



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.
R & J CONSTRUCTION CORPORATION
Respondent.

OSHRC DOCKET
NO. 94-3043

**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 14, 1995. The decision of the Judge will become a final order of the Commission on October 16, 1995 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 4, 1995 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 14, 1995

DOCKET NO. 94-3043

NOTICE IS GIVEN TO THE FOLLOWING:

Patricia Rodenhause, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

Preston A. Leschins, Esquire
Anzalone & Leschins
Suite 2808
888 Seventh Avenue
New York, NY 10106

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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BACKGROUND

The citation was issued by the OSHA area office in Manhattan by certified mail on January 14, 1994 and received by R & J on January 19. (Tr. 7-9; exhs. C-1 and C-3). Pursuant to section 10(a) of the Act, 29 U.S.C. § 659(a), R & J was required to notify the Secretary of any intent to contest within 15 working days of receipt of the citation, that is, by February 9, 1994. Although the cover letter accompanying the citation specifically states that “for violations you do not contest, you must (1) notify this office promptly . . . that you have taken appropriate corrective action . . . and (2) pay any penalties assessed” and further states that a “letter of intent to contest must be submitted to the Area Director within 15 working days of your receipt of the citation,” R & J made no response to the citation and accompanying notification of proposed penalty until it received a collection notice from the Secretary on March 14, 1994. (Tr. 10-11; exhs. C-4 & C-5). At that point, its vice-president, Joseph M. Ferrara, advised the area director that he was “unaware” of the inspection and that R & J “apparently . . . experienced some internal office mishandling of this paper work.” (Exhs. R-1 & R-3). Ferrara testified that R & J shares office space with several other companies, that a receptionist employed by R & J received and signed for the certified mailing of the citation, and that in accordance with the office procedures the receptionist gave the mailing to the office manager—not an employee of R & J—whose job was to disseminate mail to the appropriate person. There is no indication of what did happen to the citation, although it is undisputed that Ferrara never received the original certified mailing. After the penalty collection letter was issued, the area office furnished a copy of the citation at Ferrara’s request. (Tr. 27-33, 35; exh. R-1). After several unsuccessful requests for an informal conference with the area office, Ferrara filed a notice of contest with the Commission’s Executive Secretary. (Tr. 23; exh. R-6).

DISCUSSION

There is no dispute that R & J filed its notice of contest well 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. 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. *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 1981 CCH OSHD ¶ 25,591 (No. 80-1920, 1981).

Here, there is no contention and no showing that the citation was not properly served at R & J's place of business. *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058, 1987-90 CCH OSHD ¶ 28,443 (No. 88-1830, 1989). Similarly, there is nothing to demonstrate that the Secretary otherwise acted improperly or that the factors mentioned in Rule 60(b)(6) are present. As the Commission has previously observed, "a business must maintain orderly procedures for handling important documents." *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021, 1987-90 CCH OSHD ¶ 28,409, p. 37,537 (No. 86-1266, 1989). Rule 60(b)(1) requires a showing of "excusable" neglect rather than mere negligence or carelessness. Accordingly, the fact that R & J's own administrative or clerical procedures may not have been adequate to ensure that the citation was delivered to a company official authorized to take action on the citation does not excuse its untimely filing of a notice of contest. *See Stroudsburg*. While I am not unsympathetic to R & J's situation, the circumstances here are insufficient to establish that it is entitled to relief under Rule 60(b)(1).

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 14 1995**
Washington, D.C.