UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. J4 Welding, Inc., Respondent.	OSHRC Docket No. **12-0645**

Appearances:

Brooke D. Werner McEckron, Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia
For Complainant

Jimmy X. Merino, Owner, *pro se*, J4 Welding, Inc., Coral Springs, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

This late notice of contest proceeding is before the Review Commission pursuant to § 10(a) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. § 659(a). The Secretary of Labor moves to dismiss, as untimely, the notice of contest filed by J4 Welding Inc. (J4W) on February 7, 2012, as to a serious citation issued on February 4, 2011, by the Occupational Safety and Health Administrative (OSHA). The citation was issued to J4W after an OSHA inspection of a remodeling project at commercial strip mall in Coral Springs, Florida, on October 4, 2010. J4W's contest was filed approximately 12 months after receipt of the citation.

J4W opposes the Secretary's motion and claims relief under Rule 60(b), Federal Rules of Civil Procedure (FRCP). J4W's owner argues that the OSHA Industrial Hygienist mislead him by telling him during a telephone conversation after receipt of the citation to "don't worry about it" and "put it (citation) away." J4W's owner also claims that he does not read English well.

A hearing on J4W's entitlement to relief under Rule 60(b) was held on July 17, 2012, in Fort Lauderdale, Florida. J4W is represented by its owner, Mr. Jimmy Merino, *pro se*.

As discussed, J4W's notice of contest is dismissed as untimely and the citation is affirmed.

Statement of Facts

J4W, a corporation, was engaged in business as a mobile welding contractor in Coral Springs, Florida. According to Mr. Merino, J4W was closed in early 2012 and was dissolved (Tr. 96). The Florida Department of State shows that J4W was dissolved on September 23, 2011 (Exh. C-6). Mr. Merino was J4W's only employee. Its office was located in Mr. Merino's home in Coral Springs, Florida.[1] J4W had been in business for less than five years (Tr. 81-82).

On October 4, 2010, J4W was performing mobile welding work, as a subcontractor, for the remodeling of strip mall in Coral Springs, Florida when the project was inspected by an OSHA Industrial Hygienist (Tr. 42). According to the Industrial Hygienist, Mr. Merino was observed crossing from an aerial lift onto a building without proper fall protection. During the closing conference, he advised Mr. Merino that if a citation was issued, he had 15 working days to file a notice of contest (Tr. 43-44).

As a result of the inspection, OSHA issued to J4W a Citation and Notification of Penalty on February 4, 2011 for alleged serious violations of 29 C.F.R. § 1926.453(b)(2)(iv) (item 1), 29 C.F.R. § 1926.453(b)(2)(v) (item 2), and 29 C.F.R. § 1926.501(b)(1) (item 3). The citation proposed a total penalty of $ 9,000.00 (Exh. C-3).

On February 9, 2011, a package containing the Citation and Notification of Penalty and an OSHA 3000 booklet entitled "Rights and Responsibilities of Employers" was sent via certified mail to J4W's mailing address in Coral Springs, Florida (Exh. C-2). The package was returned as "unclaimed" to OSHA on February 11, 2011 (Exh. C-1; Tr. 50, 53-54).

On March 21, 2011, the OSHA Industrial Hygienist and a safety compliance officer drove to J4W's address to attempt personnel service. When no one answered the door, the package, containing the Citation and 3000 booklet, was left at the location (Exh. C-5; Tr. 54-55, 77).

[1] [redacted].

Mr. Merino acknowledges he received the citation in March 2011 (Tr. 82-83). After receipt of the citation, Mr. Merino telephoned the OSHA office to speak to the Industrial Hygienist. Mr. Merino wanted to discuss the amount of the penalty. According to Mr. Merino, the Industrial Hygienist told him "Don't to worry about it" and "put it away" (Tr. 84-85). The Industrial Hygienist denied making the statements (Tr. 67). He recalls that the penalty was discussed.

On March 7, 2012, almost a year after receipt of the citation, Mr. Merino went to the OSHA office to discuss the $ 9,000.00 penalty. He had received penalty due notice (Exh. C-4; Tr. 26, 33). The Assistant Area Director informed him that the 15 working day notice of contest period had expired, and he could not change the penalty amount. He advised Mr. Merino to file a notice of contest with the Review Commission.

J4W filed its notice of contest by letter dated February 7, 2012. The letter acknowledges the contest was late. It did not refer to the telephone conversation with the Industrial Hygienist. The Secretary filed the motion to dismiss the late notice of contest on May 7, 2012.

DISCUSSION

Section 10(a) of the Act provides that unless an employer's notice of contest is filed within 15 working days of receipt of the citation and assessment of penalty, "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." 29 U.S.C. § 659(a).

There is no dispute that J4W's contest was not filed within 15 working days after receipt of the citation. It was filed almost a year after the citation was left at J4W's office on March 21, 2011. Mr. Merino testified that he received the citation in March 2011 (Tr. 82-83). Based on Mr. Merino's acknowledgment, the citation was properly served by hand delivery. The actual notice of a citation is sufficient, even if the manner in which the citation was sent was imperfect. See, *P & Z Company, Inc.,et. al*, 7 BNA OSHC 1589, 1591 (No. 14822, 1979); *General Dynamics Corp.*, 15 BNA OSHC 2122, 2126 (No. 87-1195, 1993).

Mr. Merino's telephone conversation with the Industrial Hygienist after receipt of the citation is not deemed a timely notice of contest because, even if made within 15 days, it was not in

writing.[2] *Acrom Construction Services Inc.,* 15 BNA OSHC 1123, 1125 (No. 88-2291, 1991) (an oral notice of contest is not sufficient means of contesting a citation).

An otherwise untimely notice of contest is accepted, however, by the Review Commission if the delay was caused by mistake, inadvertence, surprise, or excusable neglect under Rule 60(b)(1), fraud, misrepresentation, or misconduct under Rule 60(b)(3), or any other reason justifying relief including mitigating circumstances such as absence, illness or disability that would prevent a party from protecting its interests under Rule 60(b)(6). The employer seeking relief has the burden of proving entitlement to Rule 60(b) relief. *Burrows Paper Corp.,* 23 BNA OSHC 1131 (No. 09-1559, 2010).

In this case, J4W argues the telephone conversation with the OSHA industrial hygienist misled him into believing that his concern regarding the amount of the penalty was handled. Also, he claims excusable neglect based on his inability to read English well. The Rule 60(b) criteria of fraud, misconduct, mistake, inadvertence, surprise, or other mitigating circumstances are not alleged or shown to have prevented J4W from timely filing its notice of contest.

J4W's Claim of Misrepresentation

The citation received by J4W on its face warned that unless a written notice of contest was timely filed, the citation and proposed penalties would become a final, non-reviewable order. The requirement to contest a citation within 15 working days is clearly spelled out on the second page of the citation in bold and underlined text in the section entitled "Right to Contest" (Exh. C-3). It states that "**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."** There are at least six other references in the citation informing an employer of the need to file a timely notice of contest. Also, the OSHA 3000 booklet, which accompanied the citation, clearly explained the requirement to file a timely notice of contest (Exh. C-2). This booklet has been found by the Review Commission to provide employers an "additional, straightforward explanation" of the

[2] Neither party could establish the date of the telephone call.

need to file a timely contest. *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991).

J4W's claim of misrepresentation under Rule 60(b) is not supported by the record. The Industrial Hygienist denies telling Mr. Merino to "don't worry about it" and "put it away." He recalls discussing the penalty during the telephone conversation and advising Mr. Merino that the penalty could be reduced (Tr. 67). He also recalls specifically telling Mr. Merino of the contest period during the closing conference on October 4, 2010 (Tr. 43-44).

What Mr. Merino understood from the telephone conversation was not misrepresentation but at best was a misunderstanding or misconception of the conversation. The blame for Mr. Merino's confusion is not attributable to the Secretary. His confusion resulted from a lack of knowledge of OSHA procedures and his failure to fully read the citation or 3000 booklet. The Industrial Hygienist was not shown to have misled Mr. Merino or act improperly. There was nothing about the conversation, even as described by Mr. Merino that would have led a reasonable person to believe a timely notice of contest did not need to be filed.

If Mr. Merino had read the citation or the 3000 booklet, he would have known that he needed to file a written notice of contest within 15 working days after receipt of the citation. He testified that "No, I don't read the whole citation. The only thing I read is the first page about the money. That's all. The rest of it, I haven't read" (Tr. 116). His failure to read the citation shows a lack of diligence in preserving the company's right.

Rule 60(b) does not "give relief to a party who has chosen a course of action which in retrospect appears unfortunate." *Sadowski v. Bombardier Ltd.*, 539 F.2d 615, 618 (7th Cir. 1976). Also, mere carelessness or simple negligence in dealing with mail from OSHA does not entitle J4W to Rule 60(b) relief. *Keefe Earth Boring Co., Inc.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991).

Even if considered misconduct by the Industrial Hygienist, which the court does not conclude, "relief is appropriate only when prejudicial government misconduct is coupled with a reasonable degree of diligence by the employer." *Craig Mechanical Inc.*, 16 BNA OSHC 1763 (No. 92-0372, 1994). In *Bueme*, 17 BNA OSHC 1301 (No. 94-0868, 1995), the Review Commission denied Rule 60(b) relief although OSHA compliance officer made statements that led

the employer to believe the citation was "no big deal" and "nothing to worry about." By failing to read the citation, the Commission decided that the employer did not show he exercised due diligence. Similarly, Mr. Merino in this case admits that he did not read the citation or seek assistance. He only read the proposed penalty (Tr. 116).

The Secretary is not to blame for J4W's failure to read the citation. It was under J4W's control and nothing about the contest process precluded J4W from submitting a timely written contest. As a result of the OSHA inspection in October, 2010, Mr. Merino was on notice that a citation may be issued and that there was a time period in which to file a contest. His telephone call to OSHA was to complain about the penalty amount which he failed to follow-up in writing until approximately a year later.

J4W's claim of misrepresentation under Rule 60(b) is rejected.

J4W's Claim of Excusable Neglect

Mr. Merino claims that he cannot read English well (Tr. 91-92). He testified that he was born in Ecuador and spoke Spanish. After he arrived in the United States in 1969, Mr. Merino moved to New Jersey; worked in a factory; got married; had three children; and went to night school to learn to English. He became a citizen (Tr. 86-87). In 1978, he moved to California, received a degree in shipbuilding from a skills center, and took a job with a large West Coast ship building company as a foreman (Tr. 88). Because of the economy, he was laid off after almost 10 years. In 1989, he moved his family to Florida where began working as a welder-fabricator (Tr. 89). He started J4W in approximately 2008. Mr. Merino testified that he can speak and understand English. However, he claims that "I'm not good at reading" English (Tr. 92).

Mr. Merion's claim of excusable neglect based on an inability to read English well enough to have timely filed a notice of contest is not established by the record. Mr. Merino agrees that he can read English, but "it's not easy" (Tr. 106). He understands and has spoken English since 1970 (Tr. 91). English has been his primary language for 42 years. He has held various jobs in the United States and has taken courses in English and shipbuilding. Mr. Merino's reading ability, even if at a basic level, was not shown to have prevented a timely contest. He certainly had the ability to read at least the highlighted portion of the citation. For 42 years in the United States, Mr. Merino has had to timely deal with numerous personal and business matters which he needed

to read and understand including income taxes, mortgage payments, insurance agreements and contracts for work.

The Review Commission has determined that even a limited understanding of English is not enough to warrant relief under Rule 60(b). *Mohegan Glass & Window Co.*, 18 BNA OSHC 2045 (No. 99-0483, 1999) (an employer's failure to timely file a notice of contest due to inexperience with OSHA, limited understanding of written English, and the absence of other business consultants was insufficient to constitute excusable neglect under Rule 60(b)).

Even if Mr. Merino's reading ability is not his "strong suit," there is no evidence that Mr. Merino sought assistance in reading the citation (Tr. 106). [redacted] In his telephone conversation with OSHA, there is no evidence that he sought assistance in contesting the citation.

J4W's claim of excusable neglect is rejected.

CONCLUSION

The court is sympathetic to Mr. Merino's situation [redacted]; a situation faced by other Americans during this difficult economic time. The circumstances in this case, however, are not sufficient to establish J4W's entitlement to Rule 60(b) relief. Also, it is noted that the citation at issue is against J4W which has been dissolved. If J4W has no assets, the collection of any penalty would be difficult.

J4W's misconstruing of the telephone conversation with the Industrial Hygienist and his failure to read the citation or seek assistance is unfortunate and in hindsight a wrong. Such conduct does not entitle J4W to relief under Rule 60(b).

Accordingly, the Secretary of Labor's motion to dismiss dated May 7, 2012 is **GRANTED**. J4W's request for relief pursuant to Rule 60(b) is **DENIED**. The violations identified in the serious citation issued to J4W on February 4, 2011, are affirmed and a total penalty of $ 9,000.00 is assessed against J4W.

SO ORDERED.

/s/
KEN S. WELSCH
Administrative Law Judge

Date: August 24, 2012