



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.
R. H. BELAM COMPANY
Respondent.

OSHRC DOCKET
NO. 94-2429

**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 September 14, 1995. The decision of the Judge will become a final order of the Commission on October 16, 1995 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 October 4, 1995 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: September 14, 1995

DOCKET NO. 94-2429

NOTICE IS GIVEN TO THE FOLLOWING:

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Irving Sommer
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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 94-2429
	:	
R.H. BELAM COMPANY,	:	
	:	
Respondent.	:	

APPEARANCES:

Patricia M. Rodenhausen, Esq.
 Regional Solicitor
 Luis A. Micheli, Esq.
 Office of the Solicitor
 U.S. Department of Labor
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 New York, New York 10014
 For Complainant

Keith Richman, Esq.
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 For 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. §§ 651-678 (“the Act”), to determine whether Respondent, R.H. Belam Company (“Belam”) filed a timely notice of contest of the penalties proposed by the Secretary for alleged violations of the Act. A hearing was held on the Secretary’s motion to dismiss Belam’s notice of contest. Neither party filed a brief following the hearing.

BACKGROUND

The citations setting forth the alleged violations and the accompanying notification of proposed penalty were issued by certified mail on June 14, 1994. Belam received these documents on June 15, 1994. (Tr. 7-9; exh. C-2). Pursuant to section 10(a) of the Act, 29 U.S.C. § 659(a), Belam was required to notify the Secretary of any intent to contest within 15 working days of receipt of the citations and notification of proposed penalty, or July 7, 1994. In the absence of a timely contest, the citations and proposed penalties would be deemed a final judgment of the Commission by operation of law. Section 10(a).

In a letter dated July 11 Belam notified the Secretary that it believed the "penalties should be waived" (Tr. 12-14; exhs. C-4, C-5). Subsequently, on August 16, 1994, Belam's counsel informed the Secretary that Belam had been under a misimpression that the contest period ran from the abatement date of August 1, 1994, the date by which the Secretary required that the violations be corrected:¹

Our client interpreted the receipt of citation and notification of proposed penalty as giving them 15 days to cure the citation within the curing date of August 1, 1994. All of the citations rendered by your department were rectified by that date. It would appear from a reading of your form at page 2 of 16 entitled Right to Contest, Penalty Payment and Notification of Corrective Action that our client was procedurally correct. We now find contrary to a reasonable reading of the procedure that our client now suffers a very substantial penalty which we wish to have abated.

Robert Haim, Belam's general manager, testified that he interpreted the cover sheets to the citations in the manner described in counsel's letter. (Tr. 26-27). Belam has never previously been inspected by OSHA. (Tr. 41).

DISCUSSION

The record here plainly shows that Belam notified the Secretary of its intent to contest only the penalties for the violations but did so after the expiration of the statutory 15-working-day period.

¹August 1, 1994 was the date by which the Secretary required abatement of all but one of the citation items for which a penalty was proposed. The remaining item, item 5 of citation no. 1, was required to be abated immediately.

The issue before this court is whether that untimely filing may 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 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. *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 1981 CCH OSHD ¶ 25,591 (No. 80-1920, 1981). Here, there is no contention and no showing that the Secretary acted improperly or that the factors mentioned in Rule 60(b)(6) are present.

The cover letter to Belam's citation 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). It further states under "Penalty Payment" that "penalties are due within 15 working days of receipt of this notification unless contested." Conversely, the section dealing with abatement of violations, entitled "Notification of Corrective Action," specifically states that "*for violations which you do not contest*, you should notify the . . . Area Office promptly by letter that you have taken appropriate corrective action within the time frame set forth on this Citation." (Emphasis added). This document placed Belam explicitly on notice that it was obligated to file a notice of contest with 15 working days of receipt. *Roy Kay Inc.*, 13 BNA OSHC 2021, 1987-90 CCH OSHD ¶ 28,406 (No. 88-1748, 1989). The provision dealing with the date for correcting violations cannot reasonably be interpreted to mean that the contest period runs from the abatement date because it refers to a situation in which there are uncontested violations; in other words, by its plain language it presupposes that a notice of contest has already been filed or the employer has previously decided not to file any notice of contest. While I am not unsympathetic to Belam's plight, I have no alternative but to hold Belam responsible for its failure to carefully read and act upon the

unambiguous instructions set forth in the documentation accompanying the citations. *Acrom Constr. Servs., Inc.*, 15 BNA OSHC 1123, 1991-93 CCH OSHD ¶ 29,393 (No. 88-2291, 1991). The circumstances here are insufficient to establish that Belam is entitled to relief under Rule 60(b)(1). *Id.* at 1127, 1991-93 CCH OSHD at p. 39,564; *Jackson Assocs. of Nassau*, 16 BNA OSHC 1261, 1266, 1993 CCH OSHD ¶ 30,140, p. 41,452 (No. 91-438, 1993).

ORDER

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



IRVING SOMMER
Chief Judge

DATED:

SEP 13 1995

Washington, D.C.