

proposed penalty would be deemed a final judgement of the Commission by operation of law. Section 10(a) of the Act. In a letter dated August 22, 1996 and received by the OSHA regional office on August 23, 1996 the Respondent listed the compliance repairs made, without noting it was contesting the citation or penalty.

DISCUSSION

The record plainly shows that Bedlam did not file a notice of contest as to the citation and proposed penalty within the 15 day working period. Bedlam apparently was of the impression that making the necessary cure of the violations would be sufficient. 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. The citation was not ambiguous. It admonishes that the 15 day deadline for contesting violations and/or penalties is critical. Under a paragraph titled "Right to Contest" is the statement 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." Moreover, the form begins with the warning that "You must abate the violations referred to in this Citation by the dates listed and pay the penalties proposed, unless within fifteen working days(excluding weekends and Federal holidays) from your receipt of this Citation and Notification of Penalty you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above. "The OSH 3000 booklet which accompanied the citation similarly echoed this advice. Bedlam had clear and ample notice of the need to contest within 15 working days. Its president, Mr. Grabowsky is responsible for failure to carefully read and act upon the unambiguous instructions accompanying the citation. *Acrom Construction*

Servs. 15 BNA OSCH 1123. Simple negligence will not provide entitlement to relief. *E.K. Construction Co.*, 15 BNA OSHC 1165-6.

While I am sympathetic to the Respondent's plight, I have no alternative but to hold it responsible for failing to file in a timely manner. Its mistake was neither excusable nor justified by any misconduct or misleading on the part of the Secretary.

ORDER

The Secretary's motion to dismiss is granted, and the citation and notification of penalty is **AFFIRMED** in all respects.

IRVING SOMMER
Chief Judge

DATED:

Washington, D.C.