



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR
Complainant,
v.
DANDEE CREATIONS, LTD.
Respondent.

Phone: (202) 606-5100
Fax: (202) 606-5050

OSHRC DOCKET
NO. 95-0429

**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 January 19, 1996. The decision of the Judge will become a final order of the Commission on February 20, 1996 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 February 8, 1996 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

A handwritten signature in black ink, appearing to read "Ray H. Darling, Jr.", written over a horizontal line.

Ray H. Darling, Jr.
Executive Secretary

Date: January 19, 1996

DOCKET NO. 95-0429

NOTICE IS GIVEN TO THE FOLLOWING:

Patricia Rodenhause, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

Kenneth A. Bloom, Esquire
Gartner & Bloom, P. C.
885 Second Avenue
New York, NY 10017

Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
Washington, DC 20036 3419

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United States of America
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1120 20th Street, N.W., Ninth Floor
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Phone: (202) 606-5405

Fax: (202) 606-5409

SECRETARY OF LABOR,

Complainant,

v.

DANDEE CREATIONS, LTD.,

Respondent.

Docket No. 95-429

Appearances:

Luis A. Micheli, Esq.
Ms. Sabina Rezza
U.S. Department of Labor
New York, N.Y.
For the Complainant

Kenneth A. Bloom, Esq.
Gartner & Bloom, P.C.
New York, N.Y.
For the Respondent

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. section 651-678 (the Act), to determine whether Respondent, Dandee Creations, Ltd. (Dandee) filed a timely notice of contest of the citation and penalties proposed by the Secretary for alleged violations of the Act. A hearing was held in New York, N.Y. on the Secretary's motion to dismiss Dandee's notice of contest.

BACKGROUND

The citation setting forth the alleged violations and the accompanying notification of proposed penalty was issued on December 15, 1994 and were posted by certified mail to the Respondent on January 3, 1995 (date U.S. Post office received documents). Tr. 17. Initially, in its motion to dismiss the Secretary alleged that the Respondent received the citation and proposed penalties and the accompanying instructions on January 3, 1995 which date was revised during the trial and in the post hearing brief to January 5, 1995. Pursuant to section 10(a) of the Act, 29 U.S.C. section 659(a), Dandee 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 27, 1995. 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).

In a letter to the Occupational Safety and Health Administration dated January 30, 1995 Dandee filed a list of corrected violations.

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 Dandee 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). Dandee was further notified on the specific method of contesting the citations and or penalty in a booklet entitled "Employer Rights and Responsibilities Following an OSHA Inspection" which accompanied the mailing of the notification the citation and notification of penalty. Pages 10 and 11 of said booklet completely outline the procedure for contesting the citations and penalty alleged.

The questions presented are as follows: (1) Did Dandee's letter dated January 30, 1995 constitute a notice of contest of the citations, or of the proposed penalty, or both? (2) If so, was the notice of contest filed in a timely manner and (3) If the letter was a valid notice of contest, but filed untimely, may such untimely filing be excused in 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 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. *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 1981 CCH OSHD Par. 25,591 (No. 80-1920, 1981).

The record in this case fully demonstrates that Dandee's letter dated January 30, 1995, (Exh. C-4) was in no way a notice of contest to either the citations and/or penalties. It was merely a notification to OSHA that the alleged violations had been corrected. The president of Dandee aptly stated the purpose of his letter when in response to the question ``---Did you respond to the correspondence that you received from the Occupational Safety and Health Administration? stated, ``Yes. We responded, stating we took care of all the violations." (Tr. 28). This is further corroborated in the letter dated March 13, 1995 when in explaining the lateness of responding to the citations etc. Mr. Palchik states that the typist was sick and that ``as soon as she returned on January 30, 1995, we wrote the letter explaining that we took care of all the complaints. (emphasis added).

A careful reading and scrutiny of all the evidence of record leads to the ultimate conclusion that there was no valid notice of contest filed.

Going one step further, as to the second question whether if one accepts the January 30, 1995 letter as a valid notice of contest, was it filed in a timely manner. Hereto, the answer must be in the negative. The president of Dandee admitted that the citations and notification of penalty was received on January 5, 1995. Dandee's president Mr. Palchik in response to his attorneys questions as to when the citations and proposed penalties package was received by them responded as follows: Q. Do you recall a specific date, in January? A. I guess the first week in January. January 5. (Tr. 26). His sworn affidavit dated June 2, 1995 again reiterates this same date (Exh. R-1). Dandee had explicit notice that it was obligated to file a notice of contest within fifteen working days of receipt of the citations and notification of penalty, and the last date for a valid filing was January 27, 1995.

Here, there is nothing to demonstrate that the Secretary acted improperly or that the factors mentioned in Rule 50(b)(6) are present. As the Commission has previously observed, `` a business must maintain orderly procedures for handling important documents." *Louisiana-Pacific Corp.*, 13

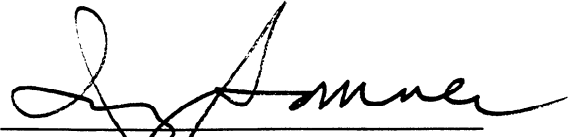
BNA OSHC 2020, 2021, 1987-90 CCH OSHD, par. 28,409, p. 37,537 (No. 86-1266, 1989). Rule 60(b)(1) requires a showing of "excusable" neglect rather than mere negligence or carelessness. It is apparent that the letter dated January 30, 1995 which if accepted as a notice of contest was belatedly filed because as Mr. Palchik states in his March 13 letter, "Please be advised that we answered the complaint a few days later as our secretary who types was sick. As soon as she returned on January 30, 1995, we wrote the letter explaining that we took care of all the complaints." What is present here is a company conducting a going business with no proper procedures for responding to important business and government mail during the illness of an employee. In short, the untimely letter was a result of simple negligence and that brings no entitlement to relief. *E.K. Construction Co.*, 15 BNA OSHC 1165, 1166; *Rebco Steel Corp.*, 8 BNA OSHC 1235. While I am not unsympathetic to Dandee's situation, the totality of the evidence here is insufficient to establish it is entitled to relief.

FINDINGS

1. The evidence of record fails to establish that the letter from Dandee to the U.S., Department of Labor dated January 30, 1995 constituted a notice of contest of either the citations and/or the proposed penalties.
2. If said filing was construed as a valid notice of contest, it was untimely filed and not in compliance with Section 10(a) of the Act, 29 U.S.C. 659(a).
3. The Respondent is not entitled to relief from such late filing under any section of Fed. R. Civ. P. 60.

CONCLUSION

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



IRVING SOMMER
Chief Judge

DATED: **JAN 16 1996**
Washington, D.C.