



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5400
Fax: (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
LEE ZOLDAN, INC.
Respondent.

OSHRC DOCKET
NO. 95-0617

**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 September 29, 1995. The decision of the Judge will become a final order of the Commission on October 30, 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 October 19, 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: September 29, 1995

DOCKET NO. 95-0617

NOTICE IS GIVEN TO THE FOLLOWING:

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

Lee Zoldan, President
Lee Zoldan, Inc.
381 North Street
Middletown,, NY 10940

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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Phone: (202) 606-5405

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SECRETARY OF LABOR,

Complainant,

v.

LEE ZOLDAN, INC.,

Respondent.

Docket No. 95-0617

APPEARANCES:

Luis Micheli, Esq.
 Ms. Sabina Rezza
 For the Complainant

Lee Zoldan, President
 For the Respondent

BEFORE: Chief Judge Irving Sommer

DECISION AND ORDER

The Secretary moved to dismiss the Respondent's notice of as not being timely filed under section 10 of the Act. A hearing was held in New York, N.Y. on August 10, 1995 concerning the merits of the motion at which time evidence and testimony was profert by both parties.

The citation setting forth the alleged violations and the accompanying notification of proposed penalty was issued by certified mail on January 12, 1995 and received on June 13, 1995. Pursuant to section 10(a) of the Act, 29 U.S.C.659(a), Zoldan was required to notify the Secretary of any

intent to contest within 15 working days of receipt of the citation and notification of proposed penalty, or February 6, 1995. In the absence of a timely contest, the citations and proposed penalties would be deemed a final judgement of the Commission by operation of law. Section 10(a).

In a letter dated March 24, 1995 the Respondent stated that its failure to file a notice of contest during the 15 day period was that he believed that if the violations were corrected and he only contested the penalties, no notice was required. Similarly, the testimony of Lee Zoldan, the corporate president was that a portion of the citation stated, "If you do not disagree with the violation, it is not necessary to respond", and thusly since he was only contesting the penalties, was of the opinion no written contest within the time period was due. Mr. Zoldan admitted he had not read the citation and accompanying document, but relied on his wife, who is one of the clerical employed at the firm for the procedure to follow.

Had Mr. Zoltan read the citation carefully he would have noted under the section called the following instructions:

RIGHT TO CONTEST- You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates without contesting the underlying violations. Unless you inform the Area Director in writing that you intend to contest the citation(s) and/or proposed penalty(ies) within 15 working days after receipt, the citation(s) and the proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.

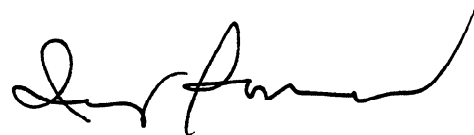
The record plainly shows that the Respondent filed an untimely notice of contest. The issue is whether said filing may be excused under the circumstances. The evidence demonstrates that the Respondent has been in the residential and commercial plumbing and heating business since 1966.

He employees 8-10 plumbers and has his wife and sister in law doing full-time clerical work. The citation and the accompanying material which the Respondent received "plainly state(s) the requirement to file a notice of contest within the prescribed period." *Roy Kay*, 13 BNA OSHC 2021, 2022. Accord, *Acrom Construction Services*, 15 BNA OSHC 1123,1126. The evidence does not establish excusable neglect or mistake under Rule 60(b)(1). What is indicated here is negligence on the part of the company president who admittedly did not read the material sent by OSHA outlining his rights and responsibilities. The Commission has held that employers whose improper business procedures has led to failure to file in a timely manner are not entitled to relief. See *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020; *Stroudsburg Dyeing & Finishing Co.*, 13 BNA 2058. Simple negligence will not establish entitlement to relief. *E.K. Construction Co.*, 15 BNA OSHC 1165, 1166; *Rebco Steel Corp.*, 8 BNA OSHC 1235.

Accordingly, the motion of the Secretary to dismiss the Respondent's notice of contest is GRANTED.

ORDER

The citation issued to the Respondent on January 12, 1995 and the proposed penalties are AFFIRMED in all respects.



IRVING SOMMER
Chief Judge

DATED: **SEP 28 1995**
Washington, D.C.