

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. 97-0180
	:	
NORTHERN ENERGY, INC.,	:	
	:	
Respondent.	:	
	:	

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**DECISION AND ORDER**

The Secretary has filed a motion to dismiss the untimely notice of contest filed by the Respondent herein. There was no response to the motion.

**BACKGROUND**

The citation setting forth the alleged violation and the accompanying notification of proposed penalty was issued by certified mail on December 11, 1996 and received by the Respondent on December 12, 1996. Pursuant to section 10(a) of the Act, 29 U.S.C.,sec. 659(a), the Respondent was required to notify the Secretary of any intent to contest within 15 working days of receipt of the citation and notification of proposed penalty, or January 6, 1997. In the absence of a timely contest, the citation and proposed penalty would be deemed a final judgment of the Commission by operation of law. Section 10(a) of the Act. In a letter dated January 8, 1997 addressed to the OSHA office in Billings, Montana the Respondent stated, ``In response to the Citation and Notification of Penalty issuance date 12/11/96 we would like to exercise our ``Right to Contest" as prescribed in OSHA 3000."

**DISCUSSION**

The record plainly shows that the Respondent did not file a notice of contest within the 15 day working period. A letter from his attorney dated January 24, 1997 states that the citation was received in the "mailroom of Heritage Propane (the mother company)" and due to the ``holiday

season and a long scheduled vacation, Mr. Jerry W. Lucas, the appropriate corporate official to contest the citation, was unable to act on the citation until his return to work on January 8, 1997."

An otherwise untimely notice of contest may be accepted where the delay in filing was caused by deception on the part of the Secretary to follow proper procedures. An employer is entitled to relief under Fed. R.Civ. Proc. 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 a party from protecting his interests. See *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 1981 CCH OSHD, par. 25,591 ( No. 80-1920,1981). Here, there is no showing that the Secretary acted improperly or that the factors mentioned in Rule 60(b)(6) are present. Here, the citation was delivered to the address given to the OSHA compliance officer doing the inspection and were in fact delivered to such corporate address, where the mail is distributed. Actually, said citation was delivered apparently to the individual who handles such OSHA matters but who was on vacation and it was held for his return. What is shown herein is that the Respondent had not provided a system to be in effect to monitor and take care of important business mail while one of its employees was on vacation. What is indicated here is neglect and poor business practice. The Respondent is a going corporate activity with other clerical and technical staff personnel. It was incumbent upon the Respondent to maintain orderly procedures for handling important mail. The Commission has held that employers whose improper business procedures has led to failure to file in a timely manner are not entitled to relief. See *Louisiana-Pacific Corp.*, 13 BNA OSHC 20920; *Stroudsburg Dyeing & Finishing Co.*, 13 BNA 2058. The office procedures of the Respondent corporation, a going business should provide for reliable, continuous mail scrutiny so that important governmental documents are not acted upon while one man is on vacation. Simple negligence will not provide entitlement to relief. *E.K. Construction Co.*, 15 BNA OSHC 1165-6.

The Respondent had clear notice of the need to contest within the 15 working day period, and it is responsible for its failure to act promptly on its governmental mail. The circumstances here are insufficient to establish entitlement to relief under Rule 60(b).

**ORDER**

The Secretary's motion to dismiss is granted, and the citation and notification of proposed penalty is AFFIRMED.

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IRVING SOMMER  
Chief Judge

DATED:

Washington, D.C.