



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W.— 9th Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,

Complainant,

v.

BADGER UNDERGROUND
CONSTRUCTION, INC.,

Respondent.

OSHRC Docket No. 94-3251

ORDER

This case became a final order of the Commission on April 17, 1995, following the failure by Badger Underground Construction, Inc. (“Badger”) to file an answer to the Secretary’s complaint and to respond to Chief Judge Irving Sommer’s Order to Show Cause. On May 29, 1996, Badger filed an “Appeal of Decision to Proceed with Penalty Collection” with the Commission. Penalty collection is solely the function of the Secretary of Labor under the Occupational Safety and Health Act of 1970 (“the Act”), 29 U.S.C. §§ 651-678. Thus, an appeal regarding penalty collection is not properly presented to the Commission.

However, Badger’s appeal contains statements that could be construed as a request for relief from the Commission’s final order. Badger states, “[t]his appeal is based on our non-receipt of the various notices alleged to have been sent to us from the offices of your solicitor as well as from the Review Commission itself.” It requests “administrative due process.”

Federal Rule of Civil Procedure 77(d) applies to claims of lack of notice of Commission decisions. Relief is granted under that rule only where the party making the

claim “has exercised due diligence to ascertain whether the judgment has been entered or has given sufficient reason for the lack of such diligence.” *Art Specialty Co.*, 16 BNA OSHC 1695, 1696, 1994 CCH OSHD ¶ 30,389, p. 41,932 (No. 92-1227, 1994) (quoting *Spika v. Village of Lombard*, 763 F.2d 282, 285 (7th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986)).

Our official file contains a Receipt for Certified Mail (copy attached) which shows that Badger received Judge Sommer’s Order to Show Cause on January 29, 1995. That order notified Badger that it was required to show cause by February 7, 1995, why “the citations and penalties in this case should not be affirmed due to its failure to file an answer to the complaint” The order further stated, in bold print, capitalized and underlined: “Failure to respond to this order will result in all violations being affirmed and all proposed penalties being assessed against respondent without a hearing.”

The certified mail receipt indicates to us that Badger received clear notice that it would have to pay the proposed penalties unless it responded in timely fashion to the Order to Show Cause.¹ Its president may have been unaware of the Order to Show Cause, but the reasons why are not apparent. In any event, Badger did not respond to that order and has waited more than a year to contact the Commission. In these circumstances, we must conclude that Badger has received administrative due process, including adequate notice and an opportunity to be heard.

For this reason, we need not determine whether Badger received the subsequent Notice of Docketing of the judge’s decision (the judge dismissed Badger’s notice of contest and assessed the proposed penalties), or whether it received other communications from the Commission. We note, however, that all of those communications were sent to the same address. We have no reason to believe that they were not sent in compliance with the Commission’s rule on serving orders on parties. Commission Rule 7(a), 29 C.F.R. § 2200.7(a). We also note that Badger clearly had notice of the proceedings before the Order

¹The person who signed the receipt for Badger apparently was also the authorized employee representative. We can only assume that, in signing, that person was acting within the scope of his employment.

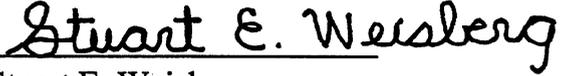
to Show Cause, because it responded to the Commission's initial Notice of Docketing of the case by returning the certificate of posting of the citations.²

²No grounds for relief under Fed. R. Civ. P. 60(a) (clerical mistakes, oversights and omissions in record by agency personnel) are suggested here. Also, Badger's request is untimely under Fed. R. Civ. Pro. 60(b), which authorizes relief from a judgment or order in appropriate circumstances. The rule requires that claims for relief due to "mistake, inadvertence, surprise, or excusable neglect" be raised not more than one year after the judgment or order is entered. Badger raised its claim to the Commission by letter of May 29, 1996, more than one year after entry of the final order. In any event, "the courts have uniformly held that Rule 77(d) bars Rule 60(b) relief when, as here, the *sole* reason asserted for that relief is the failure of a litigant to receive notice" *Art Specialty*, 16 BNA OSHC at 1696, 1994 CCH OSHD at p. 41,932 (quoting *Spika*, 763 F.2d at 286). Thus, no relief is appropriate here under any provision of Rule 60(b).

Commission Rule 41, 29 C.F.R. § 2200.41, addresses, in a general way, motions to set aside a judge's decision that dismisses a notice of contest based on a default. However, we do not construe that rule to provide relief that is inconsistent with that allowed under the specifically applicable Federal Rules.

Finally, we note that Badger appended to its request for relief what purports to be a copy of a letter addressed to OSHA's Area Director in Phoenix, AZ, signed by Badger's President and CEO, and dated 17 days after the judge's decision became the final order of the Commission, protesting that decision on notice grounds. (Unfortunately, any such protest should have been sent to the Commission rather than OSHA.) Assuming Badger sent that letter to OSHA, the letter indicates that Badger *actually knew* about the judge's decision more than a year before it requested relief from the Commission. Thus, although it could show some effort on Badger's part, it would also indicate that Badger's request for relief from the Commission was not "expeditiously made," as required by Commission Rule 41(b), or "made within a reasonable time," as required by Fed. R. Civ. P. 60(b).

Accordingly, we deny Badger's request for relief from the Commission's final order in this case. It is so ordered.


Stuart E. Weisberg
Chairman


Velma Montoya
Commissioner


Daniel Guttman
Commissioner

Dated July 25, 1996

UNITED STATES OF AMERICA
 OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

BADGER UNDERGROUND
 CONSTRUCTION, INC.
 Respondent.

Docket No. 94-3251

ORDER TO SHOW CAUSE
WHY NOTICE OF CONTEST SHOULD NOT BE DISMISSED

Respondent is **ORDERED TO SHOW CAUSE** on or before **FEBRUARY 6, 1995** why Respondent should not be declared to be in default and the citation(s) and penalties should not be affirmed due to its failure to file an answer to the complaint within the time permitted under the Commission Rules of Procedure.

Replies to this order are to be addressed to:

Judge Irving Sommer
 Occupational Safety and Health Review Commission
 One Lafayette Centre
 1120 20th Street, N.W. - 9th Floor
 Washington, D.C. 20036-3419

**FAILURE TO RESPOND TO THIS ORDER WILL RESULT IN ALL VIOLATIONS
 BEING ASSESSED AGAINST**

SENDER:
 Complete items 1 and/or 2 for additional services.
 Complete items 3, and 4a & b.
 Print your name and address on the reverse of this form so that we can return this card to you.
 Attach this form to the front of the mailpiece, or on the back if space does not permit.
 Write "Return Receipt Requested" on the mailpiece below the article number.
 The Return Receipt will show to whom the article was delivered and the date delivered.

94-3251 I also wish to receive the following services (for an extra fee):
 1. Addressee's Address
 2. Restricted Delivery
 Consult postmaster for fee.

3. Article Addressed to:
 Badger Underground Construction, Inc.
 5425 Onyx Drive
 Prescott, AZ 86303

4a. Article Number
 Z321177855

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

5. Signature (Addressee)
 [Signature]

6. Signature (Agent)
 [Signature]

7. Date of Delivery
 1/29/95

8. Addressee's Address (Only if requested and fee is paid)

Thank you for using Return Receipt Service.

Irving Sommer

G SOMMER
 Judge, OSHRC

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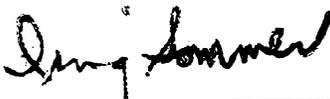
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Replies to this order are to be addressed to:

Judge Irving Sommer
Occupational Safety and Health Review Commission
One Lafayette Centre
1120 20th Street, N.W. - 9th Floor
Washington, D.C. 20036-3419

FAILURE TO RESPOND TO THIS ORDER WILL RESULT IN ALL VIOLATIONS BEING AFFIRMED AND ALL PROPOSED PENALTIES BEING ASSESSED AGAINST RESPONDENT WITHOUT A HEARING.



IRVING SOMMER
Chief Judge, OSHRC

DATED: January 23, 1995
Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that a copy of the Order was mailed to the parties listed below by first class mail on January 23, 1995.

Daniel W. Teehan, Regional Solicitor
U.S. Department of Labor
Office of the Solicitor
71 Stevenson Street, Room 1110
San Francisco, California 94105-2999
Attention: Alan M. Raznick, Esquire

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Badger Underground Construction, Inc.
5425 Onyx Drive
Prescott, AZ 86303


T.B. Dillard, Secre.

Post Office Address:
Judge Irving Sommer
OSHRC
One Lafayette Center
1120 20th Str., N.W. - 9th Floor
Washington, D.C. 20036-3419
(202) 606-5405 FAX (202) 606-5409

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on July 25, 1996.

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

Daniel Teehan
Office of the Solicitor, U.S. DOL
71 Stevenson St., Suite 1110
San Francisco, CA 94119-3495

William M. Laipple, President and
General Manager
Badger Underground Construction, Inc.
5425 Onyx Drive
Prescott, AZ 08603

FOR THE COMMISSION


Ray H. Darling, Jr.
Executive Secretary



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,

v.

BADGER UNDERGROUND CONSTRUCTION, INC
Respondent.

OSHRC DOCKET
NO. 94-3251

**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 March 15, 1995. The decision of the Judge will become a final order of the Commission on April 17, 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 April 4, 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: March 15, 1995

DOCKET NO. 94-3251

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel Teehan, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
71 Stevenson St., 10th Floor
San Francisco, CA 94119

Badger Underground Construction Co.
5425 Onyx Drive
Prescott, AZ 86303

Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
Washington, DC 20036 3419

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