

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant

v.

Cipriano Martinez dba Martinez Masonry,

Respondent.

OSHRC Docket No. **06-1073**

Appearances:

Mary L. Bradley, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

John V. Esposito, Esquire, Law Office of John V. Esposito, Hilton Head Island, South Carolina
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

This proceeding under § 10 of the Occupational Safety and Health Act (Act) is to determine whether the untimely notice of contest filed by Cipriano Martinez d/b/a/ Martinez Masonry (Martinez Masonry) is excused pursuant to Rule 60(b), Federal Rules of Civil Procedure. Under Commission Rule 61, 29 C.F.R. §2200.61, the parties on October 12, 2006, moved for a decision on the record which the parties stipulated consisted of Exhibits A - K. The parties did not believe a hearing on the issue was necessary. The parties filed briefs on the stipulated record.

There is no dispute the three citations issued by the Occupational Safety and Health Administration (OSHA) on May 8, 2006, were received by Martinez Masonry on May 10, 2006, and Martinez Masonry filed its notice of contest on June 8, 2006, more than twenty working days after receipt of the citations. The parties agree the notice of contest should have been postmarked by June 1, 2006 (Exhs. A, B, C, D, and E).

Martinez Masonry seeks relief under Rule 60(b) on the basis that owner Cipriano Martinez's failure to timely file the notice of contest was due to an illness which he described as "flu-like" symptoms from March, 2006 until June 19, 2006 (Exh. E). The Secretary argues the record fails to show Martinez's illness prevented him from filing a timely notice of contest.

Having reviewed the stipulated record and the parties' briefs, the court for the reasons stated finds Martinez Masonry's late notice of contest is not excused under Rule 60(b). The citations and proposed penalties issued May 8, 2006, are affirmed.

Background

Cipriano Martinez is engaged in the masonry business and is doing business under the name "Martinez Masonry." He has owned and operated Martinez Masonry for twelve years. He has worked in the masonry business for twenty-five years. Martinez Masonry employs 18 employees (Exhs. E, M).

On December 7, 2005, a Martinez Masonry's project at 4650 McCall Road, Rincon, Georgia was inspected by OSHA. The OSHA inspector spoke personally to owner Martinez on the second day of the inspection and advised him of the violations and abatement requirements (Exh. K). As a result of the OSHA inspection, Martinez Masonry received on May 10, 2006, three citations for violations of the scaffolding and hazard communication standards (Exh. A).

The serious citation alleges Martinez Masonry violated 29 C.F.R. § 1926.451(e)(9)(iv) and proposes a penalty of \$2,000.00. The repeat citation alleges Martinez Masonry violated 29 C.F.R. § 1926.451(e)(1) (item 1), 29 C.F.R. § 1926.451(f)(7) (item 2), and 29 C.F.R. § 1926.451(g)(1) (item 3). The repeat citation proposes total penalties of \$36,000.00. The "other" than serious citation alleges Martinez Masonry violated 29 C.F.R. § 1910.1200(e)(1) (item 1), 29 C.F.R. § 1910.1200(g)(1) (item 2), and 29 C.F.R. § 1910.1200(h)(1) (item 3). The "other" citation proposes no penalty.

The citations were mailed to Martinez Masonry by certified mail on May 8, 2006. On May 10, 2006, a representative signed the return receipt on behalf of Martinez Masonry (Exh. B). Martinez identified his wife as the representative who received the citations. Martinez agrees he saw the citations a few days later (Exh. M). On June 8, 2006, twenty working days after receiving the citations, Martinez Masonry dated its notice of contest and sent a facsimile copy to the OSHA Area Director (Exh. C, D).

The OSHA Area Director, by letter dated June 13, 2006, informed Martinez Masonry that its notice of contest was late and advised him to write a letter to the Review Commission (Exh. D). On July 6, 2006, Martinez Masonry, acknowledging the notice of contest should have been filed on or before June 1, 2006, notified the Review Commission that it was seeking relief under Rule 60(b) because owner Martinez was prevented from seeing his attorney to file a timely notice of contest due to his flu-like symptoms (Exh. E). The Secretary on August 17, 2006, filed her opposition to relief under Rule 60(b).

Discussion

There is no dispute that Martinez Masonry's notice of contest was not timely filed within the statutory 15-working days of receipt of the citations. Section 10(a) of the Act provides:

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 or proposed assessment of penalty, and no notice is filed by any employees or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed shall be deemed a final order of the Commission and not subject to review by any court or agency.

The Review Commission, however, has accepted an otherwise untimely notice of contest where it was shown the delay in filing was caused by deception on the part of the Secretary, the Secretary failed to follow proper procedures, or the late filing was due to "mistake, inadvertence, surprise, or excusable neglect." Rule 60(b), Fed. R. Civ. P.¹ See *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981), *Jackson Associates of Nassau*, 16 BNA OSHC 1261, 1264 (No. 91-0438, 1993). To establish a sufficient basis for such relief, the burden is on the employer. *Roy*

¹Rule 60(b), Fed. R. Civ. P., states, in part, that
on motion and upon such terms as are just, the court may relieve a party....from a final judgment, order, or proceeding from the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Kay, Inc., 13 BNA OSHC 2021 (No. 88-1748, 1989). The issue before the court is whether the untimely filing of the notice of contest should be excused in the circumstances.

There is no dispute that Martinez Masonry's failure to timely file its contest was not the result of misconduct or misleading of the Secretary. Also, Martinez Masonry does not assert the Secretary failed to follow proper procedures.

In this case, which arises in the Eleventh Circuit,² Martinez Masonry is asserting its late filing was due to Cipriano Martinez's illness described as "flu-like" symptoms which delayed him from contacting his attorney to file a timely notice of contest. The parties agree the issue is whether this illness constituted "excusable neglect" under Rule 60(b).

In reviewing "excusable neglect," the Commission has adopted the Supreme Court's test in *Pioneer Inv. Serv. v. Brunswick Assoc.*, 507 U.S. 380, 395 (1993) which takes into consideration "all relevant circumstances" including "the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Northwest Conduit Corp.*, 18 BNA 1948, 1950 (No. 97-851, 1999). A key factor in determining whether a late filing was due to excusable neglect is "the reason for the delay, including whether it was within the reasonable control of the movant." *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-367, 2000). Rule 60(b)(1) requires a showing of "excusable" neglect rather than mere negligence or carelessness.

Upon receiving the citations, Martinez Masonry was clearly informed of the need to file a notice of contest within 15 working days if challenging the citations. The second page of the citations, under the subheading "Right to Contest," Martinez Masonry was provided all the necessary information to file his own notice of contest and preserve his rights. The Citation and Notification of Penalty does not provide for any exceptions to the notice of contest requirements. Martinez

²Unlike the Second Circuit in *Chao v. Russell P. LeFrois Builders Inc.* 291 F.3d 219 (2nd Cir. 2002) which held the Commission does not have authority to accept a late notice of contest pursuant to Rule 60(b), the Review Commission has continued to apply Rule 60(b) to late notice of contests in cases arising in the other circuits. See *HRH Construction Corp.*, 19 BNA OSHC 2042 (No. 99-1614, 2002); *Taj Mahal Contracting*, 20 BNA OSHC 2020 (No. 03-1088, 2004).

Masonry bears the burden of its own lack of diligence in failing to carefully read and act upon the information contained in the citations.

In this case, the three citations were received by Martinez Masonry on May 10, 2006. According to his affidavits, the citations were received by his wife and Capriano Martinez saw them a couple days later, well within the statutory 15-working day period (Exhs. E, M). It is noted, Martinez Masonry had prior experience in handling OSHA citations. The record shows Martinez Masonry had received OSHA citations three times previously; February 1, 2005, July 8, 2004, and January 8, 2003 (Exh. F). The July 8, 2004 citations were settled through an informal settlement agreement dated August 24, 2004 (Exh. G). The other two citations were referred to and are now pending in Debt Collection (Exh. H).

Based on the written notification in the citations received May 10, 2006, and his prior experience in handling OSHA citations, Martinez not only had actual knowledge of the alleged violations, but was also aware that his contest needed to be filed within fifteen (15) working days after receipt of the citations.

Despite his knowledge of the OSHA requirements, Martinez chose not to file its notice of contest or contact his attorney until almost a month after receiving the citations. The excuse Martinez Masonry has made for the late filing is that Martinez was suffering a “flu-like” condition beginning March 2006 through June 2006, which prevented him from contacting his attorney to file the contest. According to Martinez Masonry, there was no one else in the company, at that time, authorized to handle the matter (Exh. E, M).

To support its claim of illness, Martinez Masonry attached a copy of medical records for Martinez (Exh. E). The medical records show one visit to a medical facility on March 6, 2006, two months prior to the issuance of the citations, with complaints of a cough, fever, chest soreness and vomiting. The doctor prescribed a drug (Diadin XL, 500 MG) and rendered a diagnosis of what appears to be “bronchitis.” Also, in the medical record was a doctor report dated July 5, 2006, indicating that Martinez was medically excused from work on June 19, 2006. He was able to return to work without limitations on June 20, 2006. It is noted the medical excuse for one day does not identify the reason for the excused absence and it occurred after the applicable notice of contest period. There are no medical reports reflective of Martinez’s physical condition during the

applicable contest period. The record is devoid of documentation showing Martinez was so medically incapacitated that he was unable to handle important business papers such as OSHA citations. Martinez was not confined to a hospital or even restricted to home at any time during the contest period.

In addition to the lack of medical documentation to support its claim that “flu-like” symptoms prevented Martinez from filing a timely notice of contest, Martinez’s affidavit , in fact, indicates he was able to continue working during this time. He states that

I was very sick for many weeks, and I was only able to work on a restricted basis. This condition persisted through June. As such, unfortunately, I was not able to work on a full-time basis, and to otherwise attend to all of my affairs, including the subject Citation (Exh. E, p.3).

When the citations were received, Martinez continued to operate his business at least on a restricted basis. Also, Martinez explained that at the time the citations were issued, he had not delegated the responsibility for handling the notice of contest to another employee. Since this incident, he has apparently re-organized the company by making such delegation (Exh. M, p. 7).

Martinez Masonry bears the burden of its own lack of diligence in failing to act upon information contained in the Citation and Notification of Penalty. *Acrom Construction Services, Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). Martinez chose not to give priority to handling important papers such as the OSHA citations. Instead, he continued to operate his business, even if sick and on a restricted basis. It was within his control and choice. His decision to file the notice of contest late is not shown due to his illness but his simple negligence. The onus is upon the employer to see that OSHA matters are handled properly. There is no showing that Martinez made a reasonable or good faith effort to assure that his own legal interests were protected.

A business has a duty to, at a minimum, institute procedures to ensure business documents are treated in a timely manner especially those concerning court procedures or those that come to its attention via certified mail. Businesses, such Martinez Masonry, are expected to maintain orderly procedures for the handling of important documents and that when the lack of such procedures result in an untimely notice of contest, the late filing is deemed to be simple negligence and not excusable neglect. *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989).

Martinez received the citations no later than “several days” after May 10, 2006. He knew of the fifteen-working day statutory period for contesting citations. He knew that if not filed by

June 1, 2006, the citations became a final order. And, he also knew that if he wanted to appeal the citations, he had to contact the Commission. Yet, he took no action until June 8, 2006. Martinez continued to work on a restricted basis yet failed to ensure that the OSHA citations were treated in a timely manner.

Based on the medical information available, Martinez was not hospitalized or work restricted except for one day on June 19, 2006, well after the notice of contest filing deadline. The record in this case reflects Martinez's indifference to the filing obligations which precludes relief under Rule 60(b).

In other OSHA cases involving illness and similar absences, the courts have not found "excusable neglect." For example, see *Construction 2000 Inc.*, 20 BNA OSHC 1911 (No. 03-1994, 2004, ALJ) (failure to have procedures to handle important business matter when owner out of town tending to sick relative is simple negligence, not excusable neglect); *Boca Bay Enterprises, Inc.*, 18 BNA OSHC 1418 (No. 97-0554, 1997, ALJ) (employer's failure to provide a system for monitoring important mail during his illness did not excuse late filing); *Dandee Creations, Ltd.*, 17 BNA OSHC 1666 (No. 95-0429, 1996, ALJ) (office typist's illness did not excuse delay in filing notice of contest); and *R.C. Smith*, 4 BNA OSHC 1953 (No. 10888, 1976) (absence from the country did not excuse late filing of contest).

Also, Martinez Masonry cannot justify its failure to submit a timely notice of contest without legal representation. The requirements for contesting a citation are not onerous and are clearly spelled out. Nothing about the process requires the expertise of a lawyer, and nothing precluded Martinez Masonry from following OSHA's instructions.

Further, Martinez Masonry has not shown meritorious defenses to the citations. Martinez Masonry has not established the citations are invalid or he had a defense to the outcome. The defenses asserted involve credibility determinations (Exh. M).

While the court is not unsympathetic to Martinez Masonry's situation, the circumstances here are not sufficient to establish that it is entitled to relief under Rule 60(b). The instructions in OSHA's notification are clear and unambiguous. Martinez Masonry's neglect was neither excusable nor justified. By its failure to file timely, the court lacks jurisdiction to review the notification or additional penalties.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED:

Citation No. 1, Item 1, serious violation of § 1926.451(e)(9)(iv), is affirmed and penalty of \$2,000.00 is assessed.

Citation No. 2, Item 1, repeat violation of § 1926.451(e)(1), is affirmed and penalty of \$4,000.00 is assessed.

Citation No. 2, Item 2, repeat violation of § 1926.451(f)(7), is affirmed and penalty of \$4,000.00 is assessed.

Citation No. 2, Item 3, repeat violation of § 1926.451(g)(1), is affirmed and penalty of \$28,000.00 is assessed.

Citation No. 3, Item 1, “other” than serious violation of § 1910.1200(e)(1), is affirmed and no penalty is assessed.

Citation No. 3, Item 2, “other” than serious violation of § 1910.1200(g)(1), is affirmed and no penalty is assessed.

Citation No. 3, Item 3, “other” than serious violation of § 1910.1200(h)(1), is affirmed and no penalty is assessed.

/S/ Ken S. Welsch
KEN S. WELSCH
Judge

Date: December 14, 2006