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. ADANLOCK OFFICE ENVIRONMENTS, DIV. OF SUPERIOR JAMESTOWN CORP., Respondent.	OSHRC Docket No. 98-1134

DECISION

Before: ROGERS, Chairman; and VISSCHER, Commissioner.

BY THE COMMISSION:

At issue before the Commission is the decision of Administrative Law Judge Irving Sommer to deny relief under Federal Rule of Civil Procedure 60(b)(1) to Adanlock Office Environments ("Adanlock") for failing to file a timely notice of contest.[1] We affirm.

Adanlock received a citation from OSHA by certified mail on February 19, 1998, but did not file a notice of contest until June 26, 1998, well beyond the 15-day notice of contest period which ended on March 12, 1998. See 29 U.S.C. § 659(a) (an employer has fifteen working days within which to notify the Secretary of its intent to contest a citation or proposed penalty). On August 7, 1998, the Secretary filed a motion to dismiss the notice of

[1] Given the narrow issue presented by this case, the Commission did not request briefs from the parties.

contest as untimely and on September 28, 1998, the judge held a hearing on this limited issue.

At the hearing, Adanlock's human resources manager, Jean DeStefano, testified that she showed the citation to the company's president, Andrew Connell, and faxed it to the company's attorney on February 23, 1998. Although she made a written notation documenting that the citation had been faxed to the attorney, and claims to have checked, but did not keep, the fax machine's transmittal report to verify that the fax had indeed "gone through", the attorney's office has no record of receiving the citation. It is undisputed that neither DeStefano nor Connell followed up on the matter with the company's attorney. Connell testified that he normally would have done so, but had been too busy at the time and it "sort of slipped through the cracks". Both Connell and DeStefano testified that they did not become aware of a problem until Adanlock received a collection letter from OSHA on May 17, 1998.[2]

In its post-hearing brief, Adanlock argued that relief under Rule 60(b)(1) was appropriate because its untimely notice of contest was the result of "excusable neglect".[3] Although the Secretary acknowledged that the company's failure to contact its attorney about the faxed citation constituted negligence, she argued that Adanlock had failed to establish that this neglect was excusable. The judge agreed with the Secretary, concluding

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[2] OSHA Area Director David Boyce testified that his office had sent Adanlock an earlier collection letter dated April 16, 1998. Although the letter was submitted into evidence at the hearing without objection, Adanlock's attorney stated that he had no evidence to show that the letter was ever received by Adanlock. At the hearing, the judge suggested that receipt of the letter was "not important", but stated in his decision that his denial of relief under Rule 60(b) was supported by the fact that neither DeStefano nor Connell had "mentioned the earlier letter from OSHA...and [explained] why the company did not contact the attorney at that time."

[3] Rule 60(b)(1) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect....

that Adanlock did not have "orderly procedures for the handling of important documents and that the untimely filing in this case was due to simple negligence". He noted in particular the failure of both DeStefano and Connell to follow up with the company's attorney about the citation. As a result, the judge granted the Secretary's motion to dismiss the notice of contest as untimely and affirmed the citation and proposed penalty. See 29 U.S.C. § 659(a) (if an employer fails to notify the Secretary within fifteen days of its intent to contest a citation or proposed penalty, the citation and penalty shall become a final order of the Commission).

Under the Commission's long-standing precedent, relief may be granted in appropriate circumstances under Rule 60(b). *Jackson Assoc. of Nassau*, 16 BNA OSHC 1261, 1993 CCH OSHD ¶ 30,140 (No. 91-438, 1993). For the reasons explained in more detail in *Northwest Conduit Corp.*, Docket No. 97-851 (September 30, 1999), we apply that precedent here. The relevant portion of Rule 60(b) in this case is subsection (1), which, as noted, permits discretionary relief from final orders that have been entered due to the party's "mistake, inadvertence, surprise, or excusable neglect." In determining whether excusable neglect exists for the purposes of granting relief under Rule 60(b)(1), the Commission considers, among other factors, whether an employer has maintained orderly procedures for handling important documents. *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021, 1987 CCH OSHD ¶ 28,409 (No. 86-1266, 1989).

Here, almost four months elapsed between the date the citation was allegedly faxed by DeStefano and the date the notice of contest was filed. At no point during that period was the company's attorney directly contacted by either DeStefano, to verify that the citation had been received, or Connell, to check the status of the citation. There was no evidence submitted as to any unusual or unanticipated event or circumstance that might have affected Adanlock's timely response to the citation. Rather, Connell testified that he had simply neglected to contact the attorney to follow up on the citation, as would be reasonably expected when the attorney did not contact Adanlock in response to DeStefano's alleged fax. Such neglect of important business matters cannot be considered "excusable" such that relief

under Rule 60(b)(1) would be appropriate. *See Pioneer Investment Serv. v. Brunswick Assoc. Lim. Part.*, 507 U.S. 380 (1993) (whether neglect is excusable is an "equitable" inquiry which takes into account the surrounding 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."); *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1991-93 CCH OSHD ¶ 29,412 (No. 90-2460, 1991). Accordingly, we affirm the judge's decision.[4]

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[4] In its petition for discretionary review, Adanlock claimed that the judge's decision "fails to give effect to [its] claim that it is not subject to OSHA's jurisdiction, but rather, that of the U.S. Postal Service ["USPS"], which has inspected, approved and certified [Adanlock's] operations." We consider Adanlock's argument, raised for the first time on review, as a claim for relief from a "void" judgment under Rule 60(b)(4). *See Honneus v. Donovan*, 93 F.R.D. 433, 436-37 (1982), *aff'd*, 691 F.2d 1 (1st Cir. 1982) (though not specifically alleged, defendant's challenge to subject matter jurisdiction implicitly raised claim that default judgment against him was void and relief should be granted under Rule 60(b)(4)).

While the record before us contains no information regarding the relationship, if any, between Adanlock and the USPS, we have found nothing to suggest that jurisdiction was lacking in this case. *See Kocher v. Dow Chem. Co.*, 132 F.3d 1225, 1230-31 (8th Cir. 1997) (as long as there is an "arguable basis" for subject matter jurisdiction, a judgment is not void). However, even if the judge was wrong to assume that OSHA had jurisdiction to issue a citation to Adanlock, his judgment is not void simply because it is erroneous. 12 *Moore's Federal Practice 3d*, § 60.44[1](a) at 60-139; Wright & Miller, 11 *Federal Practice & Procedure*, § 2862 at 326 (1995). *See Lubben v. Selective Service System*, 453 F.2d 645, 649 (1st Cir. 1972) ("A void judgment is to be distinguished from an erroneous one, in that the latter is subject only to direct attack. A void judgment is one which, from its inception, was a complete nullity and without legal effect."). *See also Stoll v. Gottlieb*, 305 U.S. 165, 171-72, 59 S.Ct. 134 (1938) ("Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter."); *GEICO v. Jackson*, 1995 U.S. Dist. LEXIS 16814, *1 (1995) ("[A] default judgment constitutes an implicit ruling on subject matter jurisdiction and an erroneous determination does not make the judgment void under Rule 60(b)(4)"). Therefore, we find that Adanlock is not entitled to relief under Rule 60(b)(4) on jurisdictional grounds, at least not in the context of the current proceeding.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary Visscher
Commissioner

Dated: September 30, 1999

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. 98-1134
	:	
ADANLOCK OFFICE ENVIRONMENTS DIV. OF SUPERIOR JAMESTOWN CORPORATION,	:	
	:	
Respondent.	:	

APPEARANCES:

Noelle B. Fischer, Esquire
New York, New York
For the Complainant.

Arnold Weiss, Esquire
Buffalo, New York
For the Respondent.

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 filed a timely notice of contest of a citation and notification of penalty issued by the Occupational Safety and Health Administration ("OSHA"). The hearing in this matter was held on September 28, 1998. Both parties have filed post-hearing submissions which have been considered.

Background

OSHA inspected Respondent's facility in Jamestown, New York on February 10 and 11, 1998, and issued the company a citation and notification of penalty on February 18, 1998. Section 10(a) of the Act requires an employer to notify OSHA of the intent to contest a citation within 15 days of receiving it, and the failure to file a timely notice of contest results in the citation and penalty becoming a final judgment of the Commission by operation of law. It is undisputed that OSHA sent

the citation by certified mail, that Respondent received it on February 19, 1998, and that the 15-day notice of contest period ended on March 12, 1998. It is also undisputed that Respondent did not file a notice of contest by March 12, 1998, and that on April 16 and May 27, 1998, OSHA sent the company letters requesting payment of the penalty that was due. Respondent's counsel filed a notice of contest on June 24, 1998, which the Commission received on June 26, 1998. The Secretary filed a motion to dismiss the notice of contest as untimely on August 7, 1998.

Discussion

The record plainly shows that Respondent did not file its notice of contest until well after the 15-day contest period had already ended. An otherwise untimely notice of contest may be accepted where the Secretary's deception or failure to follow proper procedures caused the delay in filing. An employer is also entitled to relief if it shows that the Commission's final order was entered as a result of "mistake, inadvertence, surprise, or excusable neglect" or "any other reason justifying relief," including mitigating circumstances such as absence, illness or a disability which would prevent a party from protecting its interests. *See* Fed. R. Civ. P. 60(b); *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no evidence and no contention that the Secretary was deceptive or failed to follow proper procedures in this matter. Respondent contends, rather, that its untimely filing should be excused under the circumstances.

Jean DeStefano, Respondent's human resource manager, testified that she faxed the citation to the company's attorney on February 23, 1998, that she made a notation on the citation to that effect, and that she also showed the citation to Andrew Connell, the company president; she further testified that she had faxed things to the attorney before, including OSHA matters, and that he had always taken care of them in a timely fashion. DeStefano said she did not follow up with the attorney to make sure he had received the citation but that his practice was to contact Connell after getting such documents. She also said that she did not know what had happened until she received OSHA's May 27, 1998 letter; she faxed the letter to the attorney along with a cover sheet asking about the status of the citation, after which he called and told her he had never received it. DeStefano noted that she did not keep the fax machine report of the citation's transmission because the office practice was to dispose of the report after sending a fax. She indicated she usually looked at the report after

sending a fax to make sure it had gone through, and it was her belief she had done so on February 23, 1998; however, she could not recall actually looking at the report. (Tr. 16-28; R-1-2).

Andrew Connell testified that OSHA had cited the company once before and that his attorney had taken care of the matter in a timely manner; he further testified that DeStefano showed him the citation and told him she had sent it to the attorney, after which he assumed it was being taken care of. Connell said he normally would have called the attorney to check up on this sort of matter but that he had been very busy at the time and it had "sort of slipped through the cracks." He also said he first became aware there was a problem when he saw the May 27, 1998 letter (Tr. 29-36).

The citation issued to Respondent, and the cover letter accompanying it, explain the 15-day contest period. The cover letter states, in the first paragraph on page 1, 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.

The cover letter also states, on page 2, 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 a business must have orderly procedures for the handling of important documents and that Rule 60(b), noted *supra*, 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); *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

Respondent in essence asserts that the late filing in this case should be excused based on its belief that its attorney had received the citation and was taking care of it. I disagree.

First, the citation and cover letter advised Respondent that it was required to file a notice of contest within 15 working days and that if it did not the citation and proposed penalty would become a final, non-reviewable order. Second, despite this warning, DeStefano did not ensure that the attorney had actually received the citation by contacting his office after faxing it, and she also failed to keep the fax machine record as proof of the citation's transmission. Third, Connell did not follow up with the attorney to check on the status of the citation, even though he himself testified that it was his normal practice to do so with such matters. Based on this testimony, I am persuaded that Respondent did not have orderly procedures for the handling of important documents and that the untimely filing in this case was due to simple negligence and not excusable neglect or any other reason justifying relief under Rule 60(b). This conclusion is supported by the fact that although DeStefano and Connell both discussed the May 27, 1998 letter, neither mentioned the earlier letter from OSHA dated April 16, 1998 and why the company did not contact the attorney at that time.

In light of the foregoing, Rule 60(b) relief is not appropriate in this case. The Secretary's motion to dismiss the notice of contest as untimely is accordingly GRANTED, and the citation and notification of penalty is AFFIRMED in all respects. So ORDERED.

/s/
Irving Sommer
Chief Judge

Date: NOV 16 1998