



UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
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**SECRETARY OF LABOR**  
Complainant,  
v.  
**TROPICAL BRANDS PACKING CORP.**  
Respondent.

**OSHRC DOCKET  
NO. 93-2513**

**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 May 5, 1994. The decision of the Judge will become a final order of the Commission on June 6, 1994 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 May 25, 1994 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: May 5, 1994

**DOCKET NO. 93-2513**

**NOTICE IS GIVEN TO THE FOLLOWING:**

**Daniel J. Mick, Esq.**  
**Counsel for Regional Trial Litigation**  
**Office of the Solicitor, U.S. DOL**  
**Room S4004**  
**200 Constitution Ave., N.W.**  
**Washington, D.C. 20210**

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

**Max Behar**  
**Tropical Brands Packaging Corp.**  
**290 Veterans Boulevard**  
**Rutherford, NJ 07070**

**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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including information about contesting the citation. Under Section 10(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 659(a), an employer must notify the Secretary that it intends to contest the citation or proposed penalty within fifteen (15) working days of its receipt. Unless the employer notifies the Secretary within that time, the citation is "deemed a final order to the Commission and not subject to review by any court or agency." Mr. Peist testified that the Respondent received the citations on June 4, 1993 and had until June 25, 1993 to file its notice of contest but did not do so, the first response being OSHA's receipt of a copy of a letter the Respondent sent to the Commission dated August 18, 1993 requesting abatement of the penalties.

The evidence of record fully demonstrates that the notice of contest herein was untimely filed. The Respondent in his letter of the 18th of August ascribes the late filing to a plant engineer who "misinterpreted" the documents sent, and had thought that "correction alone" of the violations would prevent a penalty. The letter further indicates that the chief executive of the Respondent, not having been present at the inspection was unaware of the violations. At the trial Mr. Behar the company president admitted that the citations had been received and forwarded to him at the New York office of the corporation on either June 4 or 5, 1993, that he had not read the documents and "had no idea that we had to pay those fines, or of course I would have contested it within the 15 days and made them aware of it."

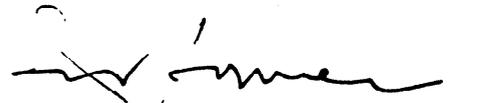
The citation "plainly state(s) the requirement to file a notice of contest with the prescribed time period." *Roy Kay*, 13 BNA OSHC 2021, 2022, 1987 CCH OSHD, par. 28,406 (No. 88-1748, 1989). *Accord, Acrom Construction Services*, 15 BNA OSHC 1123, 1126, 1991 CCH OSHD par. 29393 (No. 88-2291, 1991). While I am sympathetic to the plight of the Respondent it is apparent that there is present no excusable neglect or mistake under Rule 60 (b)(1). What is indicated is simple negligence on the part of the Respondent. The failure of Mr. Behar, the corporate president who received the citations in a timely manner to read and digest its import and to act accordingly was pure carelessness and negligence, and did not constitute "excusable neglect" or "any other reason for justifying relief" under Rule 60(b)(1). Simple negligence will not establish entitlement to relief.

*E.K. Construction Co.*, 15 BNA OSHC 1165, 1166, 1991 CCH OSHD par. 29,412 (No. 90-2460, 1991); *Rebco Steel Corp.*, 8 BNA OSHC 1235, 1980 OSHD par. 24,334 (Nos. 77-2040 & 77-2947, 1980).

Accordingly, the motion of the Secretary to dismiss is GRANTED.

**ORDER**

The citations issued to the Respondent on June 1, 1993 and proposed penalties are AFFIRMED in all respects.



IRVING SOMMER  
Judge

DATED: MAY - 4 1994  
Washington, D.C.