



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
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SECRETARY OF LABOR
Complainant,
v.
NEW JERSEY MONUMENT COMPANY
Respondent.

OSHRC DOCKET
NO. 95-1512

**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 March 14, 1996. The decision of the Judge will become a final order of the Commission on April 15, 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 April 4, 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:

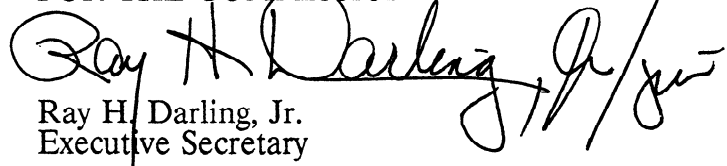
Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

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: March 14, 1996

DOCKET NO. 95-1512

NOTICE IS GIVEN TO THE FOLLOWING:

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Irving Sommer
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

NEW JERSEY MONUMENT CO.,

Respondent.

Docket No. 95-1512

Appearances:

Patricia Rodenhausen, Esq.
Ms. Sabina Rezza
Regional Solicitor
U.S. Department of Labor
New York, N.Y.
For the Complainant

Ms. Anne Marie Saracino
Owner
N.J. Monument Co.
N. Arlington, N.J. 07032

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, New Jersey Monument Co. 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. 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 June 16, 1995 and received by the Respondent on June 19, 1995. Pursuant to section 10(a) of the Act, 29 U.S.C. sec. 659(a), Respondent was required to notify the Secretary of any intent to contest the citation within 15 working days of receipt of the citation and notification of proposed penalty, or July 11, 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). The Respondent was contacted by the OSHA regional office as to whether the violations were abated and when asked about the penalties were told they had failed to file a timely contest and should contact the Review Commission. The Commission received a letter from the Respondent on October 4, 1995 requesting review and stating that "----At this time we feel we were misled by the inspector advising us we were in violation and had no appeal power. We have never had an inspection by OSHA before as we are a very small company with only one shop employee and we have an excellent safety record. We took the inspectors word as law."

DISCUSSION

Mr. Charles Triscritti the compliance officer who carried out the inspection and issued the citation testified that he did not state to the Respondent's representatives at the opening or closing conference that they had no right to appeal, that they could not win if they appealed or that they were losers. He stated he encourages Respondents to "exercise their rights" and in this instance when the inspection was over and before the citation was issued he gave the Respondent a copy of the OSHA 3000 booklet which is entitled Employer Rights and Responsibilities Following an OSHA Inspection.

Mr. Paul Saracino, father of Ms Anne Marie Saracino the company owner testified he was present at the inspection and received the definite impression from the OSHA inspector that they had no basis for appeal, and would loose if they did appeal. However on cross-examination Mr. Saracino testified: Q. Did Mr. Triscritti say that you had no appeal rights concerning issuance of the citation? A. No Q. Okay. Did Mr. Triscritti explain that should a citation be issued, an OSHA booklet 3000 was handed to you and discussed, should a citation be issued, that you had an opportunity to appeal at that point? A. Yes, I believe so. (Tr 21). Ms. Decaito was present at the inspection and when asked by Ms. Saracino: Q. Ms. Decaito, on June 8th of 1995, were you at New Jersey Monument during Mr. Charles Triscritti's walk-through? A. Yes, I was. Q. And at that time, did he inform you that you could contest the citations? A. Yes. Q. Okay. Did he imply that legally, yes, you could contest them, but there was no basis for contestment? A. Yes.

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". Both of the Respondent's witnesses testified that the inspector said they could contest the citations, but they were of the impression that he said it would be of no use. In the face of the testimony of the inspector that he did not in any way lead the Respondent to believe they had no appeal rights, which was corroborated by Respondent's own witnesses, I conclude from the totality of the evidence that there was no deception of any sort carried out by the inspector, but perhaps the Respondent in some

way erroneously misread or did not listen to the explanation given of their rights. The evidence shows that at the inspection they were given pamphlet 3000 which fully explains employer rights and responsibilities. Under the How to Contest section at page 9 of the pamphlet is stated the following: “---If you wish to contest any portion of your citation, A Notice of Contest must be submitted in writing within 15 working days after receipt of the Citation and Notification of penalty even if you have orally stated your disagreement with a citation, penalty, or abatement date during a telephone conversation or an Informal Conference.” This is repeated again in the citation where the following is stated under the paragraph 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 receipt, the citation(s) and the 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.

The citation “plainly state(s) the requirement to file a notice of contest within the prescribed time period.” *Roy Kay*, 13 BNA OSHC at 2022; *Accord Acrom Constr. Services*, 15 BNA OSHC at 1126; *Frank Irely, Jr., Inc. v. OSHRC*, 519 F2d 1200, 1206 (3d Cir. 1975), *aff’d* on other grounds, 430 U.S. 442(1977)(the citation adequately instructs on the right of contest and how it is to be done). 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.

The Respondent was negligent in not reading the material sent by OSHA, including both the booklet and the citation which outlined its 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. See *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020; Simple negligence will not establish entitlement to relief. *E.K. Construction Co.*, 15 BNA OSHC 1165, 1166. The evidence of record does not support a finding that the delay in filing was caused by the "Secretary's deception or failure to follow proper procedures". *Atlantic Marine, Inc. v. OSAHRC and Dunlop*, 524 F2d 476 (5th Cir. 1975). Accordingly, the motion of the Secretary to dismiss the notice of contest is GRANTED.

ORDER

The citation issued to the Respondent on June 16, 1995 and the proposed penalty is AFFIRMED.



IRVING SOMMER
Chief Judge

DATED: **MAR 12 1996**
Washington, D.C.