

SECRETARY OF LABOR,

Complainant,

v.

WESTERN NATIONAL CONSTRUCTION,

Respondent.

OSHRC DOCKET NO. 03-1538

APPEARANCES:

For the Complainant:

Kim Prichard Flores, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

Before: Administrative Law Judge: Sidney J. Goldstein

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

On March 3, 2003, OSHA issued a citation to Respondent, Western National Construction (Western). The citation was sent by certified mail to an Irvine, California address provided by Western's project supervisor during OSHA's January 2003 inspection of Western's work site at 4675 Alta Point, Colorado Springs, Colorado (Tr. 7-8; Exh. C-2, C-6). The citation was received on March 10, 2003 (Tr. 11; Exh. C-2). On March 31, 2003, the citation became a Final Order of the Commission pursuant to §10(c) of the Act. On May 1, 2003 and again on July 23, 2003, collection letters were sent to Western at the Irvine address (Exh. C-1, C-3, C-4).

On August 25, 2003, an undated letter from Mike Sibley, president of Courage Safety Systems, L.L.C., was received by the Commission's Office of the Executive Secretary (Exh. C-5). The letter states that Courage Safety Systems represents Western National Construction, and asks that Western be permitted to file a late notice of contest. In the letter Sibley represents that "through some misfortune this citation was never put into the hands of the appropriate person and has since fallen through the cracks." On September 9, 2003, the Commission assigned the above captioned case to this judge for a determination on the merits of Respondent's request for relief.

On October 6, 2003, The Secretary filed a motion to vacate Western's late notice of contest. A hearing, originally scheduled for November 10, 2003, was rescheduled. Both parties were notified of the new date, and the hearing was held on December 15, 2003. Neither Respondent nor its representative appeared at the hearing.

The Commission has held that a party filing a late notice of contest may obtain Commission review by filing a motion for relief from judgment or order under F.R.C.P. 60(b), which allows for such relief in cases of "mistake, inadvertence, surprise, or excusable neglect". The burden is on the respondent to show sufficient basis for relief under rule 60(b). *Branciforte Builders Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981); *Keefe Earth Boring Company, Inc.*, 14 BNA OSHC 2187, 1991-93 CCH OSHD ¶29,277 (No. 88-2521, 1991). The letter from Courage Safety Systems does not set forth a sufficient basis for relief from judgment; moreover, as of this writing Western National Construction appears to have abandoned its request for relief from judgement. The Secretary's motion to vacate the late notice of contest is GRANTED, and the citation is AFFIRMED in its entirety.

/s/

Sidney J. Goldstein
Judge, OSHRC

Dated: January 21, 2004