



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

SECRETARY OF LABOR
Complainant,
v.
HARRY FIOCCHI & ASSOCIATES, INC.
Respondent.

Phone: (202) 606-5100
Fax: (202) 606-5050

OSHRC DOCKET
NO. 95-0977

**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 February 6, 1996. The decision of the Judge will become a final order of the Commission on March 7, 1996 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 26, 1996 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: February 6, 1996

DOCKET NO. 95-0977

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

Charles B. Gross
Harry Fiocchi & Associates, Inc.
Lincoln Avenue Business Park
Vineland, NJ 08360

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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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

HARRY FIOCCHI AND ASSOCIATES,
INC.

Respondent.

Docket No. 95-0977

APPEARANCES:

Patricia M. Rodenhausen, Esq.
Regional Solicitor
Ms. Sabina Rezza
Office of the Solicitor
U.S. Department of Labor
New York, New York

Mr. Charles B. Gross
Manager of Project Development
Harry Fiocchi and Associates, Inc.
Vineland, N.J.

For the Complainant

For the Respondent

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. sec. 651-678 (the Act), to determine whether Respondent, Harry Fiocchi & Associates, Inc. (Fiocchi) filed a timely notice of contest of the citation and penalty proposed by the Secretary for alleged violation of the Act. A hearing was held on the Secretary's motion to dismiss Fiocchi's notice of contest. Neither party filed a brief following the hearing.

BACKGROUND

The citation setting forth the alleged violations and the accompanying notification of proposed penalty was issued by certified mail on March 31, 1995 and received by the Respondent on April 4, 1995. Pursuant to section 10(a) of the Act, 29 U.S.C. section 659(a), Fiocchi 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 April 25, 1995. In the absence of a timely contest, the citation and proposed penalty would be deemed a final judgment of the Commission by operation of law. Section 10(a). In a letter dated May 15, 1995, postmarked on May 18, 1995 and received by the Acting Area Director of the Occupational Safety and Health Administration on May 19, 1995, Mr. Harry Fiocchi, the president of the Respondent corporation stated that, "I was not aware that my firm had received this citation and notification of penalty until I personally received a subsequent letter from you dated May 11, 1995." The letter Respondent refers to was one from OSHA inquiring as to whether abatement of the violations found had been carried out. On May 24, 1995 the Respondent wrote the Commission to request "an Appeal of the above Citation and Notification of Penalty--". Mr. Charles B. Gross, the manager of project development for the Respondent represented the company and testified at the hearing that during May of 1995 their executive secretary was on leave and a temporary clerk had misfiled the citation and accompanying papers so that Mr. Fiocchi was not aware of the receipt of same until a later letter from OSHA. (Tr. 15-16)

DISCUSSION

The record plainly shows that the Respondent filed an untimely notice of contest. The issue before this Court is whether that untimely filing may be excused under the circumstances. An

otherwise untimely notice of contest may be accepted where the delay in filing was caused by deception on the part of the Secretary or by failure of the Secretary to follow proper procedures. An employer is also entitled to relief under Fed. R. Civ. P. 60(b) if it demonstrates that the Commission's final order was entered as a result of "mistake, inadvertence, surprise, or excusable neglect" for such mitigating circumstances as absence, illness, or a disability which prevents the party from protecting its interests. *Branciforth Builders, Inc.*, 9 BNA OSHC 2113, 1981 CCH OSHD par. 25,591 (No. 80-1920,1981).

The record shows that the Respondent has been in the business of general construction, design, build and project management for "somewhere 15 to 20 years." There are about 10 employees, consisting of secretarial and professional staffers.

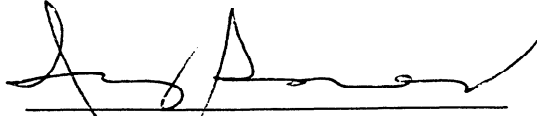
The failure of Mr. Fiocchi to receive the citations is attributable solely to a breakdown of his business procedures. The evidence does not establish excusable neglect or mistake under Rule 60(b)(1). What is indicated here is negligence of company personnel and failure of the company president to set procedures which provide that important governmental mail is promptly opened and replied to. 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 OSHC 2058. Simple negligence will not establish entitlement to relief. *E.K. Construction Co.*, 15 BNA OSHC 1165, 1166.

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

ORDER

The citation issued to the Respondent on March 31, 1995 and the proposed penalty is

AFFIRMED in all respects.

A handwritten signature in black ink, appearing to read 'Irving Sommer', written over a horizontal line.

IRVING SOMMER
Chief Judge

DATED: **FEB 26** 1996
Washington, D.C.

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SECRETARY OF LABOR

Complainant

v.

HARRY FIOCCHI AND ASSOCIATES, INC.,

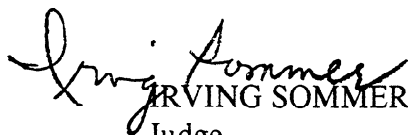
Respondent

Docket No. 95-0977

ORDER CERTIFYING RECORD

Consistent with 5 U.S.C. Section 556(e), the undersigned hereby certifies that the record in this proceeding consists of the following:

1. All documents forwarded to the undersigned by assignment dated August 18, 1995, numbered ES-1 through ES-7, and CJ-8 through CJ-10;
2. All documents filed with and issued by the undersigned numbered J-11 through J-19;
3. An original of the official transcript of the hearing held November 29, 1995, consisting of 23 pages;
4. Exhibits C-1 through C-6; are admitted into evidence and;
5. The undersigned's Decision and Order in this matter.


IRVING SOMMER
Judge

DATED: February 6, 1996
Washington, D.C.