

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS  
PENDING COMMISSION REVIEW**



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

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SECRETARY OF LABOR, :

Complainant, :

v. :

BURROWS PAPER CORPORATION, :

Respondent. :

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OSHRC DOCKET NO. 09-1559

Before: Chief Judge Irving Sommer

**DECISION AND ORDER**

This matter is before the Occupational Safety and Health Review Commission (“the Commission”) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”), to determine whether the Secretary’s motion for an order to dismiss Respondent’s late-filed notice of contest (“NOC”) should be granted.

**Background**

The Occupational Safety and Health Administration (“OSHA”) inspected Respondent’s facility, located in Lyons Falls, New York, in April 2009.<sup>1</sup> As a result, OSHA issued to Respondent a Citation and Notification of Penalty (“Citation”) on June 23. OSHA mailed the Citation to “Tony Allen, Safety Director,” at Respondent’s Franklin, Ohio office, by certified mail, return receipt requested. The Citation was delivered and signed for on June 26. The Act requires an employer to notify the Secretary of its intent to contest a citation within 15 working days of

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<sup>1</sup>All dates hereafter will refer to the year 2009, unless otherwise indicated.

receipt, and the failure to file a timely NOC results in the citation becoming a final order of the Commission by operation of law. Based upon the date it received the Citation, Respondent was required to file an NOC on or before July 20. On July 20, the OSHA area office that had issued the Citation sent a letter to Mr. Allen, Respondent's safety director. That letter stated that, due to the verbal agreement between OSHA and Mr. Allen on that same day, a written settlement agreement was enclosed. The letter noted that the agreement had to be signed that day, which was the last day of the 15-day contest period. The letter also noted that if Respondent decided not to sign the settlement agreement, the Citation would become a "final and unappealable order" unless a written notice of intent to contest the Citation was filed. Respondent did not return the settlement agreement to OSHA. It also did not file an NOC on July 20. It did file one on September 1, with the OSHA area office. It filed another NOC letter with the Commission on September 18.<sup>2</sup>

On November 30, the Secretary filed a motion to dismiss Respondent's late-filed NOC. In that motion, the Secretary's counsel states that she left messages with Respondent's representative, to discuss his position in this matter, but that she had not heard from the representative.

#### *Discussion*

The record in this case plainly shows that Respondent did not file its NOC within the requisite 15-day period set out in the Act. An otherwise untimely NOC may be accepted, however, where the delay in filing was caused by deception on the part of the Secretary or her failure to follow proper procedures. A late filing may also be excused, under Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"), if the final order was entered as a result of "mistake, inadvertence, surprise or excusable neglect." *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981) (citations omitted). The moving party has the burden of proving it is entitled to Rule 60(b) relief.

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<sup>2</sup>Mr. Allen signed the two NOC letters. Both indicate the safety office did not receive the Citation until August 4. The Secretary has included with her motion a copy of the return receipt card, showing that Respondent signed for the Citation on June 26. Also, OSHA's July 20 letter indicates Mr. Allen himself discussed the proposed settlement with OSHA. The NOC statements indicating the safety office received the Citation on August 4 are clearly incorrect.

To determine whether a late-filed NOC was due to excusable neglect, the Commission follows the Supreme Court's test in *Pioneer Inv. Serv. v. Brunswick Assoc.*, 507 U.S. 380 (1993). See *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1950 (No. 97-851, 1999). Under that test, the Commission takes into account all relevant circumstances, including the danger of prejudice to the opposing party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Id.* at 1950, quoting 507 U.S. at 395. The Commission has held that the "reason for the delay, including whether it was within the reasonable control of the movant," is a "key factor," and, in appropriate cases, the dispositive factor. *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148 (No. 99-0945, 2000); *Calhar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-0367, 2000).

Both of the NOC letters in this case express Respondent's intent to contest the Citation, but neither provides any reason for the late filing. Besides this fact, the Citation issued to Respondent states, on page 2, as follows:

**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 penalty(ies) will become a final order of the [Commission] and may not be reviewed by any court or agency.**

The Commission has held that the OSHA citation clearly states the requirement to file an NOC within the prescribed period and that an employer "must bear the burden of its own lack of diligence in failing to carefully read and act upon the information contained in the citations." *Roy Kay*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). The Commission has also held that ignorance of procedural rules does not constitute "excusable neglect" and that mere carelessness or negligence does not justify relief. *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). Finally, the Commission has held that a business must have orderly procedures in place for handling important documents and that if the lack of such procedures caused the late filing, Rule 60(b) relief will not be granted.

*NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999); *E.K. Constr.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991); *Stroudsburg Dyeing & Finishing*, 13 BNA OSHC 2058 (No. 88-1830, 1989); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989).

In addition to the above, the July 20 letter that OSHA sent to Mr. Allen provided specific notice to Respondent that, if it chose to not sign the settlement agreement, it had to file an NOC by the end of the 15-day filing period if it wanted to contest the Citation. Respondent thus had clear notice of the NOC filing period and yet failed to file a timely NOC. I find that for this reason and all of those set out above, the delay in filing was within the reasonable control of Respondent. I also find this factor dispositive. Respondent is not, therefore, entitled to Rule 60(b) relief.

There is another reason for denying relief in this matter. Besides showing that the late filing was due to “excusable neglect,” the party seeking relief must also allege that it has a meritorious defense to the citation. *See, e.g., Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1951 (No. 97-851, 1999). The NOC letters that Respondent filed contain nothing to indicate a meritorious defense to the Citation.

Based on the foregoing, the Secretary’s motion to dismiss Respondent’s late-filed NOC is GRANTED, and the Citation is AFFIRMED in all respects.

SO ORDERED.

/s/

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Irving Sommer  
Chief Judge

Dated: January 19, 2010  
Washington, D.C.