed booklet (OSHA 3000) which outlines your rights and responsibilities and which should be read in conjunction with this form.

The cover letter also states, on page 2, the following:

**Right to Contest** - 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 the 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 time period.” *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). The Commission has also held 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 really to a lack of care.” *Id.* Finally, the Commission has held that a business must have orderly procedures for the handling of important documents and has denied Rule 60(b) relief where the employer asserted that the late filing was caused by events such as a change in management, the improper handling of the citation by company personnel, and the absence, even if due to illness, of the person responsible for OSHA matters. *See Louisiana-Pacific Corp.*, 13 BNA

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<sup>2</sup>Judy Brackey’s notice of contest letter also sets out the circumstances of her hospitalization.

OSHC 2020, 2021 (No. 86-1266, 1989); *J.F. Shea Co.*, 15 BNA OSHC 1092, 1094 (No. 89-976, 1991); *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460).

According to the testimony of Roger Brackey, the failure to file the notice of contest within the required 15-day period was due to his wife's hospitalization and consequent inability to attend to this matter. However, the citation clearly gave notice of the filing requirement.<sup>3</sup> Moreover, Roger Brackey, the president of the company, was aware of the citation, and he testified that R.B. Ventures was formed in 1990, that he had been in the seafood business since 1984, and that he had had 60 to 80 employees until going out of business in the fall of 1998. (Tr. 15-19). Finally, although his wife was responsible for taking care of the company's paperwork, Brackey should have had an office procedure that would have ensured a timely response to the OSHA citation and that he did not does not constitute excusable neglect within the meaning of Rule 60(b); in addition, the employer has the burden of showing that Rule 60(b) relief is justified, and Brackey did not testify as to why he could not have filed the notice of contest himself. *See E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460). *See also Jackson Assoc. of Nassau*, 16 BNA OSHC 1261, 1265-66 (No. 91-0438, 1993).

I have noted the statements in Respondent's notice of contest letter indicating the financial and other difficulties the company has undergone, and I sympathize with Respondent's plight in this matter. Regardless, I am constrained by Commission precedent and the circumstances of this case to conclude that Respondent is not entitled to Rule 60(b) relief. The Secretary's motion to dismiss is accordingly GRANTED, the notice of contest is DISMISSED, and the citation and notification of penalty is AFFIRMED in all respects. So ORDERED.

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Irving Sommer  
Chief Judge

Date:

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<sup>3</sup>Besides the citation itself, I note the testimony of Juan Padron, the OSHA compliance officer, that he held a closing conference with Roger and Judy Brackey after his inspection, at which time he explained the violations he had found, the company's right to contest the citation, and the fact that the notice of contest had to be filed within 15 days after receipt of the citation. (Tr. 6-8).