
SECRETARY OF LABOR,

Complainant,

v.

A. W. ROSS, INC.,

Respondent.

OSHRC Docket No. 99-0945

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

At issue is whether respondent A.W. Ross, Inc. (“Ross”) should be granted relief from a final order of the Occupational Safety and Health Review Commission. That order resulted from Ross’s failure to file a timely notice of contest to a citation issued by the Secretary of Labor’s Occupational Safety and Health Administration (“OSHA”). Chief Administrative Law Judge Irving Sommer denied relief under Federal Rule of Civil Procedure 60(b).¹ For the reasons that follow, we affirm his decision.

On March 31, 1999, OSHA inspected Ross’ facility in Passaic, New Jersey. Alexander W. Ross, the company president, was not present at the facility during the inspection but did participate in the closing conference that was held on April 5, 1999. Based on the inspection, on April 7, 1999, OSHA cited Ross for four serious violations of standards

¹Federal Rule of Civil Procedure 60(b) provides, in pertinent part:

Rule 60. Relief From Judgment or Order.

. . . .

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment.

under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (“the Act”), and proposed a total penalty of \$2,550. Ross received the citation on April 9, 1999. Under section 10(a) of the Occupational Safety and Health Act (“the Act”), 29 U.S.C. § 659(a), a respondent has fifteen working days after receipt of the citation in which to contest the citation or penalty. However, Ross did not file a notice of contest until May 11, 1999, eleven days after the end of the notice of contest period. The Secretary filed a motion to dismiss the notice of contest as untimely and the judge held a hearing on whether to grant the Secretary’s motion.

At the hearing, Mr. Ross testified that when he received the citation, he only looked at the abatement date of May 24, 1999 that was listed after each of the citation items. His understanding of the term “proposed penalty” that appears after each item was that no penalty would be assessed if he fixed the cited items by the abatement date.² A “few days” after receipt of the citation, Mr. Ross had to go to California on “urgent family matters.” When he returned in early May, Mr. Ross learned that OSHA was going to impose penalties. He claims that he called someone at OSHA but didn’t get a response “for about a week or so.” He eventually spoke with someone who told him to write the letter that became his notice of contest.

The judge found that Ross was not entitled to relief pursuant to Rule 60(b) because Mr. Ross failed to carefully read and act upon the information contained in the citation. The judge noted that the first and second pages of the citation explain the 15 working day notice

²When questioned by his attorney as to what he looked at when he received the citation, Mr. Ross testified as follows:

Q And when you got it [the citation], what did you look at?

A At the date when I have to fix it. That’s the only thing what I look at. There’s a lot of papers going through. I’m a small business, one guy. I look through everything as fast as I can. And I looked at it and I see 5-24. Proposed penalty. I said proposed penalty, if I don’t do it, I get the penalty. And I understood this immediately that’s the way it would work. I didn’t propose. To me propose is something which you project. Right. Maybe you do it, maybe you won’t.

of contest period and that Ross “had been inspected and cited twice before and that this was not the company’s first experience with OSHA.”

Under Commission precedent, Rule 60(b) applies to Commission proceedings. *See, e.g., CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2000 CCH OSHD ¶ 32,081 (No. 98-0367, 2000). The Secretary makes a threshold argument that section 10(a) of the Act prohibits the Commission from applying Rule 60(b). We decline to address that argument here, however, because we agree with the judge that relief for Ross under Rule 60(b) is not appropriate.

Ross claims that it is entitled to 60(b) relief due to its “(1) mistake, inadvertence, surprise or excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgement.” A key factor in evaluating whether a party’s delay in filing was due to excusable neglect is “the reason for the delay, including whether it was within the reasonable control of the movant.” *CalHar*, 18 BNA OSHC at 2153, 2000 CCH OSHD at p. 48,145, *citing Pioneer Inv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395 (1993). Ross’ only explanation for the delay boils down to an admission that Mr. Ross failed to read the citation.³ Employers have an obligation to read a citation with sufficient care. *Craig Mechanical, Inc.*, 16 BNA OSHC 1763, 1993-95 CCH OSHD ¶ 30,442 (No. 92-0372-S, 1994), *aff’d without opinion*, 55 F.3d 633 (5th Cir. 1995). Handling important business matters in this manner cannot be considered excusable neglect such that relief under Rule 60(b) would be appropriate.⁴ *Adanlock Office Envir.*, 1999 CCH OSHD ¶ 31,936 (No. 98-

³Ross notes in its brief that the citation’s cover letter only refers to the abatement date and does not mention the fifteen working day contest period. Although mention of the notice of contest period on the cover letter might help in reducing the chance of an employer’s misinterpretation of his responsibilities, there is no evidence in this record that Ross was confused by the cover letter or the citation as a whole or that he would have acted any differently had such notice been included in this cover letter.

Ross also argues that the citation did not identify the actual date that the notice of contest period ended. At the time a citation is issued, however, OSHA does not know what date the period ends because the contest period runs from the employer’s receipt of the citation.

⁴Ross claims that the compliance officer stated that so long as the alleged violations
(continued...)

1134, 1999). Employers must maintain orderly procedures for handling important documents. *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 1987 CCH OSHD ¶ 28,409 (No. 86-1266, 1989). We therefore affirm the judge's decision denying Ross relief from the final order based on its failure to file a timely notice of contest.

/s/
 Thomasina V. Rogers
 Chairman

/s/
 Stuart E. Weisberg
 Commissioner

Dated: September 26, 2000

⁴(...continued)

were promptly corrected, there would be no penalty. Although Ross did not identify it as such, this appears to be a request for relief under rule 60(b)(3) for "misrepresentation . . . of an adverse party." However, there is no evidence in the record to support Ross' claim. Mr. Ross only testified that he was not told by the compliance officer of the 15 working day contest period. There is no evidence that Ross was misled.

VISSCHER, Commissioner, concurring:

I agree with my colleagues that respondent Ross has not made a case for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. As the main opinion notes, Mr. Alexander Ross, respondent's president and witness at the hearing, acknowledged that he failed to contest the citation within the 15 day period because he failed to read the citation carefully and only noticed the proposed abatement date of May 24 and not the information regarding the 15 day period in which to contest the alleged violations and proposed penalties.

In *CalHar Constr. Inc.*, 18 BNA OSHC 2151, 2000 CCH OSHD ¶ 32,081 (98-0367, 2000), I voted to grant relief under Rule 60(b). In that case the employer's office manager made several attempts to reach OSHA by telephone immediately after receiving the citation because she found the citation unclear and confusing. OSHA did not return her phone calls until after the 15 day period had expired, which resulted in CalHar's late filing. Under those circumstances, I considered CalHar's neglect to be excusable and that CalHar was therefore entitled to relief. But here, Mr. Ross made no effort to contact OSHA during the contest period. He acknowledged that he looked at the citation rather quickly, and put it aside, believing that he did not need to respond until the later date for abatement listed in the citation. Ross did attempt to call OSHA about the citation, but only after the notice of contest period had run.¹

In any event, Ross requests relief on other grounds. According to Ross, the notice and citation are not clear in requiring the employer to file a notice of contest within the 15 day period. But, as noted above, Mr. Ross admitted at the hearing that he simply failed to read the citation carefully. Furthermore, Ross' petition for review suggested that the compliance officer led Ross to believe that if the violations were promptly abated there would be no

¹Even though Ross' attempts to reach OSHA by telephone did not take place within the contest period, OSHA kept to its apparent practice of not returning phone calls from small employers with questions about pending citations. *See CalHar, supra*. *See also Craig Mechanical Inc.*, 16 BNA OSHC 1763, 1993-95 CCH OSHD 30,442 (No. 92-372-S, 1994), *aff'd without opinion*, 55 F.3d 633 (5th Cir. 1995).

penalties. Though Mr. Ross may have had that misunderstanding, the record does not support the assertion that the compliance officer was its source.

/s/

Gary L. Visscher
Commissioner

Date: September 26, 2000

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. 99-0945
	:	
A.W. ROSS, INC.,	:	
	:	
Respondent.	:	

Appearances:

John S. Ho, Esquire
New York, New York
For the Secretary.

Alexander W. Ross, Jr., Esquire
Marlton, New Jersey
For the Respondent.

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 purpose of determining whether the Secretary’s motion to dismiss Respondent’s notice of contest as untimely should be granted.

The Occupational Safety and Health Administration (“OSHA”) inspected Respondent’s facility in Passaic, New Jersey, on March 31, 1999. As a result, OSHA issued Respondent a citation and notification of penalty alleging serious violations of the Act. Section 10(a) of the Act requires an employer to notify OSHA of the intent to contest a citation within 15 working days of receiving it, and the 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 mailed the citation by certified mail, that Respondent received it on April 9, 1999, and that the notice of contest period ended on April 30, 1999. The record also shows that Respondent did not file a notice of contest until May 11, 1999. The Secretary filed her motion to dismiss on May 11, 1999, and the hearing in this matter was held in New York, New York on September 24, 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 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 was deceptive or failed to follow proper procedures in this matter. Rather, Respondent contends that the late filing was due to "mistake, inadvertence, surprise or excusable neglect."

At the hearing, Alexander W. Ross, the company president, testified that he was not present at the facility during the OSHA inspection as that day was a religious holiday. He further testified that while he was present when the OSHA compliance officer ("CO") returned a few days later to hold a closing conference, the CO discussed only the date by which any cited conditions had to be abated and never mentioned a 15-day notice of contest filing period. Ross said that when he received the citation, which consisted of a number of pages, he noted only the abatement date of May 24, 1999. He also said that he had had an urgent family matter in California at that time and that because of the May 24 date he had decided not to respond to the citation until he got back from California; he learned of the 15-day filing period when he returned from California, and, upon calling OSHA, the official he spoke to told him to submit a letter explaining his situation. Ross stated that if he had been aware of the 15-day deadline he would have filed a notice of contest immediately. (Tr. 36-45).

In its post-hearing submission, Respondent contends that the citation as written is confusing and that anyone reading it could reasonably conclude, as did the company president in this case, that no penalties would be assessed as long as the violations were corrected by the abatement dates set out on the "penalty pages" of the citation. I disagree, for the following reasons.

The citation issued to Respondent explains the 15-day contest period, in the first paragraph on the first page, 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.

The citation further explains the contest period, on page 2, as follow:

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 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). Finally, the Commission has 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.” *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

Based upon the evidence of record and the foregoing Commission precedent, I conclude that the untimely filing of the notice of contest was due to the failure of Respondent’s president to carefully read and act upon the information contained in the citation. In so concluding, I note the evidence showing that Respondent had been inspected and cited twice before and that this was not the company’s first experience with OSHA. (Tr. 6-9; C-1). I note also the evidence that, although the company president did not recall it, OSHA’s practice is to verbally advise the employer of the 15-day notice of contest period at the closing conference and to also give the employer an OSHA 3000 booklet at that time; OSHA’s further practice, as indicated above, is to send another copy of the OSHA 3000 booklet with the citation. (Tr. 9-11; 14-17). Although I sympathize with Respondent’s plight in this matter, I am constrained by the circumstances of this case and the Commission precedent

set out *supra* to find that 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.

/s/

Irving Sommer
Chief Judge

Date: 30 NOV 1999