

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA**

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2002-4109
OSHA INSPECTION NO. 304738909
CSHO ID NO. B9614

v.

MASTER WOODCRAFT INCORPORATED
and its successors,

ORDER

RESPONDENT.

DECISION OF THE REVIEW BOARD

This motion hearing was heard at or about 10:00 A.M. on the 22nd day of June, 2004 in Room 124, First Floor, Old YWCA Building, 217 West Jones Street, Raleigh, North Carolina by Oscar A. Keller, Jr., Chairman, Dr. Richard G. Pearson and Janice Smith Gerald, Members of the Safety and Health Review Board of North Carolina.

APPEARANCES

Linda Kimbell, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Louis B. Moss, *pro se*, President of Master Woodcraft, Incorporated, Oxford, North Carolina for the Respondent.

ISSUES PRESENTED

1. Did Mr. Louis B. Moss, president of Respondent meet the requirements for excusable neglect under N.C.G.S. 1A-1, Rule 60(b) for relief from the final order of Hearing Examiner Peebles in which numerous violations of the OSH Act and penalties of \$24,750.00 were affirmed.

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. .0102 SCOPE OF RULES: APPLICABILITY OF NORTH CAROLINA RULES

Civil Procedure

(1) The Rules of Procedure of the Safety and Health Review Board of North Carolina shall govern all proceedings before the Safety and Health Review Board of North Carolina and its hearing examiners, except where contests are initiated by agricultural employers or employees the Administrative Procedures Act shall apply. Note: The procedure for contestments by agricultural employers and employees was changed by Session Laws 1993, c. 300, s.1 by which N.C.G.S. § 95-135(j) was repealed. Contestments by agricultural employers and employees are subject to the same procedures and rules as contestments by any other employer or employee.

(2) In the absence of a specific provision, procedure shall be in accordance with the North Carolina Rules of Civil Procedure.

2. North Carolina Rule of Civil Procedure N.C.G.S. 1A-1, 60(b) which provides:

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. - On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistake, inadvertence, surprise, or excusable neglect;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void;
- (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

3. .0108 FILING

(a) A notice of contest under the provisions of Rule .0303 of this Chapter or under the provisions of Rule .0306 of this Chapter shall be filed with the Director who issued the citation or amended citation at the address shown thereon.

(b) Unless otherwise required by these Rules, all other papers relating to the contest shall be filed with the Board at Raleigh, North Carolina.

(c) Except where inconsistent with other Board rules all filing may be accomplished in a manner consistent with Rule .0107(c) of this Section.

4. .0107 SERVICE AND NOTICE

(a) At the time of filing pleadings or other documents, a copy thereof shall be served by the filing party or intervenor on every other party or intervenor by postage prepaid first-class or by personal delivery.

5. .0505 COURT REPORTER : FEES: COST OF TRANSCRIPT OF TESTIMONY (AMENDED EFFECTIVE APRIL 1, 1993)

(a) The court reporter's fees and the cost of the original transcript of testimony for depositions as provided in Rules .0504 and .0511 of this Section, shall be borne by the party which arranges for the reporter's appearance and each person who desires a copy of the transcript will be responsible for securing it and for its cost.

(b) In cases where no appeal has been effected, the Review Board will arrange for and pay for the private court reporter's fees for each hearing. If a transcript is ordered by the hearing examiner or

Board and no appeal has been effected, or if the Board directs review, the Board will also pay for preparation of the original transcript and persons desiring a copy of the transcript will be responsible for securing it and for its cost.

(c) If a petition for review is filed, the court reporter's fees, cost of the original transcript, one copy for the Board, and copy for the appellant will be paid for by the appellant. Other persons desiring a copy of the transcript will be responsible for securing it and for its cost. If a cross-petition for review is filed, the cross-petitioner shall reimburse the petitioner for one-third of the cost of the court reporter's fees, original transcript, and copy for the Board.

6. .0506 TRANSCRIPT OF TESTIMONY (AMENDED EFFECTIVE APRIL 1, 1993)

(a) Hearings, including testimony and argument (on request) shall be transcribed verbatim. If review is directed by the Board, the Board will order the transcript and notify the parties when it is filed with the Board. If a petition for review is filed, the petitioner shall, at the time of filing, order the transcript and ensure that one copy is filed with the Board. The Board will notify parties when the transcript is filed with the Board.

(b) The public proceedings conducted by the Review Board and by its hearing examiners may be recorded by an audio-tape recorder by any person in attendance. The Chairman of the Review Board, or the hearing examiner shall control the manner of any tape recording process to ensure that it is not disruptive to the proceeding.

7. .0602 REVIEW: BRIEFS FOR REVIEW (AMENDED EFFECTIVE APRIL 1, 1993)

(a) Petitioning for review. Any member of the Board may direct that a decision of a hearing examiner be reviewed by the entire Board as a whole. Any party adversely affected or aggrieved by the decision of the hearing examiner (pursuant to Rule .0309 or .0601 of this Chapter) or by the decision of the Chairman of the Review Board (pursuant to Rule .0309 of this Chapter) may file a petition for review. The petitioner or cross-petitioner must comply with applicable Rules .0505 and .0506 of this Chapter. If no direction for review or petition for review is effected within 30 days from the date on which the hearing examiner's or Chairman's decision is filed with the Board, such decision shall become the final order of the Review Board. A petition for review or cross-petition for review may be conditional: either may state that review is sought only upon the existence of an opposing party's petition for review. A cross-petition for review may be filed within seven days of notice from the opposing party of its petition for review.

(b) Content of the petition. A petition for review or cross-petition for review shall concisely and precisely state the portion(s) of the decision for which review is sought; refer to the citations and citation items (for example, Citation I, Item 3) for which review is sought; identify by number any fact or conclusion set forth by the hearing examiner which is not supported by a preponderance of the evidence or which is contended to constitute an error of law; and identify any error contended to be prejudicial or any instance which is contended to be an abuse of discretion .

(c) Procedure; briefs. A petition for review or cross-petition for review, timely filed, shall be deemed granted upon receipt by the Review Board. All interested parties to the original hearing shall be notified of the date and the time and place of such hearing and shall be allowed to appear in person or by representative as previously defined. Parties on appeal to the Review Board shall file a brief of reasons and supporting authorities relied on. Failure to file a brief may result in judgment against the parties for failure to comply with these Rules. The original and three copies of the brief shall be filed with the Board. A party shall, prior to the statement of facts, designate in his brief those pages of the transcript relevant to each portion of the decision and order of the hearing examiner to which exception is taken. The purpose of this Rule is to require parties to notify the Review Board of any pages or parts of the transcript which are irrelevant to the decision before the Review Board, as well as to notify the Review Board of those pages and parts of the transcript which are relevant. A cross-

petitioner shall file a single brief divided into two distinct sections: the first section shall respond to the petitioner's brief; the second section shall set forth issues on cross-appeal in accordance with this Rule. A petitioner's reply brief shall be limited to the issues raised in the second section of the cross-petitioner's brief.

Having reviewed and considered the record and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby denies the Motion for Relief from a final order and makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10).
4. The employer (Respondent) Master Woodcraft, Incorporated. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
5. An inspection was made of Respondent's work site located at 1312 College Street in Oxford, North Carolina on or about December 10, 2001 by Safety Compliance Officer, Nicole Brown as a result of a failure by Respondent to verify abatement of violations from a previous inspection.
6. The previous inspection was conducted on May 29, 2001 and contained serious, repeat and nonserious violations.
7. On January 28, 2002, as a result of the inspection citations were issued containing numerous failure to abate, serious and repeat violations with penalties totaling \$27,150.00.
8. The Respondent's Notice of Contest contesting the citations was filed with the Review Board on April 1, 2002.
9. On March 13, 2003, a Notice of Hearing was sent to all parties scheduling a hearing for April 16, 2003 in Raleigh, NC.
10. By letter dated April 7, 2003, addressed to "Commissioners of Labor, Safety and Health Review Board" but faxed to the OSH division at Chapanoke Road and not received by the Board until May 6, 2003, Mr. Moss indicated that he would be at a trade show through April 13, 2003, would return to Oxford the evening of April 13, 2003 after consultation with his medical specialists and asks for the Board's understanding and consideration.
11. On April 16, 2003, a hearing was held before the Honorable Charles R. Brewer at which representatives of the Complainant appeared but Respondent did not.
12. On April 21, 2003, the Honorable Charles R. Brewer issued an order finding the Respondent in default for failure to attend the hearing and ordering that the Respondent's Notice of Contest was stricken and the citations and proposed penalties were deemed final.
13. Judge Brewer's order was filed with the Board on April 28, 2003.
14. By fax dated May 2, 2003 and addressed to the Hon. C.R. Brewer and to Doris S. Hinton of the Safety and Health Review Board but faxed to the Occupational Safety and Health Division, Mr. Moss indicates that he had asked for a continuance on April 7, 2003 and that he had advised the Agency to review its files, and that this case

had been closed the previous year. In this same fax, Mr. Moss indicated that he is of advanced age and cannot come to Raleigh.

15. The Board treated the above fax and letters as a Motion and Request for a Rehearing.

16. On June 10, 2003, the Board issued an order rescheduling the hearing because a clerical error listed the incorrect inspection number on the Notice of Docketing and all subsequent documents and, therefore, failed to appraise Respondent of the regulations that he was alleged to have violated.

17. In the June 10, 2003 order the Board admonished Mr. Moss, the president of Respondent as follows:

Mr. Moss is admonished that Board Rule .0108 requires that all papers other than the Notice of Contest shall be filed with the Board and copies shall be served on all other parties pursuant to Board Rule .0107. The Board's address, phone number and fax number is clearly included on the Notice of Docketing and Notice of Hearing.

The order then gave the current mailing addresses of the Review Board and the Labor Section of the Attorney General's office.

18. The Board issued a Notice of Docketing for the rehearing and Mr. Moss again did not send the Statements of Position to the Board but faxed part of them to the Attorney General's office and mailed the rest to the OSH office.

19. On September 19, 2003, the Board mailed a Notice of Hearing to all parties scheduling the rehearing for November 13, 2003 in Oxford, North Carolina.

20. In a letter dated October 6, 2003 and addressed and faxed to the Board, Mr. Moss informs the Board of a hearing deficiency (he doesn't mention a sight deficiency) and asks for "slower and louder speech or placing me closer to the actual conversation" and requests that the Board inform Judge Peebles of "the hearing problem". In this letter Mr. Moss also thanks the Board for holding the hearing in Oxford on his behalf. Mr. Moss was mistaken in his belief that he sent this letter to Linda Kimbell asking her to relay his need for a hearing accommodation to Judge Peebles.

21. On October 6, 2003 the above mentioned letter was faxed to and received by Monique Peebles, the Hearing Examiner.

22. In a letter dated November 4, 2003, Gilbert H. Jackson, III, General Counsel for the Board, sent a letter to Mr. Moss informing him that his letter of October 6, 2003 had been faxed to Hearing Examiner Peebles and she was aware of his hearing problem. Mr. Moss was again admonished for not filing the documents with the Board and the language of the Order of June 10, 2003 ordering him to file documents with the Board was repeated.

23. Mr. Moss's wife died on November 3, 2003 in St. Louis, Missouri.

24. Mr. Moss's wife was buried in Maryland on November 6, 2003.

25. Linda Kimbell asked Mr. Moss if he wanted a postponement of the November 13, 2003 hearing due to the recent death of his wife and Mr. Moss decided to go forward with the hearing because the hearing was being held in Oxford.

26. On November 13, 2003 a hearing was held before the Honorable Monique Peebles at the Granville County Courthouse in Oxford, N.C. All of the witnesses were told to speak slower and louder and a microphone and speaker system was used as an accommodation or program modification for Mr. Moss's hearing deficiency. As a further accommodation for his hearing deficiency, Mr. Moss was allowed to move in front of the bench to better hear and to stand in front of the witnesses as he questioned them.

27. On November 21, 2003 Mr. Moss contacted the Court Reporter, Suzanne Newman about getting a copy of the transcript and was informed that the cost was \$3.50 for the original and one copy and that the person appealing was responsible for paying for it. He was also informed that if the decision was in his favor, he would not need a copy.
28. On December 22, 2003, Hearing Examiner Peebles filed an order with the Board which affirmed numerous violations of the North Carolina Occupational Safety and Health Act along with \$24,750.00 in penalties.
29. In a letter dated February 23, 2004 which was addressed to Linda Kimbell but mailed to the N.C. Department of Labor's OSH office at Chapanoke Road, Mr. Moss requested an appeal of the Hearing Examiner's order. This request for an appeal was over 30 days beyond the deadline for filing an appeal of the Hearing Examiner's order and again was not filed with the Board or sent to the Attorney General's office as Mr. Moss had been admonished and as Board Rules require.
30. In a letter dated November 20, 2003, addressed to Linda Kimbell at the address for the OSH office on Chapanoke Road but not received by the Board until March 11, 2004, Mr. Moss states that he was not afforded due process because he requested from OSH photographs that were taken at the inspection and received only 1 1/4 by 1 5/8 inch black and white photocopies. However, Mr. Moss did not make a motion for discovery with the Board requesting copies of those photographs as is allowed by Board Rule .0404.
31. In a letter dated March 23, 2004 and addressed to Linda Kimbell at the correct address, Mr. Moss repeats his claims about not receiving due process because of the inadequate copies of photos that he received; about the alleged lack of accommodations for his hearing deficiency and about the alleged failure of OSHA to supply him with a transcript. For the first time he alleges a sight deficiency. Again Mr. Moss did not send this letter to the Review Board as Board Rules require.
32. In a letter dated April 14, 2004, Chairman Keller sent a letter to Mr. Moss advising him that the Board had received copies of letters that he sent to Linda Kimbell indicating that he wanted to appeal the decision of the Hearing Examiner. Mr. Moss was advised that the time for appeal had expired and that the Board would grant him ten days in which to file a motion for relief from a final order pursuant to North Carolina Rule of Civil Procedure 60(b). Mr. Moss was admonished for the third time about his failure to file the documents with respect to the case with the Review Board with copies to the Attorney General's office and he was given the new addresses of the Review Board and the Labor Section of the Attorney General's office.
33. In a letter dated April 23, 2004 and sent to the correct addresses, Mr. Moss ostensibly makes a motion for relief from a final order and restates his claim that the Attorney General's Office had refused to supply him with a copy of the transcript and refused to provide him with a hearing accommodation. He also restates a claim that he has a sight deficiency.
34. In a letter dated June 11, 2004 correctly addressed and mailed to the Board and Attorney General's office, Mr Moss again makes claims that his alleged handicaps were not recognized and that the transcript was being denied to him and that OSHA should pay for the transcript. He also requests resolution of his dispute under the Department of Justice ADA Mediation program.
35. In a letter dated June 17, 2004, Gilbert Jackson, General Counsel for the Board sent a letter to Mr. Moss responding to his June 11, 2004 letter and informing Mr. Moss that his request for an accommodation for a hearing deficiency was forwarded to Hearing Examiner Peebles and that she was aware of his hearing problem and that his request for "'slower and louder' speech" was accommodated by asking participants to repeat what they said when Mr. Moss indicated he couldn't hear and by utilizing the microphone and speaker system in the courtroom. The letter also indicated that he never made a request of the Board for a sight accommodation prior to the hearing before the hearing examiner. With respect to his request for a transcript, Mr. Moss was informed of the Board Rules that required him to order and pay for two copies of the transcript when he filed his petition for review of the hearing examiner's decision. Mr. Moss was also admonished for his failure to file an appeal with the Board within the 30 day time limit required by law and Board Rules and again for his failure to file the purported appeal with the Board with copies to the Attorney General's office at the correct address. Mr. Moss

was also informed that the Board only employed three employees and was not required to adopt and publish grievance provisions under the ADA and that he would get a prompt resolution of his claim at the June 22, 2004 hearing.

36. The Motion hearing pursuant to Rule of Procedure Rule 60(b) was held at 10:00 A.M. on the 22nd day of June, 2004 in Room 124, First Floor, Old YWCA Building, 217 West Jones Street, Raleigh, North Carolina.

37. Mr. Moss testified that as far as he was concerned and his corporation was concerned, he recognized OSHA as OSHA and whether one part of OSHA doesn't communicate to another part of OSHA, he has nothing to do with.

38. Mr. Moss testified that during the period of time that Hearing Examiner Peebles filed her decision he was not capable of seeing because he was being operated on at Duke Medical Center for an eye problem.

39. Mr. Moss testified and the Board finds as a fact that the accommodations for any hearing impairment or sight impairment that the Board made for him at the June 22, 2004 hearing were fine with him and he was satisfied with them.

40. Mr. Moss testified that he was guilty of not knowing the rules and regulations that the Board has internally or that OSHA has.

41. Mr. Moss testified that when he sends a letter to Chairman Keller or to Linda Kimbell he is sending it to OSHA as far as he was concerned.

42. Mr. Moss did not ask Hearing Examiner Peebles during the November 13, 2003 hearing to place him closer to the witnesses so that he could hear better.

43. Mr. Moss testified and the Board finds as a fact that when he complained that he could not hear, Hearing Examiner Peebles adjusted the microphones so that he could hear better.

44. At the hearing before Hearing Examiner Peebles, Mr. Moss never informed the judge of a sight impairment or a hearing impairment.

45. On or about November 21, 2003, Mr. Moss contacted the court reporter, Suzanne Newman, about getting a copy of the transcript and was told it would take seven or eight weeks to prepare the transcript, that he would only need the transcript if the court decides against him, that he could wait until the decision came down to order the transcript and that it would be costly.

46. Mr. Moss testified that toward the end of December, 2003, he had an eye operation at Duke Medical Center and could not respond to the decision and after the eye operation he needed to get back to work.

47. While Mr. Moss was out of work for his eye operation, his secretary ran the business along with Alvie who helped out in the factory but neither one of them were informed about the OSH violations.

48. The Hearing Examiner's decision was filed with the Board on December 22, 2003 and the deadline for filing an appeal of the Hearing Examiner's opinion was January 21, 2004.

49. Review Board Rules of Procedure .0505 and .0506 requires Mr. Moss as the appealing party, at the time that he files his petition for review, to order and pay for the preparation of the original transcript and one copy for him and one copy for the Board and to ensure that one copy is filed with the Board. Neither OSHA nor Linda Kimbell of the Attorney General's office is required to provide Mr. Moss with a copy of the transcript.

50. Mr. Moss testified that he was not familiar with Board Rules .0505 and .0506.

51. A copy of the Board Rules of Procedure was sent to Mr. Moss along with the Notice of Docketing which was mailed to Mr. Moss on June 12, 2003.

52. Mr. Moss never contacted the Board to ask for an extension of time to file his petition for review as Board Rules allow so that he could order and pay for a transcript as Board Rules require.

53. Mr. Moss never contacted the Board to request that he be able to file a general petition for review and to be allowed to delay giving his detailed reasons for his appeal until he filed his brief which was due 30 days after the transcript was filed with the Board.

54. Mr. Moss failed to file documents with the Board as Board Rules require at least four different times and he had been admonished on at least four occasions of the requirement that he do so.

55. The reason that Mr. Moss gave for failing to file documents with the Board was that he operates a very small company with a total of seven employees and that he cannot spend all of his time in his office doing paper work and that he needs to be running his company and looking out for the safety of his employees.

56. As of the date of this order no transcript of the November 13, 2003 hearing before Judge Peebles has been prepared.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. The Board has jurisdiction of this cause and the parties are properly before this Board.
3. Mr. Moss did not conduct his business as a reasonably prudent business person would do in the context of this litigation for violations of safety and health regulations.
4. Mr. Moss has failed to meet his burden of proof of showing excusable neglect for his failure to file his appeal within the time limits as required by statute and Board Rules so as to be granted relief from the Hearing Examiner's Final Order pursuant to Rule 60(b).

DISCUSSION

Receiving citations for alleged violations of the Occupational Safety and Health Act of North Carolina (hereinafter OSHANC) is a serious matter. North Carolina passed OSHANC to "ensure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions". N.C.G.S. 95-126(b)(2). Receiving a citation from the Occupational Safety and Health Division of the North Carolina Department of Labor is not the end of the matter. The Legislature created an independent adjudicatory body, the Safety and Health Review Board, and provided for a two tier system of administrative review to allow an employer to contest any citations that have been issued to it by the Occupational Safety and Health Division of the North Carolina Department of Labor. First, a contested case is heard by hearing examiners who conduct an evidentiary hearing and then issue a written decision. An employer may appear in person or be represented by an attorney at the hearing or before the Board. By statute, the Department of Labor is represented by a member of the Attorney General's office. Next, within the time frame allowed by statute, an employer or the Commissioner of Labor may appeal any decision of a hearing examiner to the three member Board. The Board then conducts appellate review usually, on the record, with briefs and oral argument. The Board then issues a written decision adopting, modifying or vacating the decision of the hearing examiner. This is not the end of the matter either. If either party is dissatisfied with the decision of the Board, within the time frame allowed by statute, appeal may be made to the Superior Court and then to the Court of Appeals and even to the North Carolina Supreme Court if statutory and procedural requirements are met.

The legislature created this comprehensive scheme of administrative adjudicatory review because it recognized the serious nature of a citation both from an employer's perspective and from the perspective of providing a safe

and healthful workplace to the employees of this state. In order to ensure "the orderly transaction of its proceedings", the Board is authorized to make Rules of Procedure and to follow the Rules of Civil Procedure when a situation arises that is not covered by its own Rules of Procedure. N.C.G.S. 95-135(d). The Board like any other court cannot function unless its Rules of Procedure are followed.

In order to obtain relief from a final order in North Carolina under Rule 60(b)(1), "a party must show both excusable neglect and a meritorious defense". Gallbronner v. Mason, 101 N.C. App. 362, 399 S.E.2d 139 (1991). In a case involving the predecessor to Rule 60(b), N.C.G.S. 1-220, the North Carolina Court of Appeals spoke to the attention that a litigant must give to his legal affairs:

The exceptional relief of G.S. 1-220 to set aside a judgment for mistake, inadvertence, surprise, or excusable neglect will not be granted where there is inexcusable neglect on the part of the litigant. "A lawsuit is a serious matter. He who is a party to a case in court 'must give it that attention which a prudent man gives to his important business.' [citations]" *Pepper v. Clegg*, 132 N.C. 312, 43 S.E. 906.

Hodge v. First Atlantic Corporation, 6 N.C. App. 353 (1969). The federal Review Commission has used Rule 60(b) when deciding whether a litigant is entitled to relief from a final order. In E. K. Construction Co., Inc., 1991-1993 OSHD 39,635 (RC 1991), the Review Commission ruled on the effect of a prolonged illness and a *pro se* litigant's ignorance of procedural rules and stated:

E.K.'s only proffered reason for not responding to the citations in time was the "prolonged illness" of the person S.S. assigned to schedule the informal conference. However, under the terms of Rule 60(b), this is not an adequate excuse for E.K.'s failure to timely file a notice of contest. Rule 60(b) requires a showing of excusable neglect, not just simple negligence. An employer's failure to have a procedure in place to address such occurrences does not provide a basis for relieving an employer from the effects of a final order. . . . E.K should have had an office procedure that would ensure a timely response to such important documents.

E. K. Construction Co., Inc., 1991-1993 OSHD 39,635, 39,636-39,637 (RC 1991).

In response to E.K.'s argument that it did not understand the motion for an order dismissing E.K.'s notice of contest, the Review Commission stated:

E.K. was sent a copy of the Commission's rules when the case was docketed, more than a month before the secretary's motion was filed. We have held that ignorance of procedural rules does not constitute "excusable neglect" within Federal Rule of Civil Procedure 60(b).

E. K. Construction Co., Inc., 1991-1993 OSHD 39,635, 39,637 (RC 1991).

As we stated at the beginning, receiving a citation for alleged violations of OSHANC is a serious matter. A reasonably prudent person or businessperson would give it the attention that he or she would give any legal matter. It is a serious matter in that it is a determination by the governmental body charged with protecting the safety and health of the state's workers, that workers are being exposed to unsafe conditions and will continue to be exposed until those conditions are corrected or abated. One of the reasons the legislature created this elaborate scheme of administrative adjudicatory review is to expedite the correction of unsafe conditions to which employees are exposed. The original inspection in this case was made on May 29, 2001 and as of the date of this hearing proof of abatement of these violations has not been provided to the Occupational Safety and Health Division (hereinafter OSH Division). As far as the Board knows or the OSH Division knows, workers have been exposed to unsafe conditions for over three years.

Mr. Louis B. Moss, president of Master Woodcraft, Inc. has handled the citations that he received in this case in a cavalier and casual manner from the beginning. He failed to send in his proof of abatement forms to the OSH Division showing that he had corrected the cited conditions resulting in a follow up inspection with failure to abate citations and substantial penalties. He did not learn the Rules of Procedure of the Safety and Health

Review Board which were provided to him with the Notice of Docketing acknowledging the receipt of his notice of contest. He missed the first hearing on the matter after sending a letter, arguably requesting a continuance of the April 16, 2003 hearing, to the OSH Division rather than to the Board as required by Board Rules of which he had a copy. The Board granted a rehearing to Mr. Moss and in the order admonished him for failing to file his letter with the Review Board as required by Board Rules. Over the course of the next year Mr. Moss consistently failed to file legal documents with the Board as Board Rules required even though he was admonished several more times because of his failure to follow Board Rules. In defense of his failure to file documents with the Board, Mr. Moss stated that when he sends a document to the Attorney General's office, to the OSH Division's office or to the Board, he considers that he has sent it to OSHA, that these different agencies are all OSHA and if they don't communicate to the "other branches" of OSHA, it is not his concern. He has failed to exercise the concern of a reasonably prudent businessperson to take the time to learn the provisions of the Occupational Safety and Health Act of North Carolina and the Rules of Procedure of the Safety and Health Review Board. In lieu of learning those statutes and rules, he has failed to take the reasonably prudent business step of consulting an attorney experienced in OSH law to advise him and to represent him in this matter. The record shows that the Board has given Mr. Moss's every consideration because of his status as a *pro se* litigant and his advanced age and medical impairments, however, Mr. Moss's refusal to follow Board Rules and failure to distinguish between the Review Board, the Attorney General's office and the Occupational Safety and Health Division of the Department of Labor has resulted in a tremendous waste of taxpayer money in the rehearing of cases and the hearing of special motions. This case is an example of how the Board cannot conduct the "the orderly transaction of its proceedings" unless litigants follow the Board's Rules of Procedure.

Mr. Moss has consistently argued that the various parties, including the Attorney General's office and the OSH Division of the Department of Labor should provide him a free copy of a transcript of the proceedings before the Hearing Examiner because of an alleged denial of an accommodation for his hearing deficiency. The record shows that the Hearing Examiner was informed of his hearing deficiency and made reasonable accommodation of admonishing the witnesses to speak slower and louder and by holding the hearing in a court room equipped with microphone and speaker systems which were utilized. If Mr. Moss had read and followed the Board's Rules of Procedure, he would have known that at the time he filed his Petition for Review, he was required to order and pay for the preparation of the original transcript and a copy for himself and a copy for the Board and to ensure that the Board's copy was sent to the Board. If he had read the Board's rules he would have known that if he felt he needed the transcript in order to file the Petition for Review, he would have known that the Board's rules provide for extensions of time to file documents and could have gotten an extension of time until he ordered and paid for the transcript. Mr. Moss has also argued that he was denied due process at the hearing before the Hearing Examiner because of the poor quality of the photographs that the OSH Division sent to him but again if he had read the rules of procedure, he would have known that he could have made a motion for discovery with the Board, requesting better quality photographs. Every problem that has originated in this case would have been obviated by Mr. Moss reading and following the Board's Rules of Procedure.

During the period of time just before the November 13, 2003 hearing before Judge Peebles, Mr. Moss's wife died. This is most certainly grounds for granting a continuance and Linda Kimbell of the Attorney General's office asked Mr. Moss if he wanted a continuance and Mr. Moss declined. During December of 2003 when Hearing Examiner Peebles's opinion was filed with the Board and the 30 day time for appeal began to run, Mr. Moss stated that he had an eye operation and could not file the appeal. When questioned about how long he was out of work, he answered by saying that after the eye operation he had to get back to work. When questioned about whether he had designated anyone to run his business while he was having the operation, he said he had an office manager and a person who helped him in the factory but that they were not informed of the OSH citations. A reasonable prudent businessperson who knows that he will be out because of medical reasons will designate a person to handle important business matters which come up during his or her absence. At the least, a reasonably prudent businessperson will take the minimal steps to make a request for an extension of time to file the appeal while he is recuperating from an operation. Mr. Moss has not handled his important business affairs in the manner that a reasonably prudent businessperson would handle them and has not met his burden of showing excusable neglect so as to entitle his company to relief from the Hearing Examiner's Final Order. A review of the record also fails to find any reasons for granting relief under any of the other provisions of Rule 60(b). Since the

Board has found that the Respondent has failed in his burden of showing excusable neglect, the Board does not find it necessary to reach the issue of a meritorious defense.

ORDER

For the reason stated herein, the Review Board **ORDERS** that the Respondent's Motion for Relief from the Final Order of Hearing Examiner Peebles dated December 19, 2003 and filed with the Board on December 22, 2003, is hereby **denied** and Hearing Examiner Peebles's decision has by operation of law become the final order of the Board.

This the 19th day of July, 2004.

OSCAR A. KELLER, JR., CHAIRMAN

RICHARD G. PEARSON, MEMBER

JANICE SMITH GERALD, MEMBER