



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

Phone: (202) 606-5400

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SECRETARY OF LABOR
Complainant,

v.

SLOAN STEEL ERECTORS AND EQUIPMENT
RENTAL, INC.,
Respondent.

OSHRC DOCKET
NO. 95-1760

**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 April 4, 1996. The decision of the Judge will become a final order of the Commission on May 6, 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 April 23, 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

Ray H. Darling, Jr.
Executive Secretary

Date: April 4, 1996

DOCKET NO. 95-1760

NOTICE IS GIVEN TO THE FOLLOWING:

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Susan Hanley, President
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

SLOAN STEEL ERECTORS AND
EQUIPMENT RENTAL, INC.,

Respondent.

Docket No. 95-1760

DECISION AND ORDER

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. sec. 651-678(the Act), to determine whether Respondent, Sloan Steel Erectors and Equipment Rental, Inc. filed a timely notice of contest of the citation and penalty proposed by the Secretary for alleged violation of the Act.

BACKGROUND

The citation setting forth the alleged violations and the accompanying notification of proposed penalty was issued by certified mail on September 25, 1995, and received by the Respondent on September 26, 1995. Pursuant to section 10(a) of the Act, 29 U.S.C. sec. 659(a), Respondent was required to notify the Secretary of any intent to contest the citation within 15 working days of receipt of the citation and notification of proposed penalty , or October 18, 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. On October 3, 1995, the Secretary asserts that the parties had an informal conference and agreed to settle the matter. The Secretary notes that on October 3, 1995, a letter enclosing the informal settlement agreement was sent to the Respondent and received on October 12, 1995 advising

Respondent to sign the enclosed settlement on or before October 18, 1995, the final day of the notice of contest period. However, Respondent did not sign the settlement agreement and return it to OSHA nor file a timely notice of contest on or before October 18, 1995, but rather filed a late notice of contest dated November 9, 1995, with the Buffalo OSHA Area Office. On December 14, 1995, the Secretary filed a motion to dismiss Respondent's late notice of contest. The Respondent filed no opposition to the Secretary's motion to dismiss.

DISCUSSION

The record in this case clearly reflects that the Respondent did not file a notice of contest within the time period required under Section 10(a) of the Act. The issue before the undersigned is whether the untimely notice of contest may be accepted in this matter. 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 the failure of the Secretary to follow proper procedures. Atlantic Marine v. OSAHRC and Dunlop, 524 F2d 476 (5th Cir., 1975). In this matter there is no evidence or even assertion of deception or improper procedures by the Secretary.

An employer may be entitled to relief under Federal Rule of Civil Procedure 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. Secretary of Labor v. Branciforte Builders, Inc., 9 BNA OSHC 2113 (No. 80-1920, 1981). Respondent has made no assertions that any of these defenses apply in this matter.

Further, the citation sent to Respondent clearly notified Respondent that: 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 the 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.

The record fully demonstrates that the Respondent did not file a notice of contest within the time period required under section 10(a) of the Act. Respondent's failure to file a timely notice of contest was due solely to its own neglect and negligence in carrying out its business affairs. The citations Respondent received plainly advised it of the requirement to file a notice of contest within the prescribed time. In addition, Respondent has not provided any evidence that it is entitled to relief under Rule 60(b) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. Citations were issued to the Respondent on September 25, 1995.
2. The citations were received by the Respondent on September 26, 1995.
3. The fifteen working day period during which the notice of contest was required to be filed ended no later than October 18, 1995.
4. The Respondent did not file a notice of contest until November 9, 1995.
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 solely 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

Chief Judge

DATED:

APR 4 1996
Washington, D.C.