

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

**SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,**

OSHRC No. 17-0724

Complainant,

v.

DOLLAR TREE STORES, INC., #2828, and its Successors,

Respondent.

DECISION AND ORDER

This case concerns the issue of whether Respondent, Dollar Tree Stores, Inc. #2828, properly filed its Notice of Contest within the statutory time limit, and further, whether Respondent has met its burden of showing “extraordinary circumstances” entitling it to relief from a Final Order that became effective on March 24, 2017. *See* Fed. R. Civ. P. 60(b)(6).

As discussed below, a review of the entire record supports the finding that the Respondent has failed to present sufficient evidence of “extraordinary circumstances,” or any other justifications entitling it to relief, as a matter of law.

I. Background

Respondent seeks relief from a final order caused by its failure to contest citations within the statutorily required time. Respondent states that its failure to timely contest was due to the citation not being routed to the correct person within the company once received. Without more, this claim fails to show that Respondent’s untimely action was caused by “mistake” or “excusable neglect” entitling Respondent to relief pursuant to Fed. R. Civ. P. 60(b). As such,

the Secretary requests an Order of Dismissal of Respondent's Late Notice of Contest and an Order Affirming the Citation and the Proposed Penalty.

1. On October 13, 2016, the Occupational Safety and Health Administration ("OSHA") began an inspection of Dollar Tree store # 2828 located at 1327 Main Street, Billings, Montana 59105.

2. On February 27, 2017, as a result of that inspection, OSHA issued a Citation and Notification of Penalty ("Citations") to Respondent by certified mail sent to its corporate office at 500 Volvo Parkway, Chesapeake, VA 23320 (the same address from which its untimely notice of contest was sent). The certified mail receipt reflects that the citation was received March 3, 2017, which Respondent admits in its late notice of contest. Exhibit A.

3. Section 10(a) of the Occupational Safety & Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"), gives an employer fifteen working days from receipt of the citation and notification of penalty to notify the Secretary that it wishes to contest the citation or the proposed assessment of penalty. Pursuant to this section:

If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty . . . the citation and the assessment, as proposed, *shall* be deemed a final order of the Commission and not subject to review by any court or agency. (Emphasis added).

Respondent was entitled to 15 working days to contest the Citation. This period expired on March 24, 2017, and the Citation then became a final order of the Occupational Safety and Health Review Commission.

4. The Citation included the following provision intended to alert Respondent to the imperative of filing any notice of contest within fifteen business days of receipt of the Citation (boldface and underlined typeface are in the original):

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 the proposed penalties will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.**

The Citation was accompanied by a booklet which reiterated the need to contest in a timely fashion.

5. Despite these notices, Respondent did not submit a timely contest to OSHA. Rather, on April 21, 2017, Respondent submitted a letter to the Commission’s Executive Secretary asking that its late contest be considered.

6. Federal Rule of Civil Procedure 60(b) sets forth limited grounds for relief from a final order. A late filing may be excused pursuant to Rule 60(b)(1) if the final order was entered as a result of “mistake, inadvertence, surprise, or excusable neglect.” *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981). The party seeking relief under Rule 60(b) bears the burden of demonstrating that it is entitled to relief. *See Burrows Paper Corp.*, 23 BNA OSHC 1131 (No. 09-1559, 2010); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989).

7. Respondent’s April 21 contest letter acknowledges that “...although the Citation and Notification of Penalty was signed by our mailroom manager at our headquarters office on March 3, the package has not yet been received by any department within our office to date.”¹ The Commission has consistently ruled that “[e]mployers must maintain orderly procedures for handling important documents,” and that when the lack of such procedures results in the untimely filing of a notice of contest, relief under Rule 60(b) is not warranted. *See A.W. Ross*,

¹ The Court will presume that Respondent intended to say: “March 3, 2017.”

Inc., 19 BNA OSHC 1147, 1149 (No. 99-0945, 2000); *see also Louisiana-Pacific Corp.*, 13 BNA OSHC at 2021. *See also Creative Gold, Inc.*, 20 BNA OSHC 1217 at *3 (Nos. 02-1560 and 02-1561, 2003) (finding in part that Respondent’s inadequate mail handling procedures did not justify relief under FRCP 60(b)). Respondent has failed to provide any evidence that it has in place adequate procedures to ensure that important mail is docketed and processed in a way that ensures timely responses. Respondent acknowledges actually receiving the Citation at its corporate office, but has provided no explanation warranting relief.

8. Respondent was on notice by actual communications from OSHA that its contest was due by March 24, 2017. The evidence of record here *fails* to support a finding of mistake or excusable neglect sufficient to justify the relief requested.

The OSHA Billings Area Office did not receive a Notice of Contest from Respondent, Dollar Tree Stores, Inc., or its designated representative within the statutory time period. On the Citation and Notification of Penalty, under the heading **Right to Contest**, it relates:

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.

II. Argument

A party seeking relief under Rule 60(b) must show “extraordinary circumstances,” and “extraordinary circumstances rarely exist when a party seeks relief from a judgment that resulted from the party’s deliberate choices.” *Budget Blinds, Inc. v. White*, 536 F.2d 244, 255 (3d Cir. 2008); *see also Ackermann v. United States*, 340 U.S. 193, 212 (1950) (“free, calculated, deliberate choices are not to be relieved from”). Respondent did not timely file its Notice of

Contest within a reasonable period of time, nor has Respondent carried its burden in showing that it was faultless. Rule 60(b) is grounded in equity. *See Cox v. Horn*, 757 F.3d 113, 124 (3d Cir. 2014). A party seeking equity must do equity. *See Freck v. IRS*, 37 F.3d 986, 996 (3d Cir. 1994). Respondent has not carried its burden of showing why it is entitled to equitable relief.

III. Conclusion

Neither the grounds that Respondent cites, nor the reasons for the delay in filing a Notice of Contest, can be attributed to the Secretary. The delay falls squarely on Respondent. That Respondent's internal mail handling procedures were inadequate or ineffectual in properly forwarding the Secretary's Citation and Notification of Penalty to the appropriate employee, counsel or representative does not, under the circumstances, show 'extraordinary circumstances' which would justify relief under Rule 60(b). Respondent has also not shown that it was a party "that was faultless in the delay."

The Secretary's pleading has sufficiently articulated evidence and arguments, which logically support the inescapable legal conclusion that Respondent is not entitled, as a matter of law, to the relief sought. The Secretary's articulated evidence clearly establishes that under Section 10(a) of the OSH Act, respondent did not timely file its Notice of Contest.

The Court has thoroughly reviewed and carefully considered the entire record before it, including the Secretary's Motion and all the exhibits attached thereto, as well as Respondent's arguments and responsive pleadings. The Court finds that Respondent's arguments and responsive documents were less than persuasive, and that the record demonstrates that Respondent has failed to sufficiently carry its burden of persuasion as to the existence of extraordinary circumstances, excusable neglect, mistake, inadvertence, surprise, fraud, newly discovered evidence or any other grounds that would justify relief.

The Court finds that, on balance, the cited case law, arguments and evidence adduced in the record demonstrate that the Secretary has sufficiently carried his burden of persuasion. Good cause has been shown, by a clear and convincing preponderance of the evidence, to sustain the Secretary's Motion.

THEREFORE, Respondent's untimely contest is DISMISSED and its Counter-Motion is DENIED.

The Secretary's Citation and Notification of Penalty is AFFIRMED. The proposed Penalty of \$152,100 is also AFFIRMED in the entirety pursuant to Section 10(c) of the Act, 29 U.S.C. § 659(c).

SO ORDERED

/s/ _____

HON. JOHN H. SCHUMACHER

Administrative Law Judge

Date: June 27, 2017

Denver, Colorado