



that Atlantic received the citation on July 30, 1997, and that the final day to file a notice of contest was August 20, 1997; the record also establishes that Atlantic's notice of contest was not filed until October 2, 1997, after which the Secretary filed her motion to dismiss.

#### Discussion

The record plainly shows that Atlantic did not provide notice of its intent to contest the citation and proposed penalties until after the expiration of the 15-working-day period. The issue in this case is whether the untimely filing may be excused under the circumstances. An otherwise untimely notice of contest may be accepted where the delay in filing was caused by deception on the part of the Secretary or by the Secretary's failure to follow proper procedures. An employer is also entitled to relief under Federal Rule of Civil Procedure (60)(b)(1) if it demonstrates that the Commission's final order was entered as a result of "mistake, inadvertence, surprise, or excusable neglect," or under Federal Rule of Civil Procedure 60(b)(6) for mitigating circumstances such as absence, illness, or a disability which would prevent a party from protecting its interests. *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no contention and no evidence that the Secretary acted improperly in this matter; however, Atlantic requests that its failure to file a timely notice of contest be excused due to the administrative changes it was undergoing during the time when the OSHA citation was received.

John Keating, Atlantic's controller, testified that the employee who was responsible for OSHA matters left the company on August 1, 1997, that the employee informed him on that day that he was still waiting to hear about the results of the OSHA inspection, and that the employee also left him a list of items that needed to be corrected based on his having accompanied the OSHA compliance officer ("CO") during the inspection. Keating further testified that although Atlantic had received the citation on July 30, 1997, based on C-2, a copy of the certified mail return receipt card signed by Irene Brown, the company's receptionist, the citation had evidently been misplaced and he himself knew nothing about it until September 23, 1997, when OSHA called Atlantic.<sup>1</sup> Keating said that the citation could have been lost due to the fact that Brown, who now works part-time, was training a new receptionist, as well as the fact that the employee who left was in the process of cleaning out his

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<sup>1</sup>The record shows that the purpose of the call was to determine whether the cited conditions had been abated. (Tr. 12-13).

office; he also said that Brown had never misplaced anything before to his knowledge but that Atlantic in any case has instituted a new mail-handling system to avoid a recurrence of this kind of situation in the future. (Tr. 16-22). *See also* C-3, Atlantic's notice of contest, and the company's post-hearing letter.

The cover letter to the citation issued to Atlantic states, in the first paragraph, 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.

In addition, page 2 of the cover letter has a paragraph which provides as follows:

**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 state(s) the requirement to file a notice of contest within the prescribed time period." *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). *See also Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). The Commission has also held that a business must have orderly procedures for the handling of important documents and has denied relief where the employer claimed that the late filing was due to reasons such as management changes, improper handling of the citation by company personnel, and the absence of the person responsible for OSHA matters. *See Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989); *J.F. Shea Co.*, 15 BNA OSHC 1092, 1094 (No. 89-976, 1991); *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460); and cases cited therein.

On the basis of Keating's testimony, it would appear that the citation in this case was mishandled by one of the clerical workers when it was received or that it was overlooked by the outgoing employee who was responsible for taking care of it. However, in light of the foregoing Commission precedent, which I am constrained to follow, neither of these factual circumstances

establishes excusable neglect such that Atlantic is entitled to Rule 60(b) relief; to the contrary, the record in this case demonstrates that the late filing of the notice of contest was due to simple negligence, and it is well settled 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). Although I am sympathetic to Atlantic’s plight in this matter, I have no choice but to deny its request for relief and to grant the Secretary’s motion to dismiss.

Order

For the reasons set out above, the Secretary’s motion to dismiss is GRANTED, and the citation and notification of penalty is AFFIRMED.

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Irving Sommer  
Chief Judge

Date: