109TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
109–46

OCCUPATIONAL SAFETY AND HEALTH SMALL BUSINESS DAY IN COURT ACT OF 2005

APRIL 18, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BOEHNER, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 739]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 739) to amend the Occupational Safety and Health Act of 1970 to provide for adjudicative flexibility with regard to the filing of a notice of contest by an employer following the issuance of a citation or proposed assessment of a penalty by the Occupational Safety and Health Administration, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

H.R. 739, the "Occupational Safety and Health Small Business Day in Court Act of 2005," is intended to give to parties under the Occupational Safety and Health Act of 1970 (the "OSH Act") the same basic right to seek relief from a default judgment as that possessed by nearly every other federal litigant in the nation. Specifically, H.R. 739 clarifies the authority of the Occupational Safety and Health Review Commission ("OSHRC" or the "Commission") to grant relief to an employer that by reason of mistake, inadvertence, surprise, or excusable neglect fails to respond to a citation within the fifteen working days provided under law. H.R. 739 maintains Congress' desire to promote a necessary finality in disputes under

the OSH Act while preventing the avoidable injustices that may result under current law. The legislation is a remedial measure intended to prevent injustice and assure fairness in the adjudicatory process, and is purposefully designed to cause no diminution in the substantive workforce protections already in place under the OSH Act.

COMMITTEE ACTION

109th Congress

H.R. 739, the "Occupational Safety and Health Small Business Day in Court Act of 2005," was introduced by Congressman Charlie Norwood on February 10, 2005, and was referred to the Committee on Education and the Workforce and held at full committee. In light of the extensive legislative record developed with respect to substantively identical legislation in the 107th and 108th Congresses, the Committee held no hearings on the bill prior to mark-up.

On April 13, 2005, the Committee favorably reported the bill to the House of Representatives, without amendment, by a roll call vote of 27 to 19.

H.R. 739 is substantively identical to H.R. 2728 as passed by the House in the 108th Congress.

108th Congress

On April 3, 2003, comprehensive OSHA reform legislation, H.R. 1583, the "Occupational Safety and Health Fairness Act of 2003," was introduced in the House. The Subcommittee on Workforce Protections held a hearing on H.R. 1583 on June 17, 2003.[1] At this hearing, the Subcommittee heard testimony from Mr. Brian Landon of Canton, Pennsylvania, testifying on behalf of the National Federation of Independent Businesses; Mr. John Molovich, Health and Safety Specialist, United Steelworkers of America, of Pittsburgh, Pennsylvania; Mr. Ephraim Cohen, a small business owner from New York; and Arthur Sapper, Esq., an attorney of the law firm McDermott, Will & Emery in Washington, DC, testifying on behalf of the U. S. Chamber of Commerce. Legislation incorporating section 2 of H.R. 1583 was subsequently introduced as H.R. 2728, the "Occupational Safety and Health Small Business Day in Court Act of 2003," on July 15, 2003.

On July 24, 2003, the Subcommittee on Workforce Protections favorably reported H.R. 2728, without amendment, by voice vote.

On May 5, 2004, the Committee on Education and the Workforce considered H.R. 2728. An amendment by Chairman John Boehner, changing the short title of the bill from the "Occupational Safety and Health Small Business Day in Court Act of 2003" to the "Occupational Safety and Health Small Business Day in Court Act of 2004" was accepted by unanimous consent. The Committee ordered H.R. 2728, as thus amended, favorably reported to the House of Representatives by a roll call vote of 24 yeas and 20 nays.

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[1] See Hearing on H.R. 1583, "The Occupational Safety and Health Fairness Act of 2003," before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, Serial No. 108–20 (hereinafter "Hearing on H.R. 1583").

On May 18, 2004, the full House of Representatives passed the measure without amendment by a vote of 251–177.[2]

SUMMARY

It is a well-established legal principle in the United States that relief from a final judgment, order, or proceeding that is caused by mistake, inadvertence, surprise, or excusable neglect should be resolved in favor of setting aside that default judgment so that the case may be tried on the merits. While this legal maxim is the practice in almost every federal court in the United States, proceedings under the OSH Act have at times in the past departed from this rule. H.R. 739 simply assures that this widely held principle applies to proceedings under the OSH Act. Specifically, H.R. 739 adds language to Section 10 of the OSH Act, 29 U.S.C. § 659(a), clarifying that a litigant under the OSH Act may be relieved from a default judgment when its failure to contest a citation in a timely manner results from "mistake, inadvertence, surprise, or excusable neglect." The language inserted is identical to language contained in Federal Rule of Civil Procedure 60(b),[3] and is intended simply to authorize OSHRC to deem any notice of contest timely filed if it finds under the totality of the circumstances that an employer's failure to meet its deadline was the result of one of the aforementioned factors.

COMMITTEE VIEWS

Background

Section 8(a) of the OSH Act specifically empowers the Secretary of Labor, subject to limitation, to enter places of work to "inspect and investigate *** all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein."[4] In cases where such inspection and investigation reveal the presence of what are perceived to be violations of the OSH Act, the Occupational Safety and Health Administration ("OSHA") is authorized to issue a citation alleging with specificity the violation(s); identifying the type or classification of such violation(s) believed to be appropriate by OSHA; proposing a penalty to be assessed for such alleged violation(s); and establishing a required date by which the identified violation(s) must be abated.[5]

Section 10(a) of the OSH Act specifies that upon the receipt of an OSHA citation, an employer has fifteen working days in which to notify OSHA of its intention to challenge or contest any or all of the elements contained therein.[6] If the employer has properly contested any of the elements of the citation,[7] the employer is enti-

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[2] Pursuant to the rule providing for its consideration, H. Res. 645, upon approval of the bill it was enrolled with four other bills (H.R. 2729, H.R. 2730, H.R. 2731, and H.R. 2432) and thus transmitted to the Senate.

[3] Federal Rule of Civil Procedure 60(b) states in relevant part: "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 a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. * * *" 28 U.S.C. § 60(b).

[4] 29 U.S.C. 657(a).

[5] See 29 U.S.C. 658(a).

[6] See 29 U.S.C. 659(a).

[7] Generally, an employer's notice of intent to contest must be in writing and must indicate a clear intent on the part of the employer to contest one or more of the elements of the citation.

Continued

tled to a hearing, after which OSHRC may affirm, modify or vacate the Secretary's citation and/or the proposed penalty, or direct other appropriate relief.[8]

If an employer does not contest an OSHA citation within the specified statutory fifteen day period, under section 10 of the OSH Act 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."[9] Put more simply, the failure to file a notice of contest within fifteen days, for any reason, means that a default judgment is entered against the employer, from which it has no appeal.[10]

By way of contrast, under the Federal Rules of Civil Procedure, litigants in federal court are entitled to relief from a default judgment based on the failure to file a timely response, where such failure is caused by reason of mistake, inadvertence, surprise, or excusable neglect, determined with reference to the totality of the circumstances. Despite this well-established principle of law, a series of court cases and differing interpretations of the OSH Act by OSHA and the Commission have made it highly uncertain whether the Commission has the same power to grant employers such relief in appropriate circumstances, or whether an employer who misses the fifteen-day deadline for any reason, no matter how meritorious, is simply "guilty" before OSHA. H.R. 739 makes clear that OSHRC enjoys that authority, and is empowered to grant relief to an employer in the appropriate circumstances.

Documenting Existing Legal Uncertainty

The current state of legal uncertainty over whether or not OSHRC is vested with statutory authority to exercise flexibility in relieving parties, in appropriate circumstances, from what would otherwise be deemed as final orders under section 10 is not new. These differing interpretations result from the conflicting language contained in section 12(g) and section 10(a) of the OSH Act. Specifically, in section 12(g), Congress stated that unless OSHRC "adopted a different rule * * * its proceedings shall be in accordance with the Federal Rules of Civil Procedure."[11] In section 10(a), however, Congress provided that if "within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to no-

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The fifteen day working period specified in the OSH Act generally begins to run when service of a type reasonably calculated to provide an employer with knowledge of the citation occurs. While the OSH Act does not specifically define what constitutes "working days," this term is defined in OSHA's regulations and OSHRC's rules to mean "Mondays through Fridays, exclusive of federal holidays." See 29 CFR 1903.21(c); 29 CFR 2200.(1)(l).

[8] See 29 U.S.C. § 659(c).

[9] 29 U.S.C. § 659(a).

[10] In its consideration of this measure, the Subcommittee on Workforce Protections heard detailed testimony as to the possible consequences of an employer's failure to file a timely notice of contest, which may include: (1) an implied order to abate the cited condition by the date specified in the citation; (2) an obligation to pay the amount of the proposed penalty; and (3) an acceptance of OSHA's classification of the violation. Less obvious consequences may include: (1) inclusion of the citation in the employer's history of previous violations (which will increase subsequent proposed penalties); (2) exposure to possible future citation classifications of "repeat" or "willful" violations (increasing possible penalty levels and raising the possibility of criminal liability); (3) possible impact on an employer's reputation, potentially affecting consumer perception and damaging market position; (4) possible collateral use of the final order against the employer in related civil litigation; and (5) possible disqualification in some jurisdictions from bidding upon public construction contracts. See Testimony of Arthur G. Sapper, Hearing on H.R. 1583, at 59–60 (detailing consequences of employer's failure to file timely notice of contest of OSHA citation).

[11] 29 U.S.C. § 669(g). OSHRC itself has promulgated a rule specifying that unless an OSHRC rule governs a point the Federal Rules of Civil Procedure shall apply. See 29 CFR 2200.2(b).

tify the Secretary that he intended to contest *** 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."[12] Historically, the conflict in these two provisions of the OSH Act has been the source of disagreement over whether OSHRC possesses the authority, pursuant to section 12(g), to relieve employers from a final judgment entered against them in accordance with Rule 60(b) or whether section 10(a) precludes such relief.

Historic Judicial Uncertainty and the LeFrois Case

In one of OSHRC's earliest cases, the Commission exhibited its confusion over Congress' intended meaning of section 10 by holding that it could not apply Rule 60(b) of the Federal Rules of Civil Procedure because it lacked jurisdiction over an appeal of an OSHA citation if a notice of contest were not timely filed.[13] In 1981, the Commission reversed its position, adopting instead the holding of the Third Circuit Court of Appeals, which held that OSHRC did, in fact, have the authority to apply Rule 60(b) to excuse some inadvertent late filings.[14] The Commission has maintained this position since that time. OSHA, in contrast, has maintained its position that OSHRC lacks such authority, and that the fifteen-day rule set forth in section 10(a) of the OSH Act governs.

In 2002, the decision of the United States Court of Appeals for the Second Circuit in *Chao* v. *Russell P. LeFrois Builder, Inc.,*[15] renewed urgency in the need for Congress to reexamine this issue. As the *LeFrois* case was summarized before the Subcommittee on Workforce Protections:

> OSHA issued citations and $11,265 in proposed penalties to that company by certified mail. A secretary for the company got the envelope from the post office, and put it with the day's other mail on the front seat of her car. The envelope with the OSHA citation apparently slipped behind the seat, where it was found after the fifteen-working-day contest deadline expired. The company had used the same mail pickup system for 18 years and had not previously had a problem with it. LeFrois promptly filed a notice of contest, and asked the independent Occupational Safety and Health Review Commission for "a chance to tell our side and to defend ourselves."[16]

In LeFrois, OSHRC excused the lateness of the employer's notice of contest, finding that its failure to respond in a timely fashion was a case of excusable neglect.[17] Nevertheless, despite the Commission's willingness to excuse the employer's justified failure to file a timely notice, OSHA appealed the decision of OSHRC to the U.S. Court of Appeals for the Second Circuit. OSHA argued that

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[12] 29 U.S.C. § 659(a).

[13] See *Secretary* v. *Plessy Burton, Inc.,* 12 OSHRC 577, 1974 OSAHRC LEXIS 145 (Oct. 18, 1974). Remarkably, in Plessy, the Secretary of Labor had moved OSHRC to vacate an uncontested citation item because further investigation indicated that "there was, in fact, no violation."

[14] See *Secretary* v. *Branciforte Builders Inc.,* OSHRC Docket No. 80–1920, 1981 OSAHRC LEXIS 138 (July 13, 1981) (adopting holding of U.S. Circuit Court of Appeals for Third Circuit in *J.I. Hass Co.* v. *OSHRC,* 648 F.2d 190, 195 (3d Cir. 1981) (concluding that OSHRC has authority to excuse late filings through application of Rule 60(b)).

[15] 291 F.3d 219 (2d Cir. 2002).

[16] Testimony of Arthur G. Sapper, Esq., Hearing on H.R. 1583, at 58.

[17] See 291 F.3d at 225.

under section 10(a), the Commission did not have authority to waive the fifteen-day requirement for any reason. OSHRC in turn argued that it had the authority under section 12(g) to apply Rule 60(b) to relieve the employer from the default judgment entered against it. The Second Circuit found in favor of OSHA, holding that OSHRC "does not have this [60(b)] authority."[18]

Arthur G. Sapper, Esq., an expert legal witness well-versed in the law of workplace safety and health, testified before the Subcommittee on Workforce Protections as to the effect of the *LeFrois* case:

> According to a recent decision by the U.S. Court of Appeals for the Second Circuit [*LeFrois*] * * * an employer flatly loses its opportunity to defend itself before the Occupational Safety and Health Review Commission, and will be deemed guilty, if it misses a rigid fifteen working-day deadline to file a notice contesting an OSHA citation, even if the employer had a good excuse for missing that deadline. The employer is out of luck and the government wins without even proving its case.[19]

Continued Uncertainty: The Villa Marina Yacht Case

More recently this issue was addressed, and the continuing uncertainty of the law in this area recognized, in *Secretary of Labor* v. *Villa Marina Yacht Harbor.*[20] In *Villa Marina,* OSHA maintained its position that "Rule 60 is a procedural rule that cannot be used to avoid a limitation on OSHRC's authority."[21] The facts of *Villa Marina* were largely not in dispute:

> OSHA sent the citations and notification in two separate packages to the Post Office Box designated by Villa Marina during the OSHA inspection as its mailing address. On January 18, 2001, the packages were picked up and signed for by a messenger employed by Villa Marina. Based on this date of receipt, Villa Marina's fifteen-day contest period expired on February 8, 2001. On January 19, 2001, the messenger brought the mail he had picked up the day before, including the package from OSHA, to the company. He gave the citations and notification to a secretary, but did not inform her that he had picked up the mail the previous day. The secretary stamped both the citation and the notification as received on January 19, 2001 leading Villa Marina to believe it had one more day than it actually had with which to file a timely notice of contest. Later that day, a Villa Marina supervisor discussed the OSHA matter with the employer's attorney. Thereafter, a notice of contest was prepared and dated February 9, 2001, one day after the period of contest had expired.[22]

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[18] *Id.* at 230.
[19] Testimony of Arthur G. Sapper, Hearing on H.R. 1583, at 58.

[20] *Secretary of Labor* v. *Villa Marina Yacht Harbor,* OSHRC Docket No. 01–0830 (2003).
[21] Brief of Secretary of Labor, *Secretary of Labor* v. *Villa Marina Yacht Harbor,* at 11.

[22] Decision, *Secretary of Labor* v. *Villa Marina Yacht Harbor*, OSHRC Docket No. 01–0830 (2003), at 2–3.

An OSHRC Administrative Law Judge ("ALJ") found that the company "did not have orderly procedures in place for the handling of important documents and/or that [the messenger] was not properly supervised" and that, accordingly, the failure of the employer to file a timely notice of contest was not excusable and thus would stand.[23] In a unanimous decision, OSHRC adopted the ALJ's findings, agreeing that the company had failed to demonstrate the facts necessary to make a case for excusable neglect. More important, OSHRC again expressed its position that it has the authority to relieve employers from such judgments when the facts of the case made it appropriate to do so—they simply did not so warrant in this case.[24]

Resolution of Legal Uncertainty and Judicial Conflict

The Committee finds no fault in OSHRC's application of Rule 60(b) to the facts of the case presented in *Villa Marina.* Indeed, the Commission's close, fact-based scrutiny and judicious application of its authority suggests that, if given clear statutory authority to excuse a missed deadline in appropriate circumstances, OSHRC would use such authority sparingly and on the basis of sound precedent under which the totality of circumstances surrounding the actions of an employer would be examined before granting such relief.[25]

In contrast, the Committee is deeply concerned with the legal interpretation advanced by OSHA regarding the appropriate use of Rule 60(b) by OSHRC. Indeed, this position, and how it might affect OSHRC's ability to excuse missed deadlines in future cases concerning the application of Rule 60(b), was discussed in a prominent footnote in the *Villa Marina* decision.[26] In light of the position maintained by OSHA that its interpretations are to be given deference over those of OSHRC, the Committee is concerned that in the future OSHRC may be faced with no choice but to accept OSHA's argument that it does not possess the authority to apply Rule 60(b) under the OSH Act.

In light of these conflicting views of OSHRC's authority, the Committee concludes that legislative resolution of this matter is necessary. The Committee finds it appropriate that OSHRC have the ability to apply rule 60(b) principles to provide more just and fair results in the cases that it hears, and concludes that the legislative solution embodied in H.R. 739 is necessary to this end.

Recent OSHA Directive Regarding Rule 60(b)

Most recently, on December 13, 2004, the Solicitor of Labor conceded that OSHA's interpretation of Section 10(a) was incorrect. On two separate occasions the Third Circuit ruled that the Commission's view of the use of Rule 60(b) was correct and that inadvert-

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[23] Id. at 10.

[24] Id. at 4; see also id. at 2 n. 3 & 4. n. 5 (discussing OSHRC position and precedent with respect to 60(b) authority).

[25] Indeed, one estimate made by OSHRC in 1996 is that Rule 60(b) motions are made before OSHRC only about thirty times per year, and that such motions would constitute only about two percent of its case activity.

[26] See Decision, *Secretary of Labor* v. *Villa Marina Yacht Harbor* at 4 n. 5 (noting that "the Secretary's statutory limitation argument is a substantial one, particularly in light of the language in sections 10(a) and 12(g) of the Act" and that "the decision in to the Second Circuit in LeFrois further supports the Secretary's position in this matter" but declining to overrule Commission 60(b) precedent on grounds of stare decisis).

ence or excusable neglect should permit an employer to have its case heard on the merits before the Commission.[27] The Solicitor instructed the Regional Solicitors that it would embrace the Commission's position regarding the consideration of late contests. In his Memorandum to Regional Solicitors, the Solicitor states, "After studying the statute and relevant case law, the Department has concluded that late filed notices of contest may be considered under the conditions specified in Rule 60(b)." [28]

The Committee welcomes the Department of Labor's recognition that Rule 60(b) may be applied to permit the consideration of late-filed notices of contest, and commends the Solicitor for reassessing his position. It is the Committee's position that enactment of H.R. 739 is still critically important, to codify this position in the OSH Act and avoid further legal confusion as to this point.

Conclusion

H.R. 739 gives employers before OSHRC the same right to seek relief from a default judgment possessed by nearly every other litigant in federal court, maintaining Congress' desire to promote a necessary finality in disputes under the OSH Act while preventing the avoidable injustices that may result under current law. H.R. 739 does so by simply amending the OSH Act to include language identical to that of Federal Rule of Civil Procedure 60(b), thereby extending to OSHRC the specific authority to excuse missed deadlines when the totality of the surrounding circumstances renders it appropriate to do so. In using language identical to that used in Federal Rule of Civil Procedure 60(b), Congress expresses its intent that the well-developed area of the law that has grown around the use of this rule in federal practice will guide OSHRC in its application of this authority.

SECTION-BY-SECTION: H.R. 739

Section 1. Short title

This act may be cited as the "Occupational Safety and Health Small Business Day in Court Act of 2005."

Section 2. Contesting citations under the Occupational Safety and Health Act of 1970

This section amends section 10 of the Occupational Safety and Health Act of 1970 to authorize relief from a default judgment resulting from an employer's failure to file a notice of contest with OSHA within 15 working days from receipt, if such failure results from "mistake, inadvertence, surprise, or excusable neglect."

Section 3. Effective date

The amendments made by this Act shall apply to a citation or proposed assessment of penalty issued by the Occupational Safety

[27] See *George Harms Constr. Co.* v. *Chao*, 371 F.3d 156 (3d Cir. 2004) & *Avon Contractors* v. *Chao*, 372 F.3d 171 (3d Cir. 2004).

[28] Howard M. Radzely, Solicitor of Labor, "Memorandum to Regional Solicitors re: Late Notices of Contest to OSHA Citations," (Dec. 13, 2004) at 1. A copy of this Memorandum was introduced at markup and is reproduced herein. Also introduced at markup was a copy of a GAO Report, Workplace Safety and Health: OSHA's Voluntary Compliance Strategies Show Promising Results, but Should Be Fully Evaluated before They Are Expanded, No. GAO–04–378 (March 2004), available at *http://www.gao.gov/new.items/d04378.pdf*.

and Health Administration that is issued on or after the date of the enactment of this Act.

EXPLANATION OF AMENDMENTS

No amendments were adopted by the Committee.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act (CAA), requires a description of the application of this bill to the legislative branch. H.R. 739 amends the Occupational Safety and Health Act (OSH Act) to grant relief to an employer that by reason of mistake, inadvertence, surprise, or excusable neglect fails to respond to a citation within the fifteen working days provided under law. Section 215 of the CAA applies certain requirements of the OSH Act to the legislative branch. The Committee intends to make the provisions of this bill available to legislative branch employees and employers in the same way as it is made available to private sector employees and employers under this legislation.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget & Impoundment Control Act requires a statement of whether the provisions of the reported bill include unfunded mandates. The Committee received a letter regarding unfunded mandates from the Director of the Congressional Budget Office and as such the Committee agrees that the bill does not contain any unfunded mandates. See infra.

ROLLCALL VOTES

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 1 BILL H.R. 739 DATE April 13, 2005

H.R. 739 was ordered favorably reported by a vote of 27 – 19

SPONSOR/AMENDMENT Mr. Castle / motion to report the bill to the House with the recommendation that the bill do pass

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. BOEHNER, Chairman	X			
Mr. PETRI, Vice Chairman	X			
Mr. McKEON	X			
Mr. CASTLE	X			
Mr. JOHNSON	X			
Mr. SOUDER	X			
Mr. NORWOOD	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. TIBERI	X			
Mr. KELLER	X			
Mr. OSBORNE	X			
Mr. WILSON	X			
Mr. PORTER	X			
Mr. KLINE	X			
Mrs. MUSGRAVE	X			
Mr. INGLIS	X			
Ms. McMORRIS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. JINDAL	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mrs. DRAKE	X			
Mr. KUHL	X			
Mr. MILLER				X
Mr. KILDEE		X		
Mr. OWENS		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KIND		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. DAVIS				X
Ms. McCOLLUM		X		
Mr. DAVIS		X		
Mr. GRIJALVA				X
Mr. VAN HOLLEN		X		
Mr. RYAN		X		
Mr. BISHOP		X		
Mr. BARROW		X		
TOTALS	27	19		3

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 3(c)(3) of rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 739 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 15, 2005.

Hon. JOHN A. BOEHNER,
Chairman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN:

The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 739, the Occupational Safety and Health Small Business Day in Court Act of 2005.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Tom Bradley.

Sincerely,

ELIZABETH M. ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

H.R. 739—Occupational Safety and Health Small Business Day in Court Act of 2005

H.R. 739 would modify the Occupational Safety and Health Act to provide exceptions to the 15-day deadline for employers to file responses to citations made by the Occupational Safety and Health Agency (OSHA). Under current law, employers who receive a citation or proposed assessment of penalty from OSHA must file a notice of contest within 15 days from receipt of the citation. The citation and assessment are deemed a final order of the Occupational Safety and Health Review Commission (OSHRC) if the 15-day deadline is not met. Since the early 1980s, however, OSHRC has applied Rule 60(b) of the Federal Rules of Civil Procedure and has granted relief from the final order in cases where an employer filed a late notice of contest because of "mistake, inadvertence, surprise, or excusable neglect."

H.R. 739 would codify the equitable standard contained in Rule 60(b) and ensure consistent application of that standard across all jurisdictions in cases involving an employer's failure to file a timely notice of contest. CBO estimates that implementing H.R. 739 would not have any effect on the federal budget.

H.R. 739 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact is Tom Bradley. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with Clause (3)(c) of House Rule XIII, the goal of H.R. 739 is to amend the Occupational Safety and Health Act (OSH Act) to grant relief to an employer that by reason of mistake, inadvertence, surprise, or excusable neglect fails to respond to a citation within the fifteen working days provided under law. The Committee expects the Department of Labor to implement the changes to the law in accordance with these stated goals.

CONSTITUTIONAL AUTHORITY STATEMENT

H.R. 739 amends the Occupational Safety and Health Act, and thus falls within the scope of Congressional powers under Article I, section 8, clause 3 of the Constitution of the United States to the same extent as does the OSH Act.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 739. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

SECTION 10 OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

PROCEDURE FOR ENFORCEMENT

SEC. 10. (a) If, after an inspection or investigation, the Secretary issues a citation under section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty *(unless*

such failure results from mistake, inadvertence, surprise, or excusable neglect), and no notice is filed by any employee or representative of employees under subsection (c) within such time, 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.

(b) If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to assessed under section 17 by reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification or proposed assessment of penalty *(unless such failure results from mistake, inadvertence, surprise, or excusable neglect)*, the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

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MINORITY VIEWS

We oppose H.R 739 because the Occupational Safety and Health Review Commission (OSHRC) already possesses the authority that H.R. 739 purports to grant, obviating any need for this legislation; and because enacting this legislation will distort the Commission's authority to grant equitable relief in ways that are neither equitable nor fair.

H.R. 739 amends sections 10(a) and 10(b) of the OSH Act to provide that an employer who has failed to contest a citation and proposed penalty (section 10(a)) or has failed to contest a notification of failure to correct a violation (section 10(b)) in a timely manner (within 15 working days of receiving the notice) may still contest the citation (or failure to correct notice) if the failure to contest in a timely manner was due to a "mistake, inadvertence, surprise, or excusable neglect." Notwithstanding the bill's title, the "Occupational Safety and Health Small Business Day in Court Act," this bill has nothing to do with small businesses, per se, but applies to all OSHA regulated businesses regardless of size.

The intent of the bill is to overturn a single case in a single circuit, *Chao* v. *Russell P. Le Frois Builder, Inc.* (United States Court of Appeals for the Second Circuit, May 10, 2002). In that case, the Secretary contended and the court, in deference to the Secretary, agreed that the Review Commission does not have authority to grant equitable relief under Rule 60 of the Federal Rules of Civil Procedure, even though Rule 60 otherwise applies the Commission proceedings, because of the statutory construction of sections 10(a) and 10(b). For its part, the Commission has consistently held, before and after *Le Frois,* that, pursuant to Rule 60, it may consider late notices of contest if the failure to meet the deadline was due to excusable neglect.[1]

Le Frois is a unique holding among the circuit courts and directly contradicts an earlier Third Circuit decision, *J.I. Hass Co.* v. *OSHRC,* 648 F.2d 190 (3d Cir. 1981). The Third Circuit, in *George Harms Constr. Co.* v. *Chao,* F.3d 156 (3d Cir. 2004), reconsidered the issue of whether the Commission may grant excusable neglect relief again, subsequently to *Le Frois*. The Third Circuit concluded:

> We discern no basis for the Secretary's contradictory position that the Commission lacks jurisdiction to consider relief under Fed. R. Civ. P. 60(b)(1) but has jurisdiction to consider equitable tolling. A tribunal cannot exercise an equitable remedy unless it first has jurisdiction. If the Commission is not barred by section 10(a) from applying equitable tolling, as the Secretary now asserts, then it also

[1] See Majority Views, "Committee Views: Continued Uncertainty: The Villa Marina Yacht Case."

should not be barred from granting Fed. R. Civ. P. 60(b)(1) relief.[2]

Notwithstanding *Le Frois*, we believe that Hass was correctly decided and has not been undermined by recent decisions.[3]

In fact, no other circuit court has ruled similarly to *Le Frois Builders.*

Not only have other circuits declined to follow *Le Frois*, but as the Majority notes, the Secretary, herself, has changed her position.[4] On December 13, 2004, the Solicitor of Labor sent a memorandum to Labor Department attorneys notifying them that the Department had changed its position regarding the authority of the Commission to grant excusable neglect. Under the new policy, the Secretary will no longer argue that the Commission lacks authority to apply Rule 60(b)'s excusable neglect standard.[5]

The *Le Frois* decision was premised upon deference to the Secretary's opinion. Having changed her view there is no longer a reason for any court to object to the Commission's granting excusable neglect. Nor is there any means by which anyone else may object.

The Commission already has authority under Rule 60 to grant relief based upon excusable neglect. The Secretary, having changed her view, has already effectively overturned *Le Frois*, a case that failed to generate any progeny in the first instance. Simply and plainly, there is no need for this legislation.

If there is no need for H.R. 739, there are also good reasons not to enact it. The bill's proponents state that their intent is to enable OSHRC to waive a statute of limitations in the same way that a federal court may pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. But the bill provides no reference to Rule 60, it simply says that the Review Commission may allow an employer to challenge an OSHA citation, even though it has been properly served by the agency and even though the employer has failed to challenge the citation, so long as the employer's failure is due to "mistake, inadvertence, surprise, or excusable neglect."

Rule 60(b) provides that a party may be relieved from final judgment for mistake, inadvertence, surprise, or excusable neglect, as does H.R. 739.[6] Unlike H.R. 739, however, Rule 60(b) goes on to

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[2] *George Harms Constr. Co.* v. *Chao,* 371 F.3d 156 (3d Cir. 2004) at 16. See also *Avon Contractors Inc.* v. *Secretary of Labor,* 372 F.3d 171 (3d Cir. 2004).

[3] Id. at 18–19.

[4] Majority Views, "Committee Views: Recent OSHA Directive Regarding Rule 60(b)."

[5] Yin Wilczek, "Policy Changed Regarding OSHRC's Authority on Late Notices of Contest," Occupational Safety & Health Jan. 13, 2005: S19–S20.

[6] Rule 60(b) 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; (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 subdivision (b) 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 grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs

Continued

provide that a motion for relief does not affect the finality of a judgment or suspend its operation. Unlike H.R. 739, under Rule 60(b) the motion for relief must be made within a year. Finally, unlike H.R. 739, Rule 60(b) applies equally to section 10(c) of the OSH Act, as well as section 10(a) and 10(b). Section 10(c) authorizes workers and their representatives to challenge the period the Secretary has provided for abating a safety and health hazard if that period is unreasonably long. Section 10(c) is subject to the same fifteen day statute of limitations that is applicable to sections 10(a) and 10(b). As previously noted, Rule 60(b) applies equally to section 10(c). H.R. 739, however, applies only to sections 10(a) and 10(b).

The best that can be said of H.R 739 is that its language is similar to part of Rule 60. Without specific reference to Rule 60, there is no assurance that the court decisions that have otherwise circumscribed the application of that rule would be applicable to this legislation. The plain language of the statute provides no such limitation. The Federal Rules of Administrative Procedure indisputably apply to proceeding before the Commission and the presumptive view, including that of the Secretary of Labor, is that the Commission has authority under Rule 60 to grant excusable neglect. A canon of statutory interpretation is that the Congress does not enact redundant laws; that is, as a matter of statutory interpretation, the Congress would not enact legislation granting an agency authority it already possesses. Therefore, it is not unreasonable to expect the courts to interpret H.R. 739 as achieving something different from Rule 60.

If the Congress acts to statutorily extend excusable neglect to sections 10(a) and 10(b), but does not make a similar extension to section 10(c), the virtually inescapable conclusion is that the Congress intended that only employers and not similarly situated workers should be entitled to excusable neglect relief. A court will assume that Congress acted knowledgeably in enacting H.R. 739 and was aware of the provisions of 60(b). It, therefore, would not be unreasonable for a court to conclude that the Congress intentionally did not limit the time period in which an excusable neglect claim may be raised. Under this legislation, the responsibility to correct a health hazard may be indefinitely delayed.

In his memorandum to the regional Solicitors, the Solicitor pointed out that under Rule 60(b), relief for excusable neglect cannot be granted "unless the employer also asserts a meritorious defense to the citation." H.R. 739 imposes no such limitation. The Solicitor noted that under Rule 60(b) relief is available only "upon such terms as are just." H.R. 739 imposes no such limitation. As the Solicitor pointed out, the Secretary can require employers to show that workers are no longer at risk as a condition for proceeding with a hearing on the merits. Once again, H.R. 739 imposes no such limits.

The Majority appears to equate an OSH Act proceeding with any other typical proceeding. In fact, however, much more is at stake. What is at stake is not merely whether an employer will pay a

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of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

monetary fine, but whether workers will have a safe and healthy workplace or be subject to injury, illness, and death. H.R. 739 ignores these facts and undermines the safety and health of workers as a consequence. This legislation should be rejected.

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