# UNITED STATES OF AMERICA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,

Complainant,

v. : Docket No. 96-0999

SEBCO, INC.,

Respondent.

Appearances:

Ms. Sabina Rezza Stephen Hicks, President

For the Secretary 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. section 651-678(the Act), to determine whether Respondent, Sebco, Inc. (Sebco) filed a timely notice of contest of the citation and penalties proposed by the Secretary for alleged violations of the Act. A hearing was held in New York, N.Y. on December 4, 1996 on the Secretary's motion to dismiss Sebco's notice of contest.

#### **BACKGROUND**

The citation setting forth the alleged violations and the accompanying notification of proposed penalty was issued by certified mail on May 15, 1996. Pursuant to section 10(a) of the Act, 29 U.S.C., section 659(a), Sebco was required to notify the Secretary of any intent to contest within 15 working days of receipt of the citation and notification of proposed penalties, or June 10, 1996. In the absence of a timely contest, the citation and proposed penalties would be deemed a final judgement of the Commission by operation of law. Section 10(a) of the Act. In response to a second letter from OSHA requesting information as to whether the hazards had been abated the Respondent

by letter dated July 10, 1996 stated, "Let me first apologize for not responding to the citation, but it was misplaced during our office move and when I received your second notice today I realized my negligence in responding."

#### DISCUSSION

The record here plainly shows that Sebco notified the Secretary of its intent to contest the citation and penalties but did so after the expiration of the 15 working day period. The issue presented is whether the 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)(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 a party from protecting its interests. See Branciforte Builders, Inc., 9 BNA OSHC 2113, 1981 CCH OSHD par. 25,591 (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. The Citation "plainly state(s) the requirement to file a notice of contest within the prescribed period. Roy Kay, 13 BNA OSHC 2021-2. Accord, Acrom Construction Services, 15 BNA OSHC 1123,1126. What is indicated here is neglect and poor business practices. The Respondent states that the citation was misplaced during a business move causing the late filing. The respondent has been in the general contracting and construction management business since 1989, and has a work force of between 5 and ten people. His front office consists of three people including a secretary. The misplacement of the citation and accompanying documents was due to nothing more than poor business practices and neglect on part of the respondent. Even during a management transition and move it was incumbent upon the respondent to maintain orderly procedures for handling its important mail. 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. The office procedures of the respondent, a going business should provide for reliable, continuous mail scrutiny so that important document are not overlooked or misplaced. Simple negligence will not provide entitlement to relief. E.K. Construction Co., 15 BNA OSHC 1165-6.

While I am sympathetic to the Respondent's plight, I have no alternative but to hold it responsible for failing to file in a timely manner. Sebco had clear notice of the need to contest within the 15 working day period. Its mistake was neither excusable nor justified by any misconduct or misleading on the part of the Secretary.

## **ORDER**

	The Secretary's	motion to	dismiss is	granted,	and the	citation	and	notificatio	ı of	penalty	is
AFFI	RMED in all respo	ects.									

IRVING SOMMER Chief Judge

DATED:

Washington, D.C.