



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1120 20th Street, N.W., Ninth Floor
 Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 98-0150
	:	
J & B MASONRY AND	:	
CONSTRUCTION, INC.,	:	
	:	
Respondent.	:	

APPEARANCES:

Helen J. Schuitmaker, Esquire
 Chicago, Illinois
 For the Complainant.

Jan Borkowski
 Chicago, Illinois
 For the Respondent, *pro se.*

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”), to determine whether Respondent J & B Masonry and Construction, Inc. (“J&B”) filed a timely notice of contest of a citation and notification of penalty issued by the Occupational Safety and Health Administration (“OSHA”). The Secretary filed a motion to dismiss the notice of contest on March 17, 1998, and the hearing in this regard took place on May 13, 1998. Neither party has filed a post-hearing brief in this matter.

Background

The citation setting forth the alleged violation and the proposed penalty was issued to J&B on September 8, 1997. Pursuant to section 10(a) of the Act, J&B was required to notify OSHA of its intent to contest the citation within 15 working days of its receipt of the citation, and failure to file a timely notice of contest would result in the citation and proposed penalty becoming a final judgment

of the Commission by operation of law. The record shows that OSHA mailed the citation by certified mail, that J&B received the citation on September 15, 1997, and that the 15-day notice of contest period ended on October 6, 1997. The record also shows that J&B did not file its notice of contest until well after the 15-day period, after which the Secretary filed her motion to dismiss due to the untimeliness of the notice of contest.¹ (Tr. 4-8; C-1; R-1).

Discussion

The record establishes that J&B did not provide notice of its intent to contest the citation and proposed penalty until after the expiration of the 15-working-day period. The issue to be resolved 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 shows 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 "any other reason justifying relief," including mitigating circumstances such as absence, illness, or a disability which would prevent a party from protecting its interests. *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no contention and no evidence that the Secretary has acted improperly in this matter. Rather, J&B's contention would appear to be that the untimely filing was due to excusable neglect.

Jan Borkowski, J&B's president, testified that he spoke to the OSHA compliance officer ("CO") who had conducted the inspection the day after he received the citation, that the CO told him that he should make an "appeal," and that he thought that his conversation with the CO was sufficient.² Borkowski conceded his fault in this matter, but said that this was his first experience with an OSHA citation, that he had not really read the citation, and that he had in any case lost the citation after receiving it; he also said that his company was very small, consisting at times of himself and one

¹The record establishes that J&B filed two notice of contest letters, both of which were untimely. The first is an undated letter that was received by the Commission on December 8, 1997, while the second, R-1, is a virtually identical letter dated January 12, 1998; according to the record, the Commission received this second letter on January 29, 1998.

²The CO did not recall any conversations with Borkowski after the inspection. (Tr. 7).

other worker, that his office was in his home, and that he had been very busy with work during the period of time in which he had received the citation.³ (Tr. 10-19).

The cover letter to the citation issued to J&B 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). The Commission has also held that inexperience in OSHA matters and ignorance of procedural rules, even by a layman, do not constitute excusable neglect for purposes of Rule 60(b) relief. *Id. See also Acrom Constr. Serv.*, 15 BNA 1123, 1126-27 (No. 88-2291, 1991). Finally, the Commission has held that a business must have orderly procedures for the handling of important documents and 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.” *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989).

Applying the foregoing to the facts of this case, J&B is not entitled to Rule 60(b) relief. First, J&B has been a going concern since 1990, and, as such, it should have had procedures in place for the proper handling of important matters such as the OSHA citation. (Tr. 11). Second, Borkowski is the individual who reads and signs the contracts relating to his business, and, in the exercise of due

³Borkowski indicated that the citation was stolen from his car. (Tr.17).

diligence, he should have been aware of the 15-day notice of contest filing requirement. (Tr. 12-13). Third, Borkowski himself acknowledged his fault in this matter, and none of the reasons he asserted for not filing a timely notice of contest constitute “excusable neglect.” (Tr. 19). Although I am sympathetic to J&B’s plight, I am constrained by the Commission precedent set out above and by the record to conclude that the failure to file a timely notice of contest in this case was not due to excusable neglect or any other reason justifying relief under Rule 60(b).

Order

For the reasons set out *supra*, the Secretary’s motion to dismiss the notice of contest is GRANTED, and the citation and notification of penalty is AFFIRMED in all respects.

Irving Sommer
Chief Judge

Date: