



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
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SECRETARY OF LABOR
Complainant,

v.

VOLMAR CONSTRUCTION, INC.
Respondent.

OSHRC DOCKET
NO. 93-1609

**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 10, 1994. The decision of the Judge will become a final order of the Commission on April 11, 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 March 30, 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: March 10, 1994

DOCKET NO. 93-1609

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
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200 Constitution Ave., N.W.
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John P. Volandes, Vice-President
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Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
Review Commission
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SECRETARY OF LABOR,

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v.

VOLMAR CONSTRUCTION, INC.

Respondent.

Docket No. 93-1609

Appearances:

Luis A. Micheli, Esq.
 U.S. Department of Labor
 202 Varick Street
 New York, N.Y.

Joseph P. Volandes, Vice Pres.
 Volmar Construction, Inc.
 4400 Second Avenue
 Brooklyn, N.Y.

For the Complainant

For the Respondent

BEFORE: Administrative Law Judge Irving Sommer

DECISION AND ORDER

The Respondent was issued a repeat citation and a notification of penalty on February 3, 1993. A hearing was held in New York, N.Y on October 27, 1993, concerning the motion of the Secretary dated August 16, 1993 to dismiss the Respondent's notice of contest as not being timely filed under Section 10 of the Act.

Diana Cortez, a safety supervisor in the Bayside, N.Y. office of OSHA testified that the office records which are kept in the regular course of business in said office reveals that a citation and notice of proposed penalty was issued to the Respondent on February 3, 1993

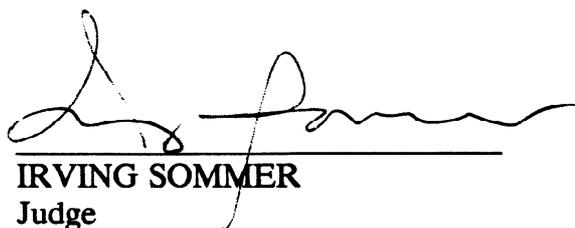
a citation and notice of proposed penalty was issued to the Respondent on February 3, 1993 and were received by the Respondent on February 8, 1993. She stated that the last day to contest the citation under the Act was on March 2, 1993. She testified that an informal conference was held on February 24, 1993 with Joe Rapole, a representative of the Respondent at which time the matter at issue was discussed and no agreement was reached. Another informal meeting was discussed with the suggestion made that an official of the company be present. She further stated that "Mr. Rapole was advised at this meeting that we had to schedule the meeting before the end of the contest period, being March 2, and if it could not be done, we needed a letter in writing where the employer indicated that he was going to contest, so that we can continue discussions on the case." Mr. Volandes, the Vice President of the Respondent corporation testified that their representative Joe Rapole had met with Ms. Cortez on February 24 and that he was told by Mr. Rapole that "the citation would be abated." As a result of this information from his own representative at the informal conference, the Respondent's notice of contest was late, it being a letter addressed to the Commission dated May 3, 1993.

The evidence of record fully demonstrates that the notice of contest herein was untimely filed. The Respondent's argument that this was due to his being told by his own representative that the case was essentially settled because the hazard was abated, which has proved to be untrue does not excuse his late filing. The citation "plainly state(s) the requirement to file a notice of contest within the prescribed time period." *Roy Kay*, 13 BNA OSHC 2021, 2022, 1987-90 CCH OSHD, par. 28.406(No 88-1748, 1989). *Accord, Acrom Construction Services*, 15 BNA OSHC 1123, 1126, 1991 CCH OSHD par. 29, 393 (88-2291, 1991). The evidence does not establish excusable neglect or mistake under Rule 60 (b)(1). What is indicated is simple negligence on Respondent's part; it relied on its own representative to give them all the facts herein and did not in any way check or attempt to monitor its validity; their failure to carefully construct the events herein and fully ascertain the results of the informal conference is a serious lapse of their management system and does in no way constitute excusable neglect. There is no evidence 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).

The weight of the credible testimony and evidence in this case constrains me to the conclusion that the Respondent did not file a timely notice of contest herein which was caused solely by its own neglect and negligence in carrying out its business affairs. Simple negligence will not establish entitlement to relief. Accordingly, the motion of the Secretary to dismiss is granted.

ORDER

The citation issued to the Respondent on February 3, 1993 and proposed penalties is AFFIRMED in all respects.



IRVING SOMMER
Judge

DATED: MAR 10 1994
Washington, D.C.