



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX
COM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR
Complainant,

v.

PULLINI WATER MAIN & SEWER CONTRACT
Respondent.

OSHRC DOCKET
NO. 92-1913

**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 24, 1993. The decision of the Judge will become a final order of the Commission on April 23, 1993 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 13, 1993 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

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) 634-7950.

FOR THE COMMISSION

A handwritten signature in cursive script, appearing to read "Ray H. Darling, Jr.", written over the typed name and title.

Ray H. Darling, Jr.
Executive Secretary

Date: March 24, 1993

DOCKET NO. 92-1913

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
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Blaise F. Parascandola, Esquire
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356 Fulton Street, 3rd Fl.
Brooklyn, NY 11201

Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 417/A
1825 K Street, N.W.
Washington, DC 20006 1246

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SECRETARY OF LABOR,

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v.

PULLINI WATER MAIN & SEWER

Respondent.

Docket No. 92-1913

Appearances:

Esther D. Curtwright, Esq.
 U.S. Department of Labor
 New York, New York
 For the Complainant

Blaise F. Parascandola, Esq.
 356 Fulton Street, 3rd Fl.
 Brooklyn, New York
 For the Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

Respondent was issued a serious citation and a repeat citation on March 18, 1992. A hearing was held in New York, New York on October 22, 1992, concerning the Secretary of Labor's motion to dismiss the Respondent's notice of contest as not being timely filed.

Diana Cortez, a safety supervisor in the Bayside, New York area office of OSHA testified that the office records which are kept in the regular course of business in said office reveal that the citations were sent to the Respondent on March 19, 1992, by certified mail, return receipt requested. Further, a green card evidencing their receipt by Respondent on March 23, 1992, was returned to said office on March 25, 1992 (transcript, p.9,10).

Under section 10(a) of the OSH Act, 29 U.S.C. section 659(a), an employer must notify the Secretary that it intends to contest the citation or the proposed penalties within fifteen (15) working days of their receipt. If no such notice is received within such time, the citations and penalties shall be deemed a final order of the Commission and not subject to review by any court or agency. The Respondent in this case had until April 13, 1992, to file its notice of contest timely. However, the official case record reveals that Respondent did not contest these citations until its attorney, Mr. Parascandola, sent a notice of contest letter to the Bayside, New York area office of OSHA dated May 12, 1992, and received by that office on May 14, 1992. Since Respondent's notice of contest letter was received beyond the 15 working day contest period, the Bayside area office notified Mr. Parascandola by letter dated May 22, 1992, that they declined to accept his letter as it was an untimely filed notice of contest regarding this matter. Subsequently, by letter dated July 1, 1992, Mr. Parascandola appealed to the Executive Secretary of the Occupational Safety and Health Review Commission to accept his notice of contest of the citations which were previously disallowed as untimely filed by the Bayside OSHA area office. The matter is now before the undersigned for a decision solely on the issue of the timeliness of the Respondent's notice of contest.

DISCUSSION

A careful analysis of the evidence and of the testimony of the witnesses for each party compel the conclusion that the Respondent received the citations on March 23, 1992. Pursuant to section 10(a) of the OSH Act, the company had 15 working days within which to contest these citations, or more specifically in this case a notice of contest had to be received by the OSHA area office on or before April 13, 1992 (transcript, p.14). At the hearing, Respondent's secretary admits (despite protestations that the certified mail package lacked a certified sticker and that the certified card was minus an article number filled-in on the card) that her signature appears on the green certified return receipt card, which reflects that she received the package containing the citations on behalf of the Respondent on March 23, 1992 (transcript, p. 43).

Respondent's president, Mr. Pullini, admits that though he had developed a practice for his employees to follow regarding the handling of certified mail, " ... sometimes it may go a little astray because of other interferences we may have at times" (transcript, p. 31). In addition, Mr. Pullini notes on page 32 of the transcript, in response to a question from his attorney regarding when he actually reviewed the citations received in his office on March 23, 1992, that "To the best of my recollection it might have been barring holidays and weekends it might have been a week later where I really got into the grit of it". Further, Mr. Pullini, in response to questions from the Secretary's counsel notes that he read at least the first page of the citations received and instructed his employee to forward the citations to his attorney, Mr. Parascandola, within about a week of their receipt "more or less, give or take" (transcript, p. 39, p. 40). Subsequently, Respondent's attorney sent a notice of contest letter to the Bayside, New York area office of OSHA dated May 12, 1992, and received by that office on May 14, 1992.

The weight of the credible testimony and evidence in this case leads to the inescapable conclusion that the Respondent did not file a notice of contest within the time period required under section 10(a) of the Act. His failure to do so was due solely to his own neglect and negligence in carrying out his business affairs. The citations he received plainly advised him of the requirement to file a notice of contest within the

prescribed time. There is no evidence that the Respondent's failure to file a timely notice of contest was caused by any deception by the Secretary of Labor. Further, Respondent has not provided sufficient evidence that he is entitled to any relief under Rule 60(b) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. Citations were issued to the Respondent on March 18, 1992.
2. The citations were received by the Respondent on March 23, 1992.
3. The fifteen working day period during which the notice of contest was required to be filed ended no later than April 13, 1992.
4. The Respondent did not file a notice of contest until May 12, 1992.

5. The Respondent did not file a notice of contest within the fifteen working day period after receipt of the citations.

6. The late filing was due to the negligence of the Respondent in the disposition of the citations.

CONCLUSION OF LAW

The Respondent's notice of contest was untimely filed and is **DISMISSED**.

ORDER

The citations and proposed penalties are **AFFIRMED** in all respects.



IRVING SOMMER
Judge

DATED: MAR 23 1993
Washington, D.C.