



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1120 20th Street, N.W., Ninth Floor
 Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 98-0616
	:	
RICHARDS ROOFING, INC., AND	:	
CONSTRUCTION,	:	
	:	
Respondent.	:	

DECISION AND ORDER

This matter 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”), 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 a citation and notification of penalty on October 3, 1997. Pursuant to section 10(a) of the Act, Respondent was required to notify OSHA of its intent to contest the citation within 15 working days of its receipt of the citation, and failure to file a timely notice of contest would result in the citation and penalty becoming a final judgment of the Commission by operation of law. It is undisputed that the citation setting forth the alleged violations and proposed penalties was sent by certified mail on or about October 3, 1997, and that Respondent received the citation on October 6, 1997. It is also undisputed that the notice of contest period ended on October 28, 1997, and that Respondent’s notice of contest was not filed until October 31, 1997. A letter from Respondent’s attorney, dated March 31, 1998, states the following:

My client is not attuned to the procedures required when a complaint is filed against him and thus did not appeal OSHA decision within the time allotted....Please allow this late notice of contest and let this matter proceed through the contest procedures.

DISCUSSION

The record plainly shows that Respondent did not file its notice of contest until the expiration of the required 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 Federal Rule 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 Federal Rule of Civil Procedure (60)(b)(6) for "any other reason justifying relief," including mitigating circumstances such as absence, 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; rather, Respondent is requesting, in effect, that the untimely filing be excused due to its lack of experience in OSHA matters.

The cover letter to the citation issued to Respondent states, in the first paragraph, as follows:

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.

In addition, page 2 of the cover letter has a paragraph which provides as follows:

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," and that the OSHA 3000 booklet accompanying the citation "provide[s] additional, straightforward explanations."¹ *Roy Kay, Inc.*, 13 BNA OSHC

¹According to an affidavit of the area director of the OSHA office that issued the citation,
(continued...)

2021, 2022 (No. 88-1748, 1989); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). The Commission has additionally held that ignorance of procedural rules due to inexperience in OSHA matters does not constitute excusable neglect for purposes of Rule 60(b) relief. *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). 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 really to a lack of care.” *Acrom Constr. Serv.*, 15 BNA 1123, 1126 (No. 88-2291, 1991); *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

Based on the foregoing, Respondent is not entitled to Rule 60(b) relief. The citation itself clearly warned that the citation and penalties would become a final, non-reviewable order unless a written notice of contest was timely filed, and this warning was also set out in the OSHA 3000 booklet which accompanied the citation. Although I am sympathetic to Respondent’s plight in this matter, I am constrained by the circumstances and the above Commission precedent to conclude that the failure to file a timely notice of contest was not due to excusable neglect or any other reason justifying relief pursuant to Rule 60(b).

Order

For the reasons set out above, the Secretary’s motion to dismiss the notice of contest is GRANTED, and the citation and notification of penalty is AFFIRMED in all respects.

Irving Sommer
Chief Judge

Date:

¹(...continued)
which is Exhibit A of the Secretary’s motion, an OSHA 3000 booklet was sent with the citation.