United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Masonary Solutions, LLC, Respondent.	OSHRC Docket No. **06-0292**

Appearances:

Susan J. Willer, Esq., U. S. Department of Labor, Office of the Solicitor, Kansas City, Missouri
For Complainant

Mike Ray, Sr., President, *Pro Se*, Masonary Solutions, ,St. Charles, Missouri
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION DISMISSING NOTICE OF CONTEST AS UNTIMELY

On July 29, 2005, compliance officer Joseph Czaicki of the Occupational Safety and Health Administration (OSHA) inspected a construction site in St. Louis, Missouri, where Masonary Solutions, LLC (Masonary), was performing tuckpointing. As a result of the inspection, the Secretary issued two citations to Masonary on August 10, 2005.

The citations were mailed certified to Masonary, return receipt requested. OSHA's St. Louis Area Office never received the green card, and eventually the post office returned the unopened citation packet to OSHA's St. Louis Office unclaimed. In accordance with OSHA's procedures, Czaicki then hand delivered the citations to Masonary president James Michael Ray on October 13, 2005.

As set out in § 10(a) of the Occupational Safety and Health Act of 1970 (Act), and as noted on the first page of the Citation and Notification of Penalty issued to Masonary, the company had 15 working days to file a notice of contest. Masonary failed to meet this deadline. It was not until February 12, 2006, that the Review Commission in Washington, D. C., received a handwritten notice of contest directly from Masonary.

On May 5, 2006, the Secretary moved to vacate Masonary's late notice of contest. This case was assigned to proceed under Simplified Proceedings.

On June16, 2006, the undersigned held a hearing in St. Louis, Missouri, on the issue of Masonary's late notice of contest. President James Michael Ray represented his company *pro se*. Ray declined to stipulate jurisdiction and coverage. Post-hearing briefs were not requested or filed. For the reasons set out below, the undersigned concludes that Masonary's notice of contest was untimely filed, and it is vacated.

Facts

The relevant facts are not in dispute. Masonary is a small, family-owned masonry company, performing both commercial and residential work. At the dates relevant to this proceeding, Masonary rented office space at 2110A Chouteau Avenue in St. Louis. (At the time of the hearing, Ray was running Masonary's office out of his residence.)

On July 29, 2005, compliance officer Czaicki inspected a construction site on Chouteau Avenue in St. Louis, just down the street from Masonary's office. Czaicki held an opening conference and conducted a walk-around inspection with Mike Ray, Jr., son of James Michael Ray. After the inspection, Czaicki called the senior Ray on his cell phone and discussed the inspection with him. Czaicki knew Ray from a previous inspection when Ray was an employee working for another company (Tr. 42-46).

On August 10, 2005, the Secretary issued two citations to Masonary alleging serious and "other" violations of seven standards under the Occupational Safety and Health Act of 1970 (Act), and proposing penalties totaling $4,500.00. As is customary in its St. Louis office, OSHA mailed the citation packet certified, return receipt requested. On September 26, 2005, the citation packet was returned to OSHA as unclaimed (Tr. 17-24). OSHA assistant area director Thomas Briggs instructed Czaicki to hand deliver the citations to Masonary. Czaicki attempted to do this on September 29, 2005, but Masonary's office door was locked, and no one responded to his knocks that day. Czaicki returned to Masonary's office on October 13, 2005, accompanied by another compliance officer, and this time met with Ray. Czaicki identified himself to Ray and told him "he had to hand deliver these citations to him" (Tr. 46). Ray accepted the citation packet but refused to sign for it. Ray subsequently threw the citation packet (allegedly unopened) on his desk in his front

office where "they got shuffled around and lost" (Tr. 62-63). After receiving the citations on October 13, Masonary had 15 working days (until November 3) within which to contest them. During that time, OSHA did not receive any letters, telephone calls, or any other form of communication from Masonary (Tr. 27). OSHA considered the citations to become final orders on November 3. On December 14, 2005, OSHA mailed Masonary an abatement letter, sent both certified and by regular mail, and a debt collection letter, which Ray admittedly received (Tr. 27-33, 62).

Sometime later, Ray sent an undated letter directly to the Review Commission requesting "a late contest and review to these citations." The handwritten letter stated in pertinent part: "I am writing this letter to let you know that I had contested these citations verble (sic) over the phone" (Exh. C-5). The Review Commission received the letter on February 12, 2006. The St. Louis area office has no record of a telephone call being placed by Ray or any other representative of Masonary contesting the citations (Exh. C-2). Ray did not pursue evidence about an earlier telephone call.

The Secretary moved to vacate Masonary's late notice of contest. In its response to the Secretary's interrogatories, Masonary averred the citations "got misplaced and lost."

Coverage

Masonary declined to admit coverage. The Secretary elicited testimony from Ray establishing his company used grinders, masonry supplies, ladders, and scaffolds, which Ray acknowledge could be assumed to be manufactured throughout the United States. He also used a cell phone, a fax machine, and a computer to facilitate interstate commerce in its daily business (Tr. 55-56).

The Act covers employers, and under § 3(5) of the Act, "[t]he term 'employer' means a person engaged in a business affecting commerce who has employees. . . ." Ray admittedly has employees. The statutory phrase "affecting commerce" signals a broad sweep of jurisdiction, in contrast to the phrase "in commerce," which requires a more specific showing. *Usery v. Lacy*, 628 F.2d 1226, 1228 (9th Cir. 1980). Although it is the Secretary's burden to establish the employer is employed in a business affecting commerce, the evidence required to meet this burden is minimal. She has specifically established that Masonary used construction supplies, equipment and telephone service, as well as a computer. Further she has established that Masonary's business involves

construction. "[C]onstruction business is subject to OSHA regulation because the economic activity of . . . construction, as an aggregate, affects interstate commerce." 425 F.3d 861, 867 (10th Cir. 2005). Masonary is a covered employer within the meaning of § 3(5) of the Act.

Analysis

Section 10(a) of the Act provides that if an employer fails to file a notice of contest within 15 working days, the citation and proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency." Despite this language, the Commission has held since 1981 that it could exercise jurisdiction to excuse some inadvertent late filings under Federal Rule of Civil Procedure 60(b)(1). *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981).

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

> 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.

It is the employer's burden to show that it is entitled to relief under Rule 60(b). *Craig Mechanical Inc.*, 16 BNA OSHC 1763 (No. 92-372, 1994, *aff'd without opinion*, 55 F.3d 633 (5th Cir. 1996). Masonary does not claim OSHA committed any manner of fraud, misrepresentation, or other misconduct (Tr. 72). Ray acknowledges receiving the citation packet from OSHA. His only defense is that he misplaced the unread packet. Under Rule 60(b), this excuse fits best under an analysis for "excusable neglect." The key factor in evaluating whether an employer's delay in filing its notice of contest was due to excusable neglect is "the reason for the delay, including whether it was within the reasonable control of the movant." *Pioneer Inv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993).

Ray testified that the mail system in his office building was "a real problem" (Tr. 59). He explained there was a Phillips 66 gas station adjoining his building and that another tenant also rented space in his building (Tr. 59-60):

> Half the time my mail wound up over in their desk in their office. As an example, when I sign a contract with somebody, they generally put up a deposit of the job, generally a third. Then they mail me a check, okay. On many occasions, I

> never receive the checks, so I would call the customer and I would say, "I haven't received your check. I thought we were going to pursue," and blah, blah, blah. "I mailed that to you a week ago." All right. I would walk next door. "You guys got any of my mail over here?" "I'm not sure." Now, you have to remember we're dealing with young kids over there that run this Phillips 66 gas station. Sometimes they had my mail; sometimes my mail got thrown out.
>
> So, you know, as far as me ever seeing a certified document or something, no. But the mail was a real problem around there. We weren't there–there was nobody at that office from 8:00 to 5:00 on a regular basis. . . . You know, there were days I didn't show up for two or three days.

Ray stated that he failed to receive numerous checks that had been mailed to him, including a check for $8,000.00 (Tr. 75). When he missed a check, he would contact the individual or business who wrote the check. The individual or business would put a stop payment on the first check, then issue another one to Ray in person. Despite the inefficiency of this system, Ray never attempted to remedy the situation.

Ray's method of handling hand-delivered mail is similarly haphazard. Ray testified Czaicki met with him on October 13, 2005, and handed him an orange envelope and asked him to sign for it. Ray refused, stating, "I'm not signing for them until I can look at them" (Tr. 63). Ray took the envelope. Then, he stated, "I threw them on the desk and I went out" (Tr. 63). Despite the personal delivery and the request for his signature, Ray never opened the envelope, stating he had no reason to believe it contained anything important (Tr. 64). After that, Ray testified, the envelope "got lost" (Tr. 73). Ray stated, "They just got misplaced. Out of sight, out of mind" (Tr. 68).

This was not Ray's first encounter with OSHA. When he worked as a foreman for E & R Tuckpointing, OSHA conducted an inspection of one of that company's sites and issued a citation to E & R. Because Ray was the foreman in charge of the site, E & R improperly instructed him to handle the OSHA paperwork and pay the penalty. Ray went to OSHA's St. Louis area office and met with assistant area director Thomas Briggs. Ray signed an informal settlement agreement and arranged to pay $100.00 a month until the penalty was paid off (Tr. 67, 69-70).

Ray was familiar with OSHA's procedures and cognizant of the deadlines and penalties associated with citations. His repeated statements that he had no reason to think the envelope contained anything important are undermined by his position as an employer and his experience in

dealing with OSHA. The circumstances attendant to his receipt of the orange envelope would put a reasonable person on notice that the envelope contained important documents.

> The Commission expects employers to "maintain orderly procedures for handling important documents." *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 1987-90 CCH OSHD ¶ 28,409 (No. 86-1266, 1989). "The Commission has consistently denied relief to employers whose procedures for handling documents were to blame for untimely filings" of NOC's. *E. K. Construction Co.*, 15 BNA OSHC 1165, 1166, 1991-93 CCH OSHD ¶29,412, p. 39,637 (No. 90-2460, 1991).

NYNEX, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999).

Masonary has failed to establish that its failure to file a timely notice of contest was the result of excusable neglect or of any other rationale under Rule 60(b). Accordingly, the Secretary's motion to vacate Masonary's late notice of contest is granted.

ORDER

Based upon the foregoing decision, it is hereby ordered that the Secretary's motion to vacate Masonary's late notice of contest as untimely is GRANTED. The citation and penalty of $4,500.00 constitute a final order of the Commission. Masonary's untimely notice of contest is vacated.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: July 10, 2006