



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.

JIM SMITH BODY SHOP & WRECKER SER.
Respondent.

**OSHRC DOCKET
NO. 96-0443**

**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 July 24, 1996. The decision of the Judge will become a final order of the Commission on August 23, 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 August 13, 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

A handwritten signature in cursive script that reads "Ray H. Darling, Jr.".

Ray H. Darling, Jr.
Executive Secretary

Date: July 24, 1996

DOCKET NO. 96-0443

NOTICE IS GIVEN TO THE FOLLOWING:

James E. White, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
525 Griffin Square Bldg., Suite 501
Griffin & Young Streets
Dallas, TX 75202

Jim Smith, Owner
Jim Smith Body Shop & Wrecker
Service
Highway 64, East, Box 1812
Conway, AR 72032

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.

JIM SMITH BODY SHOP & WRECKER
SERVICE,

Respondent.

Docket No. 96-0443

APPEARANCES:

Alex Mabry, Esq.
U.S. Department of Labor
Dallas, Texas
Complainant

Jim Smith, Owner
Jim Smith Body Shop, Respondent
Conway, Arkansas
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. section 651-678 (the Act), to determine whether Respondent, Jim Smith Body Shop & Wrecker Service filed a timely notice of contest of the citations and penalties proposed by the Secretary for alleged violations of the Act. A hearing was held on the Secretary's motion to dismiss the Respondent's notice of contest. Neither party filed a brief following the hearing.

BACKGROUND

The citations setting forth the alleged violations and the accompanying notification of proposed penalties were issued by certified mail on January 24, 1996 and received by the Respondent on January 25, 1996. Pursuant to section 10(a) of the Act, 29 U.S.C. section 659(a), the Respondent

was required to notify the Secretary of any intent to contest within 15 working days of receipt of the citations and notification of proposed penalty, or February 15, 1996. In the absence of a timely contest, the citations and proposed penalties would be deemed a final judgment of the Commission by operation of law. Section 10(a).

In a letter dated February 7, 1996 to the Department of Labor Smith stated that "I am going to contest the following citations,---", but in his testimony indicated that he had started the letter on said date, that his postage meter stamp on the letter was dated February 16, 1996, but even at said date the letter was not mailed, and that another date on said letter of February 20, 1996 was when the letter got down to the Little Rock post office.

See Tr. 334-36.

DISCUSSION

The record here plainly shows that Smith notified the Secretary of its intent to contest the citations and penalties after the expiration of the statutory 15-working day period. The issue before this court is whether that untimely filing may be excused in 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. Rules of Civil Procedure 60(b)(1) if it demonstrates that the Commission's final order was entered as a result of "mistake, inadvertence, surprise, or excusable neglect" or under Rule 60(b)(6) for such mitigating circumstances as absence, illness, or a disability which prevents the party from protecting its interests. *Branicforte Builders, Inc.*, 9 BNA OSHC 2113, 1981 CCH OSHD, par. 25591 (No. 80-1920,1981). Here, there is no contention and no showing that the Secretary acted improperly or that the factors mentioned in Rule 60(b)(6) are present.

Both in the citation issued on March 30, 1995 and the follow up inspection which culminated in the issuance a repeat citation and in the notification of failure to abate alleged violations issued January 24, 1996 the Respondent was notified that if he wished to contest any of the citations or proposed penalty he must do so within the 15 working day period. These documents placed Smith explicitly on notice he was obligated to file a notice of contest within 15 working days of receipt. *Roy Kay, Inc.*, 13 BNA OSHC 2021, 1987-90 CCH OSHD, par 28,406 (No. 88-1748, 1989). *Accord, Acrom Construction Services*, 15 BNA OSHC 1123, 1126, 1991 CCH OSHD, par. 29393(88-2291, 1991). The evidence does not establish excusable neglect or mistake under Rule 60(b)(1). What is indicated here is neglect and poor business practices on the part of the Respondent. This is a going business of fifteen years standing, but the proprietor Mr. Smith did not take the time and put in practice methods to treat this important government investigation and results which he was personally involved in. 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. The Respondent has a going business of long standing and should have provided for sound and proper procedures for dealing with governmental affairs. Simple negligence and neglect will not provide entitlement to relief.

While I am not unsympathetic to the Respondent's plight, I have no alternative but to hold it responsible for failure to carefully read and act upon the unambiguous instructions set forth in the documentation and other papers accompanying the citations.

ORDER

The Secretary's motion to dismiss is granted, and the citation and notice of proposed penalties, and the citation and notification of failure to abate alleged violations and the proposed penalties therein are **AFFIRMED** in all respects.



IRVING SOMMER
Chief Judge

DATED: **JUL 22 1996**
Washington, D.C.