



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

FAX:
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SECRETARY OF LABOR,

Complainant,

v.

HERASCO CONTRACTORS, INC.,

Respondent.

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: OSHRC Docket No. 93-1412
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DECISION

BEFORE: FOULKE, Chairman, and MONTROYA, Commissioner.


BY THE COMMISSION:


Following a July 22, 1992 inspection, the Occupational Safety and Health Administration ("OSHA") issued two citations against Herasco Contractors, Inc. on August 19, 1992. On August 29, 1992, Herasco's president, Renee Heras, filed a document captioned "Abatement Letter" with OSHA. This document was never forwarded to the Commission. An April 21, 1993 collection letter from OSHA demanding payment of \$4,919 in penalties, interest and other late fees prompted Herasco to file a letter on May 22, 1993 that explicitly contested the citations. On June 15, 1993, the Secretary of Labor filed a motion to dismiss Herasco's notice of contest as untimely filed. In the memorandum supporting his motion, the Secretary claimed that the Commission has no jurisdiction over this matter because the only writing from Herasco that could be construed as a notice of contest, the May 22, 1993 letter, is "grossly out of time." The Chief Administrative Law Judge agreed, found the notice of contest to be untimely, and granted the Secretary's motion.

By letter of August 17, 1993, Herasco requested relief from the Chief Judge's order. The case was directed for review.

We find that the judge erred in granting the Secretary's motion to dismiss because the May 22, 1993 document is not the only one that may be interpreted as a notice of contest. We construe the August 29, 1992 letter liberally in accordance with long-standing Commission precedent and appellate court case law. *See, e.g., Brennan v. OSHRC (Bill Echols Trucking Co.)*, 487 F.2d 230 (5th Cir. 1973). The Secretary alleges in his motion that the letter was merely an "abatement letter" containing only information about corrective measures. *Cf., e.g., Arena Constr. Co. v. Secretary of Labor*, 1978 CCH OSHD ¶ 22,987 (S.D.N.Y. 1978) (abatement letter was not construed as a notice of contest in a penalty collection action because there was no intent to dispute citation exhibited in the letter). We find, to the contrary, that Heras' statements in the letter constitute objections to the two citations on the grounds that compliance was physically impossible in one instance and infeasible in the other. Liberally construed, Heras' statements in the letter exhibit a clear intent to dispute the citations and, thus, serve as a notice of contest. *See, e.g., Eastern Knitting Mills*, 1 BNA OSHC 1677, 1973-74 CCH OSHD ¶ 17,691 (No. 2019, 1974) (employer's letter complaining of inability to devise a way to abate a violation constituted a notice of contest). Herasco's August 29, 1992 letter was filed within fifteen working days of the date the citations were issued and thus constitutes a timely notice of contest.

Accordingly, the Commission vacates the Chief Administrative Law Judge's order dated August 2, 1993 dismissing Herasco's notice of contest as untimely and remands the case for a hearing on the merits of the citations.


Edwin G. Foulke, Jr.
Chairman


Velma Montoya
Commissioner

Dated: September 22, 1993

Docket No. 93-1412

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on September 22, 1993.

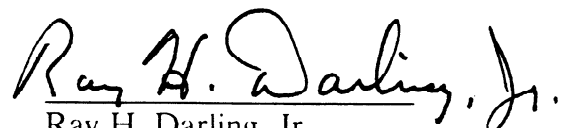
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One Congress Street
Boston, MA 02114

Renee Heras, President
Herasco Contractors, Inc.
PO Box 109
Ashland, MA 01721

Irving Sommer
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th Street, Suite 990
Washington, D.C. 20036-3419

FOR THE COMMISSION


Ray H. Darling, Jr.
Executive Secretary



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OSHRC DOCKET
NO. 93-1412

**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 August 3, 1993. The decision of the Judge will become a final order of the Commission on September 2, 1993 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 23, 1993 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: August 3, 1993

DOCKET NO. 93-1412

NOTICE IS GIVEN TO THE FOLLOWING:

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Irving Sommer
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ORDER

By motion dated June 15, 1993 the Secretary moves to dismiss the Respondent's notice of contest as not being timely filed under section 10 of the Act. The Respondent did not file an answer to the allegations advanced in the motion.

Accordingly, the facts alleged in the motion are accepted as being admitted to be true. Based on these facts I find that the notice of contest was untimely. Motion for dismissal is granted, and the notice of contest is DISMISSED.

IT IS FURTHER ORDERED that the citation(s), penalties and abatement dates are AFFIRMED as issued.

IRVING SOMMER
Judge

DATED: **AUG - 2 1993**
Washington, D.C.