

DISCUSSION

Section 10(a) of the Act, in pertinent part, provides:

If, after an inspection or investigation, the Secretary issues a citation under section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. This is more starkly brought out in the cover letter which the Secretary sent to Riccon in finding certain violations present after the inspection and stating the amount of the alleged penalties due. Such cover letter states in emphasized type: **RIGHT TO CONTEST - You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates without contesting the underlying violations. Unless you inform the Area Director in writing that you intend to contest the citation(s) and or proposed penalty(ies) within 15 working days after receipt, the citation(s) and proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency. (Emphasis in original).**

Riccon was further notified on the specific method of contesting the citations and or penalty in a booklet entitled "Employer Rights and Responsibilities Following and OSHA inspection" which accompanied the mailing of the notification of the citation and proposed penalty. Thusly the citation and the OSHA 3000 booklet put Riccon on notice of its obligations to file a notice of contest within 15 working days of receipt. See *Roy Kay Inc.*, 13 BNA OSHC 2021, 1987 CCH OSHD par 28,406 (No 88-1748,1989); *Keefe Earth Boring Co.*, 14 BNA 2187.

The record here plainly shows that Riccon did not file a notice of contest as required at any time within the 15 day working period. Actually, it never filed any notice with the Secretary, but sent a letter to the Commission dated August 30, 1996 stating it had never received the citation, and also stating that the general contractor on the job had paid the fines totaling \$1356-. of which Riccon had reimbursed them in amount of \$910.

Mr Ufert, the compliance officer who conducted the inspection of Riccon's premises stated a citation was issued on February 28, 1996 and that prior thereto he had discussed this with Mr.

Richards the company president and had informed him that a notice of contest must be filed within 15 working dates after receipt of the citation if it is being contested. The record further demonstrates that the daughter of the Riccon president, Ms. Georgia Richards, age 16 received and signed for the citation and accompanying data. Mr. Richards admitted that anyone who is present will accept the mail.

Mr. Richards further testified that he was under the impression that Welch Construction had paid the citation, since they had asked him for a contribution to the fees owed OSHA which had thereafter been deducted from the moneys owed to him by Welch. In fact, Mr. Ufert testified that Welch Construction had also been separately cited in this case for violations. It would appear that Welch had paid its own obligations by obtaining funds from Riccon, but this did not negate the citation that Riccon was assessed for. The issue before this court is whether Riccon's failure to file a timely notice of contest may be excused under the circumstances. An otherwise untimely notice of contest may be accepted where the delay in filing was caused by deception on the part of the Secretary or by failure of the Secretary to follow proper procedures. An employer is also entitled to relief under Fed. R. Civ. P. 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 the party from protecting its interests. Here, there is no contention and no showing that the Secretary acted improperly or that the factors mentioned in Rule 60 are present. The evidence does not establish excusable neglect or mistake under Rule 60(b)(1). What is indicated here is neglect and poor business practices on part of the respondent. This is a business of 10 years standing, but Mr. Richards the president had not put in practice methods to see that important government mail was brought to his attention for disposal. His daughter received the government documents but from his testimony was not given over to him. Apparently the system in effect is that whoever is around can take the 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 2020; *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058. The respondent should have provided for sound and proper procedures for the processing of mail. Simple negligence and neglect will not provide entitlement to

relief. His further belief that the payment by the general contractor to OSHA would relieve him of any responsibilities on his citation is misplaced and of no moment herein.

The totality of the evidence fails to demonstrate that Riccon is entitled to any relief from its actions herein.

ORDER

The Secretary's motion to dismiss is granted, and the citation and notice of proposed penalties is AFFIRMED in all respects.

IRVING SOMMER
Chief Judge

DATED:

Washington, D.C.