



UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
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SECRETARY OF LABOR  
Complainant,  
v.  
JOSEPH BUEME  
Respondent.

OSHRC DOCKET  
NO. 94-0868

**NOTICE OF DOCKETING  
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on February 14, 1995. The decision of the Judge will become a final order of the Commission on March 16, 1995 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before March 6, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary  
Occupational Safety and Health  
Review Commission  
1120 20th St. N.W., Suite 980  
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.  
Executive Secretary

Date: February 14, 1995

DOCKET NO. 94-0868

NOTICE IS GIVEN TO THE FOLLOWING:

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Barbara Hassenfeld-Rutberg  
Administrative Law Judge  
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UNITED STATES OF AMERICA  
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SECRETARY OF LABOR :

Complainant :

v. :

JOSEPH BUEME :

Respondent :

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OSHRC  
 DOCKET NO. 94-0868

Appearances:

Alan L. Kammerman, Esq.  
 Office of the Solicitor  
 U.S. Department of Labor  
 For Complainant

Paul M. Michalek, Esq.  
 561 Ridge Road  
 Lackawanna, NY 14218  
 For Respondent

Before: Administrative Law Judge Barbara L. Hassenfeld-Rutberg

**DECISION AND ORDER**

This proceeding arises under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C 651, et seq, ("the Act"), on a motion to dismiss the Respondent's late filed notice of contest. The Respondent seeks relief under Rule 60(b) of the Federal Rules of Procedure, which are applicable to proceedings before the Occupational Safety and Health Review Commission ("OSHRC", "Commission") under section 12(g) of the Act.

Respondent is a corporation with its chief corporate officer being Mr. Joseph Bueme ("Mr. Bueme"). The Respondent was issued a citation on February 9, 1994, stemming from an inspection by the Occupational Safety and Health Administration ("OSHA") of its premises located at 770 Wehrle Drive, Williamsville, New York, . The citation contained (2) two items, both serious in nature, arising under 29 CFR 1926.59(e)(1) and 29 CFR 1926.59(h).

The citation was delivered by certified mail and signed for by Mr. Bueme on February 11, 1994 (Exhibits C-2 & C-5). Enclosed with the citation was a letter from David Boyce, OSHA Area Director (Exhibit C-3). Mr. Boyce's letter summarized portions of the informal hearing and notice of contest procedures that were available to Mr. Bueme on behalf of the Respondent. These appellate procedures also were explained in greater detail by a booklet entitled "Employer Rights and Responsibilities Following an OSHA Inspection" (OSHA 3000), revised 1992 ("Booklet")

( Exhibit C-1), which also accompanied the citation. Both the letter from Mr. Boyce and the Booklet stated that an employer intending to file a notice of contest must do so within 15 working days of receiving the citation, regardless of whether the employer also intended to exercise its option to request an informal conference. In the instant case, then the notice of contest would have had to been filed by March 4, 1994. However Mr. Bueme did not file a notice of contest on behalf of the Respondent until March 14, 1994, wherein he apologized for the delay and also requested an informal conference (Exhibit C-4).

The Secretary of Labor ("Secretary", "Complainant") filed a motion to dismiss the Respondent's late filed notice of contest. Respondent opposed the motion to dismiss and seeks relief under Rule 60 (b) of the Federal Rules of Procedure because of his excusable neglect and the government's misrepresentation. A hearing was held before the undersigned judge on November 3, 1994, in Buffalo, New York, solely on the issue of the late filing of the notice of contest and the motion to dismiss.

### DISCUSSION

The Secretary alleges that the Respondent violated 29 CFR 1926.59(e)(1), by failure to develop, implement and maintain at the workplace a written hazard communication program, and 29 CFR 1926.59(h), by failure to provide information and training for employees using hazardous chemicals in their work area. The Secretary further alleges that the Respondent failed to file a timely notice of contest after receiving the citation, and that the Respondent knew, or should have known from the material received with the citation, that a *notice of contest must be filed within fifteen working days of receipt of the citation*. The Secretary argues that the Respondent's failure to timely file the notice of contest bars the Respondent from contesting the citation and the proposed assessed penalties.

At issue in this case is whether the Respondent's failure to file a written notice of contest within the 15-day statutory period<sup>1</sup> was the result of misrepresentations or misconduct by OSHA, which led to the Respondent's defense of excusable neglect. The Respondent has burden of proof in order to obtain relief from a final order. Roy Kay, Inc. 13 BNA OSHC 2021, 2022, 1989 CCH OSHD ¶ 28,406, p. 37,534 (No. 88-1748, 1989).

The Respondent asserts that he failed to file a timely notice of contest because the OSHA inspector, Mr. Robert C. Upton ("Mr. Upton"), made misrepresentations by telling Mr. Bueme at the time of the inspection that the identified violations were "no big deal" and that "there was nothing to worry about". Therefore, the Respondent claims that he relied upon Mr. Upton's characterization of the violations and did not know that he had to respond to the citation by filing anything, as he believed that OSHA would contact him to set an informal conference date. The Respondent argues that he has met his defense of excusable neglect because he was misled by Mr. Upton's statements, which Mr. Bueme alleges are sufficient to constitute misrepresentations or misconduct within the meaning of Rule

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<sup>1</sup> Section 10(a) of the Act, provides in relevant part:

If within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation . . . the citation and the penalty assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

60(b)<sup>2</sup>. On occasions, information or an impression contradicts or overshadows the directions on the citation, or distracts the employer from ever reading it. If this other source is an OSHA representative, as alleged here, the case is analyzed under 60(b)(3) and the issue is whether the employer's failure to file was engendered by misconduct or misrepresentation on OSHA's part. See Jackson Assocs., 16 BNA OSHC 1261 (No. 91-0438, 1993). However, relief is appropriate only when prejudicial Government misconduct is coupled with a *reasonable degree of diligence by the employer*. Craig Mechanical Inc., 16 BNA OSHC 1763, 1766 (No. 92-0372-S, 1994).

At the hearing, Mr. Upton who has conducted almost 700 inspections, admitted that he told the Respondent that the violations were "no big deal" because he felt that Mr. Bueme was upset by the inspection and the possible penalties, but Mr. Upton denied stating that the Respondent had "nothing to worry about". The issue before the undersigned concerns a motion to dismiss filed by the Complainant, and therefore, all ambiguous facts must be construed in favor of the party opposing the motion. Jackson v. Beech 636 F.2d 831, 836 -38 (D.C. Cir. 1980). Assuming the statements made by Mr. Upton are as the Respondent alleges, do they rise to the level of misrepresentation or misconduct as contemplated by Rule 60(b)? If so, did the Respondent meet its burden of proof for excusable neglect? See Keefe Earth Boring Co., 14 BNA OSHC 2187 (No. 88-2521, 1991).

Although Mr. Upton's statements may have led the Respondent to believe that the citation was "no big deal" and "nothing to worry about", the Respondent's behavior by failing to read the citation and accompanying material does not meet his burden of exercising due diligence, which is necessary for the defense of excusable neglect. In Craig, supra, the Commission indicated that the language on the citation does not provide for any exception to the requirement that an employer notify OSHA in accordance with its regulations, i.e., in writing, if it wants to contest a citation. In the instant case, the material Respondent received from OSHA clearly spelled out the Respondent's obligations to *file a notice of contest within 15 days even if there was an informal conference* requested. Mr. Upton never suggested that the Respondent disregard the citation or the notice of contest instructions; therefore, he did nothing to misrepresent the law or act improperly in any way. I find that Mr. Upton's statements and behavior did not rise to the level contemplated by Rule 60(b).

The Commission stated in Keefe, supra, that the Respondent has the burden of carefully reading the portions of the written instructions stated and reiterated on the face of the citations and indicated in that case if the Respondent had exercised due diligence there, he could have avoided his errors. The Commission went on to further state in Keefe that *due diligence* requires that even a layman unfamiliar with OSHA procedures read the face of the citation carefully and that receipt of additional explanatory materials is not a prerequisite for adequate notification under the Act. In the Keefe and Craig cases, the Commission found that the citation itself bears the essential information alerting an employer how to preserve its rights. The facts in the instant case are within the guidelines set out in decisions by the Commission wherein the *Respondent has the burden of proof regarding its defense of excusable neglect*, and the Respondent's failure to read the clear instructions he received from OSHA does not

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<sup>2</sup> Fed. Rules Civ. P. 60(b) provides in relevant part:

that on motion and upon such terms as are just, the court may relieve a party 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.

meet that burden.

In conclusion, I find that Mr. Upton did not make misrepresentations as contemplated by Rule 60(b) and even if he did, I find that the Respondent did not meet its burden to establish excusable neglect. Thus, the Respondent's notice of contest is found to have been filed late and under section 10(a) of the Act, the citation and its proposed penalties became a final order of the Commission. No relief is granted to the Respondent from that final order.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

All findings of fact relevant and necessary to a determination of the contested issue have been found specifically and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law inconsistent with this decision are denied.

### **ORDER**

The citation and its proposed penalties became a final order of the Commission when the Respondent failed to timely file its notice of contest. Thus, Serious citation 1, item 1, alleging a violation of 29 CFR 1926.59(e)(1) is affirmed along with its proposed penalties. Serious citation 1, item 2, alleging a violation of 29 CFR 1926.59(h) is affirmed along with its proposed penalties.

  
**BARBARA L. HASSENFELD-RUTBERG**  
Judge, OSHRC

Date: January 30, 1995  
Boston, Massachusetts