



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.
HERZOG FOOD, INC.
Respondent.

**OSHRC DOCKET
NO. 96-0415**

**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 26, 1996. The decision of the Judge will become a final order of the Commission on October 28, 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 October 16, 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:

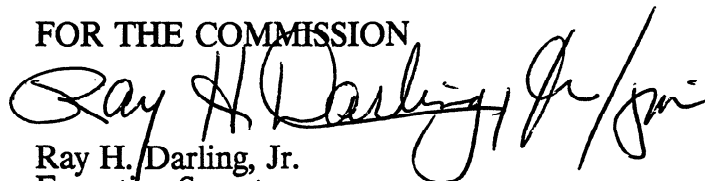
Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

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.
Executive Secretary

Date: September 26, 1996

DOCKET NO. 96-0415

NOTICE IS GIVEN TO THE FOLLOWING:

Patricia M. Rodenhausen
Regional Solicitor, U.S. DOL
201 Varick Street, Room 707
New York, NY 10014

Jeffrey A. Marshall, Esquire
Marshall, Conway & Wright, P. C.
116 John Street
Nw York, NY 10038

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

00106866783:02

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

HERZOG FOOD, INC.,

Respondent.

Docket No. 96-0415

Appearances:

Luis Micheli, Esq.
Ms. Sabina Rezza, Esq.
Regional Solicitor, USDOL
New York, N.Y.

For the Complainant

Robert Conway, Esq.
Marshall, Conway & Wright, Esq.
New York, N.Y.

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 the Respondent Herzog Food, Inc. ("Herzog") 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 the Respondent's notice of contest. The Secretary filed a brief following the hearing.

BACKGROUND

The citation setting forth the alleged violation and the accompanying notification of proposed penalty was issued by certified mail on December 11, 1995. Herzog received these documents on December 18, 1995. (Exh.C-3,6;Tr.36). Pursuant to section 10(a) of the Act, 29 U.S.C. sec. 659(a), Herzog 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 January 10,1996. 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 January 18, 1996 counsel for Herzog notified the Department of Labor that "We are hereby issuing a formal protest to the filing of two violations against us." (Exh. C-4). Subsequently, in a letter dated February 21, 1996 counsel informed the Department of Labor that "Our letter of protest was issued on the nineteenth working day following receipt of the claim. We note that the City of New York had lost four days to snow emergencies. I am a Westchester resident and lost the entirety of the week of January 15th through the 18th."

DISCUSSION

The record here plainly shows that Herzog notified the Secretary of its intent to contest the citation and proposed penalty after the expiration of the 15 day working 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. 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 the party from protecting its interests. Here, there is no contention and no showing that the Secretary acted improperly or that the factors mentioned in Rule 60(b)(6) prevented the required action.

The cover letter to Herzog's citation states in emphasized type:

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 the receipt, the citation(s) and 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. This admonition is repeated in the pamphlet enclosed with the citation to the Respondent which fully explains the employer rights and responsibilities. (Exh. C-2). Thusly, the citation placed Herzog explicitly on notice that it was obligated to file a notice of contest within 15 working days of receipt. *Roy Kay Inc.*, 13 BNA OSHC 2021, 1987 CCH OSHD par.28,406 (No.88-1748, 1989). The "OSHA 3000"booklet also provides an "additional, straightforward explanation" of the need for a timely contest. See *Keefe Earth Boring Co.*, 14 BNA OSHC 2187.

Mr. Mark Witlieb, the corporate owner testified that he received the citation and documents from OSHA on December 18, 1995 (Tr. 36), read the same (Tr.39) and then "probably on or about that day" (Tr.37) notified his insurance carrier of said receipt.

Mr. Matthei, the senior claims representative for the insurance carrier testified that the documents from Herzog was first received by him on December 29, 1995 (Tr. 43), but that he had spoken to Mr. Witlieb and been informed of their existence on December 21. However, this date would appear to

be in error, since in a letter to the attorney dated January 16, 1996 Matthei makes reference to their conversation concerning this matter on December 18, 1995 buttressing the statement of Witlieb as to when he called his insurance company. The Respondent alleges that because of snow emergency closings on a number of days in January 1996 the contest letter was late. The evidence however, belies such contention. The corporate owner admitted receipt of the OSHA documents and read same. His rights and responsibilities were plainly there for him to see and comprehend. He called his insurance professional on that very day and obviously gave notice of the citation, and forwarded it. Matthei, the insurance professional called the attorney on December 18, 1995 to alert him, and testified he received the documents on December 29, 1995, all these dates before the alleged snowstorm. In short, two people read the documents, which told of the need for filing within 15 working days and took no action. The failure of the corporate owner who received the documents and who while reading them was careless and overlooked the admonitions given does not give rise to excusable neglect or any other reason which would allow relief. *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058. The employers error and neglect of his vital business mail does not give rise to an excuse sufficient to obtain relief under Rule 60(b). "The excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules." *Cosmopolitan Aviation Corp.*, 763 F2d 507, 515 (2nd Cir.), cert. den., 474 U.S. 1032. The Respondent was negligent and did not follow proper business practices in not reading thoroughly the material sent by OSHA, including both the citation and booklet which outlined his rights and responsibilities. The Commission has held that employers whose improper business practices and procedures has led to failure to file in a timely manner are not entitled to relief, *Louisiana Pacific Corp.*, 13 BNA OSHC 2020, nor will negligence establish such relief rights. *E.K. Construction Co.*,

15 BNA OSHC 1165. It is further pertinent that his insurance agent similarly read the documents and while conversing with the attorney before sending the documents to him, similarly did not act to see that a timely notice of contest was sent, although there was still time available when he received the papers. "inadvertence, ignorance of the rules or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer Investment Services Co. v. Brunswick Assoc.*, 113 S.Ct. 1489, 1496 (1993).

Respondent is responsible for its failure to carefully read and act upon the unambiguous instructions set forth in the documentation accompanying the citation. *Acrom Construction Servs., Inc.* 15 BNA OSHC 1123. The circumstances here are insufficient to establish that Herzog is entitled to relief under Rule 60(b).

ORDER

The Secretary's motion to dismiss is granted, and the citation and notification of proposed penalty are affirmed.



IRVING SOMMER
Chief Judge

DATED: **SEP 20 1996**
Washington, D.C.