



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
VOODOO CONSTRUCTION CORP.
Respondent.

OSHRC DOCKET
NO. 94-1968

**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 January 23, 1995. The decision of the Judge will become a final order of the Commission on February 22, 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 February 13, 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.
Ray H. Darling, Jr.
Executive Secretary

Date: January 23, 1995

DOCKET NO. 94-1968

NOTICE IS GIVEN TO THE FOLLOWING:

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Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
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contest the citations or proposed penalty within fifteen working days of its receipt. The Respondent had until December 20, 1993, to file its notice of contest, but did not do so, instead its attorney, Mr. Sabghir sent a letter to the Commission dated February 2, 1994, blaming the failure to file in a timely fashion on himself stating, "As I have handled their prior OSHA matters as well as their administrative law work, they faxed their papers to me as they normally do. Unbeknownst to them, although there was paper in my machine, it was not functional and was unable to ascertain who or what was faxed to me." In short, he stated the client faxed him the OSHA papers which he never received due to a broken fax machine.

Mr. Genek Jakobowicz, the Supervisor and Executive Officer of the Corporation testified that the firm had about 50 employees and about 6 or 7 clericals working in the office; that there was a system in place for receipt of all incoming mail. He recalled receiving the citations from OSHA and that the president "most likely saw that mail" and told the girl to fax it to the attorney. He further testified that they were waiting for a response from their attorney but because of "the changes, we have some problems financial and everything, we have a lot of people change. Some people quit on us and some people left because of the financial conditions and there was no one following up on that letter, if it was received, what has happened." (T-17) To further befuddle this state of affairs, Mr. Sabghir stated that because his fax machine was broken, he never received the letter regarding the citations sent by his client; actually, since he responded by letter dated February 2, 1994, it took approximately 6 weeks for him to become acquainted with the citations issued and respond to them. The evidence demonstrates that Voodoo Construction is a going business, employs 6 or 7 clerical, some of which are assigned to and take care of

the mail received; the company has dealt with OSHA before, the president was aware of the OSHA mail, and while they allegedly faxed a letter to their attorney regarding the citations, did not follow up to see that what was necessary (filing a notice of contest timely) was effectuated; compounding the error was the failure of their attorney who stated his fax was only out one day to check with his clients regarding the meaning of the blank fax received. This is a case where a business has not followed its own procedures of following up to see that an important governmental communication is properly and timely answered; it is also a case where counsel had a sudden failure of equipment, but he compounded it by not checking further to identify whence the fax came from, in effect just not looking after his business properly. What permeates the state of events here that led to the late filing was slovenly business practices by both the company personnel and counsel; there was a lack of diligence on part of the company in following up on its fax herein, and further lack of diligence by counsel in reconstructing the fax and meeting the Act's requirements as to notice promptly. The evidence does not establish "excusable neglect" under Rule 60. The Commission has held that employers whose improper business procedures has led to failure to file on a timely basis are not entitled to relief. See *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 1987-90 CCH OSHD par. 28,409 (No. 86-1266,1989); *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058, 1987-90 CCH OSHD par 28,433 (No 88-1830, 1989). What is indicated here is simple negligence, slovenly business practices and lack of diligence in policing good business follow-up. Such conduct will not establish grounds for relief. *E.K. Construction Co.*, 15 BNA OSHC 1165-6. The Secretary's motion to dismiss the late filed notice of contest is GRANTED.

ORDER

The citations and proposed penalties are **AFFIRMED** in all respects.



IRVING SOMMER
Chief Judge

DATED: **JAN 20 1995**
Washington, D.C.