



UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

One Lafayette Centre  
1120 20th Street, N.W. — 9th Floor  
Washington, DC 20036-3419

PHONE:  
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SECRETARY OF LABOR  
Complainant,  
v.  
PULASKI CONSTRUCTION, INC.  
Respondent.

OSHRC DOCKET  
NO. 93-2091

**NOTICE OF DOCKETING  
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 28, 1994. The decision of the Judge will become a final order of the Commission on January 27, 1995 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before January 17, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary  
Occupational Safety and Health  
Review Commission  
1120 20th St. N.W., Suite 980  
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.  
Executive Secretary

Date: December 28, 1994

DOCKET NO. 93-2091

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Ave., N.W.  
Washington, D.C. 20210

Patricia Rodenhausen, Esq.  
Regional Solicitor  
Office of the Solicitor, U.S. DOL  
201 Varick, Room 707  
New York, NY 10014

Richard A. Pulaski, President  
Richard A. Pulaski Construction  
Co., Inc.  
436 Princeton Avenue  
Mercerville, NJ 08619

Irving Sommer  
Chief Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
One Lafayette Centre  
1120 20th St. N.W., Suite 990  
Washington, DC 20036 3419

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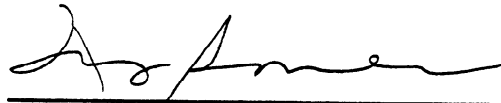
notice of contest within the fifteen day working period(on or before June 4, 1993). He further testified that a letter dated June 3, 1993, in an envelope postmarked by the U.S. Post Office on June 11, 1993 was received on June 15, 1993.

To counter the allegation that he was late in filing his notice of contest the company president Mr. Pulaski testified that he had written the June 3, 1993 letter of contest and had given it to his clerk for typing and mailing as is usually done; he assumed it was done and mailed the same day. Interestingly this scenario differs from the letter he wrote dated July 7, 1993 in response to a request for payment from OSHA in which he states, “ I put my timely reply in the mail box on June 3, 1993, which is within the (15) fifteen day period.” And finally, in filing a letter brief after the hearing, Mr. Pulaski attaches a letter from his clerk in which she states she typed the letter on June 3, 1993, and “put it immediately in the mail box the same day.”

The Commission has recognized that “Where the date of the postmark establishes initially that the notice of contest is untimely, the employer may rebut by introducing evidence that the notice of contest was placed in the mails on a date other than that shown by the postmark.” *Stone Container Corporation*, 9 BNA OSHC 1832, 1833. The burden was on the Respondent to present evidence demonstrating that the notice was timely filed and that the postmark was erroneous. The conflicting evidence presented by the Respondent is totally insufficient to sustain his burden herein. His testimony and that of the self serving letter sent in post hearing are totally at odds with a statement written long before the hearing.

The citations “plainly state(s)” the requirement to file a notice of contest within the time period.” *Roy Kay*, 13 BNA OSHC 2021, 2022. While I am sympathetic to the plight

of the Respondent, it is apparent that there is no excusable neglect or mistake herein which would render relief under Rule 60(b)(1). What is indicated here is simple negligence and slovenly business practice. Mr Pulaski failed to have procedures which would monitor and see that his clerical help was proceeding properly with the matters at hand. Simple negligence will not establish entitlement to relief, *E.K. Construction Co.*, 15 BNA OSHC 1165, 1166, nor will improper business procedures, *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020. The preponderance of the evidence fully demonstrates that the Respondent's notice of contest was untimely filed, and that no relief under Federal Rule 60 is warranted. Motion by the Secretary to dismiss the notice of contest is granted. The citation and proposed penalty is AFFIRMED in all respects.



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IRVING SOMMER  
Chief Judge

DATED: **DEC 23 1994**  
Washington, D.C.



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SECRETARY OF LABOR,

Complainant,

v.

MONTFORT OF COLORADO -  
 GREELEY LAMB

Respondent.

---

Docket No. 93-2614

ORDER

This matter is before the Commission on a direction for review entered by Commissioner Edwin G. Foulke, Jr., on January 21, 1994. The parties have now filed a stipulation and settlement agreement.

Having reviewed the record, and based upon the representations appearing in the stipulation and settlement agreement, we conclude that this case raises no matters warranting further review by the Commission. The terms of the stipulation and settlement agreement do not appear to be contrary to the purposes of the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the stipulation and settlement agreement into this order, and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the stipulation and settlement agreement. This is the final order of the Commission in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).

BY DIRECTION OF THE COMMISSION

Dated 1-26-95

*Ray H. Darling, Jr.*  
 Ray H. Darling, Jr.  
 Executive Secretary



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BY DIRECTION OF THE COMMISSION

Dated 1-26-95

*Ray H. Darling, Jr.*  
Ray H. Darling, Jr.  
Executive Secretary

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on January 26, 1995.

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, USDOL  
200 Constitution Ave., N.W. Room S4004  
Washington, D.C. 20210

Tedrick A. Housh, Jr., Esq.  
Regional Solicitor  
Office of the Solicitor, U.S. DOL  
1210 City Center Square  
1100 Main Street  
Kansas City, MO 64105

Rodney L. Smith, Esquire  
Eiberger, Stacy, Smith & Martin  
3500 Republic Plaza  
370 Seventeenth Street  
Denver, CO. 80202-5635

James Barkley  
Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
Room 250  
1244 North Speer Boulevard  
Denver, CO 80204-3582





violations of 29 C.F.R. §§ 1910.120(g)(2)(ii), (iii), (vii), and (x), and 29 C.F.R. §§ 1910.1200(h)(1)(ii), (2)(ii), and (2)(iv), as serious rather than repeat violations.

2. Respondent hereby withdraws its notice of contest to the citation as amended above.

3. Respondent certifies that the abatement of all items of Citation Number 1 for serious violations, Citation Number 2 for repeat violations as amended above, and Citation Number 3 for other-than-serious violations, was accomplished by November 15, 1994, the final abatement date.

4. Respondent certifies that it has provided Bobby Glover, Area Director of the Denver Office of the Occupational Safety and Health Administration, with written verification that abatement has been completed and the manner in which it had been accomplished for all items of the above citations.

5. Respondent certifies that it has submitted payment of \$37,500.00 to the OSHA Area Office, in full and complete payment of the penalty.

6. Respondent certifies that a copy of this Stipulation and Settlement Agreement was posted at the workplace on December 19, 1994, in accordance with Rules 7 and 100 of the Commission's Rules of Procedures, and will remain posted for a period of ten days.

7. There is no authorized employee representative to have elected party status in this case.

8. Each party agrees to bear its own costs.

9. None of the foregoing agreements, statements, stipulations, or actions taken by respondent shall be deemed an admission by respondent of the allegations contained in the citations or the complaint herein. The agreements, statements, stipulations, and actions herein are made solely for the purpose of settling this matter economically and amicably and they shall not be used for any other purpose, except for subsequent proceedings and matters brought by the Secretary of Labor directly under the provisions of the Occupational Safety and

Health Act of 1970.

Dated this 12<sup>th</sup> day of December, 1994.

Respectfully submitted,

THOMAS S. WILLIAMSON, Jr.  
Solicitor of Labor

JOSEPH M. WOODWARD  
Associate Solicitor for  
Occupational Safety and Health

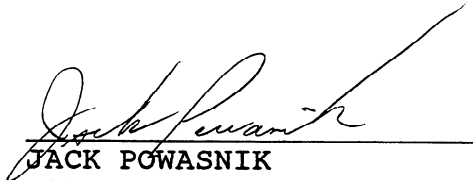
TEDRICK A. HOUSH, Jr.  
Regional Solicitor

DANIEL J. MICK  
Counsel for Regional  
Trial Litigation



---

ROONEY L. SMITH, Esq.  
Eiberger, Stacy, Smith  
& Martin, P.C.  
Attorney for Respondent



---

JACK POWASNIK  
Attorney for the  
Secretary of Labor

KATHLEEN BUTTERFIELD  
Attorney for the  
Secretary of Labor

NOTICE TO EMPLOYEES OR EMPLOYEE REPRESENTATIVE

The attached Stipulation and Settlement Agreement has been entered into by the parties and is being submitted to the Occupational Safety and Health Review Commission for entry as a Final Order. If you have any comments on the Stipulation and Settlement Agreement, you may submit them within ten days of service or posting of the Stipulation to:

Ray H. Darling, Jr.  
Executive Secretary  
Occupational Safety and Health  
Review Commission  
1120 20th St., N.W., #980  
Washington, D.C. 20036

A copy of the comments should also be sent to:

Rodney L. Smith, Esq.  
Eiberger, Stacy, Smith & Martin, P.C.  
3500 Republic Plaza  
370 17th Street  
Denver, CO 80202

Served and/or posted this 19<sup>th</sup> day of December, 1994.



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Complainant,

v.

MONFORT OF COLORADO, GREELEY LAMB  
Respondent.

OSHRC DOCKET  
NO. 93-2614

**NOTICE OF DOCKETING  
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 22, 1993. The decision of the Judge will become a final order of the Commission on January 21, 1994 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before January 11, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

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FOR THE COMMISSION

Ray H. Darling, Jr.  
Executive Secretary

Date: December 22, 1993

DOCKET NO. 93-2614

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
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Kansas City, MO 64106

Robert D. Moran, Esquire  
Suite 800  
919 18th Street, N. W.  
Washington, DC 20006

James H. Barkley  
Administrative Law Judge  
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1244 North Speer Boulevard  
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SECRETARY OF LABOR,

Complainant,

v.

MONFORT OF COLORADO -  
GREELEY LAMB,

Respondent.

OSHRC DOCKET  
NO. 93-2614

ORDER DISMISSING NOTICE OF CONTEST

Between May 10 and May 24, 1993, Monfort was inspected by OSHA. As a result of that inspection, on May 24, 1993 Monfort was issued one "serious" citation and one "other than serious" citation, alleging violations of 29 C.F.R. §§1910.212(a)(3)(ii) and 119(f)(1)(i), respectively. On June 7, 1993, Monfort's attorney filed a timely notice of contest to the citations. On July 14, 1993, the parties were notified that the case had been docketed and assigned the docket number 93-1806.

On August 5, 1993, Monfort was issued three more citations arising out of the same inspection. The August 5 citations included three items alleging "serious" violations of §1910.1200 *et seq.*, "repeated" and "other than serious" violations of §§1910.120 *et seq.* and "repeat" violations of §1910.1200 *et seq.* Monfort did not forward the citation to its attorney until September 28, 1993; on which date the attorney immediately filed a notice of contest. The latter case was docketed as case number 93-2614.

Complainant moves to vacate the notice of contest as untimely based on §10(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, *et seq.*) which provides that a citation uncontested within 15 days automatically becomes a final order of



the Commission. Monfort does not deny the notice of contest was untimely. However, Monfort moves for relief under Fed.R.Civ.P. 60(b).

A party filing a late notice of contest may also obtain Commission review by filing a motion for relief from judgment or order under Rule 60(b), which allows for such relief in cases of “mistake, inadvertence, surprise, or excusable neglect”. The burden is on the Respondent to prove itself “justified in failing to avoid its error,” in order to show its entitlement to relief under Rule 60(b). *Keefe Earth Boring Company, Inc. (KEBCO)*, 14 BNA OSHC 2187, 2192, 1991 CCH OSHD ¶129,277 (No. 88-2521, 1991). In *KEBCO*, the Commission noted that mere carelessness or negligence, even by a layman, is not excusable. *Id.*

Monfort alleges that the employee who received the second citation thought it was part of the previously contested case because of the common ID number on the citation and the merged inspection. Monfort argues that its mistake entitles it to relief under rule 60(b).

This judge does not agree. Monfort’s misunderstanding, if any, does not merit relief under Rule 60(b). OSHA citations and documents received from the Commission are important legal documents that are to be carefully read and understood. Here the two citations are so dissimilar that a reasonable person could not conclude that the second citation was part of the first case. Significantly, the first citation had been contested and docketed before the second citation was issued. The different issuance dates, types of violations, descriptions of the violations and proposed penalties would all have alerted a reasonable person to the existence of a second citation requiring a second notice of contest. Moreover, an affidavit filed by OSHA supervisor, Herb Gibson, indicates Respondent was aware that two separate citations were generated by the March inspection. Monfort is not inexperienced in OSHA matters, having been cited previously. A client’s lack of diligence in informing his attorney regarding matters relevant to the suit does not entitle the client to 60(b) relief. *See; KEBCO, supra*, citing with approval *National Bank of Joliet v. W.H. Barber Oil Co.*, 69 F.R.D. 107, 109 (N.D.Ill. 1975).

Respondent has not demonstrated entitlement to relief under Fed.R.Civ.P. 60(b). Its notice of contest is vacated, and the citation and proposed penalties are affirmed.

  
James H. Barkley  
Judge, OSHRC

Dated: December 10, 1993