



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

v.

RCS RIZZOLI CORP. OF N.Y.
Respondent.

OSHR DOCKET
NO. 92-3658

**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 16, 1993. The decision of the Judge will become a final order of the Commission on October 18, 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 October 6, 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:

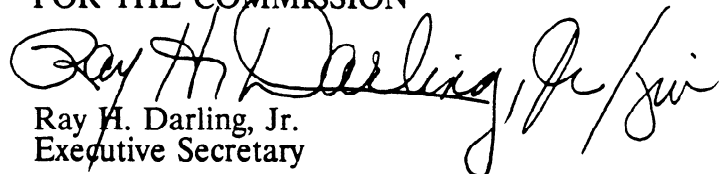
Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

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 16, 1993

DOCKET NO. 92-3658

NOTICE IS GIVEN TO THE FOLLOWING:

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Irving Sommer
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SECRETARY OF LABOR,

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RCS RIZZOLI CORP. N.Y.,

Respondent.

Docket No. 92-3658

Appearances:

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 U.S. Department of Labor
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 New York, New York 10014

Jesse Alan Epstein
 Weisman, Celler, Spett & Modlin
 445 Park Avenue
 New York, New York 10022

For Complainant

For Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

Respondent was issued a serious citation and a notification of penalty on October 19, 1992. A hearing was held in New York, New York on March 26, 1993, concerning the motion of the Secretary dated January 22, 1993, to dismiss the Respondent's notice of contest as not being timely filed under Section 10 of the Act.

On October 19, 1992, a serious citation and notification of penalty was issued to RCS Rizzoli Corp. of New York (Rizzoli) and was personally served on Tom Dutcher, manager of the Rizzoli bookstore that day. Mr. Dutcher delivered the citation to Ms. Eugenia

Pakalik, the operations manager of Rizzoli on October 20, 1993. 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 of the Commission and not subject to review by any court or agency." The Respondent had until November 10, 1992, to file its notice of contest, but did not do so, filing a letter dated November 30, 1992 requesting permission to file a late notice citing various reasons therefor.

It is abundantly clear and is admitted that Rizzoli did not file a timely notice of contest. The letter from Respondent's attorney dated November 30, 1992 states, "The reason why a contest was not filed within the 15-day period is that the violations were forwarded by our client to us by mail but were not received by us. At some point when our client realized that it had not heard from us, our client forwarded another copy of the violations to us. However, by then, the 15-day period had expired. Accordingly, it is respectfully requested that a late contest be permitted."

At the hearing the Secretary established that the citation was issued on October 19, 1992 and served on the manager of the Rizzoli bookstore, Tom Dutcher the same day. Ms. Pakalik, Rizzoli's operations manager testified that she received the citation from Dutcher on October 20, 1992, and after reviewing it called the corporate attorneys and advised them of its receipt. Pakalik stated that thereafter she left the city on corporate business, and realized later on that the attorneys had not been heard from on this matter. Further inquiry by her resulted in the finding that the attorneys had not received the citation, and it was forward to them after the lapse of the 15 day period, resulting in the late filing of the notice of contest.

Respondent's Arguments

Respondent argues that the service of the citation was improper, and therefore the time to file the notice of contest had not expired. The record shows that the citation was served on Dutcher, the manager of the Rizzoli bookstore located on the premises of the Bloomingdale's department store. He in turn delivered it to Pitakis, the operations manager who "read over the documents" and contacted the law firm. Counsel for the Respondent

relying on *Buckley & Co. v. Secretary of Labor*, 507 F2d 78 (2 OSHC 1432)(3 Cir. 1975) states the service on Dutcher and Pitakis was improper since it was not served to an official at the corporate headquarters, but on a manager at the worksite. The Commission has declined to follow the 3d Circuit's reasoning, and adheres to the principal stated in *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474, 1979 CCH OSHD par. 23,675 (No. 76-2165. 1979) "that the test to be applied in determining whether service is proper is whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest. This approach is consistent with the test applied by courts in general when determining sufficiency of service in other areas of law." (Cases cited).

In this case, the service was made on the manager of the store where the alleged violations took place, and who was present at the inspection. The manager in turn knew to deliver the citation to the Rizzoli operations manager, a responsible position in the organization. Petakis, the operations manager perused the document, realized its importance and immediately called company counsel. Unquestionably, service on Dutcher was reasonably calculated to provide the employer with the "requisite notice of the pending citation(s), and the need to proceed." Thusly, service herein was valid service on the Respondent.

The Respondent's argument that the service of the citation is void since the incorrect party Respondent is named (RCS Rizzoli NY instead of Rizzoli International Bookstores, Inc.) is without merit. The service was made on one with sufficient authority to act for the Respondent, and one reasonably expected to notify management of the pending citation. The evidence shows this was done by Ms. Petakis, although negligently.

Respondent further requests relief under Rule 60(b) of the Fed R. Civ. Pr. which provides in relevant part that "(o)n motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect." The reason advanced for failure to file in a timely fashion was that the citation was tardily received from the client, i.e., counsel's letter of the 30th of November, 1992 states the violations were forwarded to them by mail and not received, and when their absence was noted, another

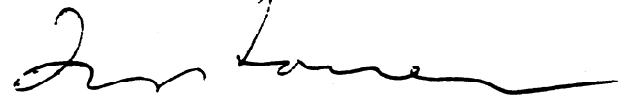
copy was sent. The testimony of Ms Petakis demonstrates she received the citation on October 20, called counsel to alert them, and then left town for a California business trip forgetting to forward the citation, and did not realize it until at least two weeks later (around the 17th of November), at which time the fifteen day period was passed. Counsel responded by letter dated November 30 asking for approval of a late contest 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 (No. 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; Ms. Petakis left on a business trip and did not carry out her proper responsibility to forward the citation to counsel although recognizing its importance after reading same, and only came to recognize the error when the time to file had lapsed. The failure of the respondent's operations manager who received the citation, was aware of its contents to properly forward it to counsel 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 citation issued to the Respondent on October 19, 1992, and proposed penalties is **AFFIRMED** in all respects.



IRVING SOMMER

Judge

DATED: **SEP - 7 1993**
Washington, D.C.