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

SECRETARY OF LABOR, Complainant, v. EMPLOYMENT 2000 CORP., Respondent.	OSHRC DOCKET No. 16-0858

Appearances:

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Employment 2000 Corp.
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Stephen C. Lang
President/CEO

Before:

Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER GRANTING THE SECRETARY'S MOTION TO DISMISS RESPONDENT'S UNTIMELY NOTICE OF CONTEST

This proceeding is before the Occupational Safety and Health Review Commission (the Commission or OSHRC) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act). The court finds the Citation and Notification of Penalty issued to Employment 2000 Corp. (Employment 2000 or Respondent), in connection with Inspection No. 1068078, on November 25, 2015 is upheld as a Final Order since Employment

2000 cannot demonstrate "excusable neglect" for their untimeliness pursuant to Federal Rule of Civil Procedure 60(b)(1).[1]

I. Facts

Employment 2000 is a recruiting and staffing agency that provides 100-150 production line workers to Pharmasol Corporation (Pharmasol), a pharmaceutical manufacturing company. Affidavit (Aff.). of Assistant Area Director (AAD) Katie Nishimura ¶ 2. On May 28, 2015, one of these workers, [redacted], suffered a partial amputation of his finger while being trained at Pharmasol's production facility. *Id.* at ¶ 3. Pharmasol President Marc Badia called the Occupational Safety and Health Administration (OSHA) Hotline and reported the accident that day. *Id.* As a result, OSHA's Boston South Area Office (BSAO) opened Inspection 1068078 (the Inspection) to investigate any violations of the Act. *See id.* at ¶ 4. BSAO also opened an inspection of Pharmasol. *Id.*

On June 4, 2015, BSAO held an opening conference. Messrs. Badia and David Doyle, the Employment 2000 Sales Manager who oversaw the company's Pharmasol account, were in attendance. *Id.* The opening conference covered the Inspection's purpose and scope. *Id.* Through June and July, 2015, BSAO communicated with Employment 2000 President Stephen Lang in order to obtain safety records and schedule employee interviews. *Id.* On November 5,

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[1] Rule 60(b) provides that:

> Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
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> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Fed. R. Civ. P. Rule 60(b).

2015, BSAO held a closing conference with Mr. Lang over the phone, covering Employment 2000's apparent violations, the company's rights, and employee protections. *Id.*

Following the Inspection, BSAO issued a five-item Serious Citation 1 (the Citation) with proposed penalties totaling $25,200, to Employment 2000 on November 25, 2015. *Id.* at ¶ 5. The Citation included reference to a 15 working day time period within which a Notice of Contest (NOC) must be filed, stating:

> **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 Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.**[2]

On November 25, 2015, BSAO sent the Citation through certified mail to Employment 2000's business address at 73 Belmont Street, Easton, Massachusetts. *Id.* at ¶ 6. BSAO also sent Employment 2000 an OSHA 3000 booklet, which outlined the company's rights and responsibilities. *Id.*

On November 30, 2015, Mr. Doyle signed the certified mailing receipt for the Citation. *Id.* at ¶ 7; Ex. B to Nishimura Aff. The 15 working days specified in the Citation brought the due date of the notice of contest to December 21, 2015. *Id.* at ¶ 8. BSAO did not receive notice of contest or any payment for Employment 2000's penalties on or before that date. *Id.*

On January 27, 2016, BSAO sent a debt collection letter, dated January 26, 2016, to Employment 2000 at the 73 Belmont Street, Easton, Massachusetts address, but BSAO received no response. *Id.* at ¶¶ 9-10; Nishimura Aff., Ex. C). On April 13, 2016, OSHA's Office of Financial Management (OFM) also sent a demand letter for the outstanding penalty to the 73

[2] Nishimura Aff., Ex. A (emphasis in original).

Belmont Street, Easton, Massachusetts address. *Id.* at ¶ 11; Nishimura Aff., Ex. D. After receiving this letter, Mr. Lang went to BSAO and met with AAD Nishimura on April 22, 2016. *See id.* at ¶ 12. AAD Nishimura provided Mr. Lang with the Citation sent to Employment 2000 and showed him the certified mailing receipt for the Citation that Mr. Doyle signed on November 30, 2015. *Id.* Mr. Lang confirmed that Mr. Doyle worked for Employment 2000 as a Sales Manager, but said that he, Mr. Lang, had never seen the Citation. *Id.*

After meeting with Ms. Nishimura, Mr. Lang sent a NOC to BSAO on April 22, 2016. BSAO received the notice on April 25, 2016. Mr. Lang stated he never received the Citation and he believed Respondent was not "at fault in this matter." Respondent did not raise a meritorious defense in its NOC. *Id.* at ¶ 13; Nishimura Aff., Ex. E. BSAO responded to the letter, explaining that the Citation was deemed a final order of the Commission because the 15-day contest period had expired and that Employment 2000 could contact the Commission directly to continue pursuing the matter. *Id.* at ¶ 14; Nishimura Aff., Ex. F.

On May 10, 2016, the Commission received a letter from Mr. Lang, dated May 6, 2016, concerning the Citation. Mr. Lang stated one of Respondent's employees was instructed by Pharmasol to go to a machine that did not have a guard on it. He asserted that "[t]his was not in his job description." He stated Pharmasol was at fault, and not Respondent. The Commission docketed the instant matter as Docket No. 16-0858.

On June 23, 2016, the Secretary filed his Motion to Dismiss Respondent's Untimely Notice of Contest. The Secretary seeks the dismissal of Respondent's untimely Notice of Contest (NOC) because Respondent cannot demonstrate "excusable neglect" pursuant to Federal Rule of Civil Procedure 60(b)(1).

Respondent has not filed a response to the Secretary's Motion to Dismiss Respondent's

Untimely Notice of Contest.

II. The Cited Standard

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1910.147(c)(4)(i), which states:

> Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section[.]

Citation 1, Item 2 a alleges a serious violation of 29 C.F.R. § 1910.147(c)(7)(i)(A), which states:

> Authorized employee(s) did not receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation.

Citation 1, Item 2 b alleges a serious violation of 29 C.F.R. § 1910.147(c)(7)(iv), which states:

> The employer did not certify that employee training had been accomplished and kept up to date [.]

Citation 1, Item 3 alleges a serious violation of 29 C.F.R. § 1910.147(f)(2)(i), which states:

> When outside servicing personnel were engaged in activities in a facility, the onsite employer and the outside employer did not inform each other of their respective lockout or tagout procedures[.]

Citation 1, Item 4 alleges a serious violation of 29 C.F.R. § 1910.219(c)(4)(i), which states:

> Shaft ends projecting more than one-half the diameter of the shaft were not guarded by nonrotating caps or safety sleeves.

Citation 1, Item 5 alleges a serious violation of 29 C.F.R. § 1910.219(f)(3), which states:

> Sprocket wheels and chains which were seven feet or less above floors or platforms were not enclosed[.]

III. Discussion

Pursuant to section 10(a) of the Act, if an employer fails to notify the Secretary within 15 working days from receipt of the notice issued that it intends to contest the citation, the citation will be deemed a final order of the Commission.[3] 29 U.S.C. § 659(a); *Sec'y of Labor v. Barretto Granite Corp.*, 830 F.2d 396, 397 (1st Cir. 1987).[4] 29 C.F.R. § 1903.17(a) requires that the employer notify the Area Director in writing "that he intends to contest such citation or proposed penalty before the Review Commission. Such notice of intention to contest shall be postmarked within 15 working days of the receipt by the employer of the notice of proposed penalty."

The Court finds that Employment 2000 did not file a NOC within 15 working days of its receipt of the Citation as section 10(a) of the Act and 29 C.F.R. § 1903.17(a) require. Respondent's office received the Citation on November 30, 2015, as is proven by the signed certified mailing receipt for the Citation. Nishimura Aff. at ¶ 7. Fifteen working days following this date, excluding weekends and federal holidays, was December 21, 2015. *Id.* at ¶ 8. BSAO did not receive a letter to contest the Citation on or before that date. *Id.* Any NOC postmarked after the 15-day contest period has no effect. *Barretto Granite Corp.*, 830 F.2d at 397-98; *see also Therrel-Kizer, Inc.*, 1981 OSHD (CCH) ¶ 25234, p. 2 (No. 80-3845) (citing *Kerr-McGee Chem. Corp.*, 4 BNA OSHC 1739 (No. 9890, 1976) (filing the notice on the sixteenth day after receipt of the citation was too late and the citation became a final order).

The Commission may excuse a late filing pursuant to Federal Rule of Civil Procedure

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[3] 29 U.S.C. § 659(a) states:

> "… 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, and no notice is filed by any employee or representative of employees under subsection (c) of this section within such time, 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."

[4] The 15-day period is activated by the employer's receipt of the notice. *Barretto Granite Corp.*, 830 F.2d at 396.

60(b)(1). Rule 60(b)(1) states that a late filing may be excused if the final order was entered as a result of "mistake, inadvertence, surprise, or excusable neglect."[5] Fed. R. Civ. P. Rule 60(b); *Ricop Constr. Co.*, 19 BNA OSHC 1802, 1802 (No. 01-0955, 2002) (reaffirming "an untimely NOC may be accepted in cases in which the delay in filing was a result of the Secretary's deception or failure to follow proper procedures" or if an employer "can show that the Commission's final order was entered due to 'mistake, inadvertence, surprise, or excusable neglect'"); *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981) (finding "Respondent's failure to file a timely NOC could not be excused, since there was no evidence that the Respondent's late filing resulted from the erroneous representations of the Secretary"); *Monroe & Sons, Inc.*, 4 BNA OSHC 2016 (No. 6031, 1977), *aff'd*, 615 F.2d 1156, 1160 (6th Cir. 1980).[6] It is clear Employment 2000 is not entitled to relief under Rule 60(b)(1). There is no evidence of mistake, inadvertence, surprise or excusable neglect.

The Commission and federal courts evaluate claims of excusable neglect using the criteria set forth in *Pioneer Inv. Servs. v. Brunswick Assocs.*, 507 U.S. 380, 395 (1993). The Commission takes into account "all relevant circumstances surrounding the party's omission," including:

> (1) "the danger of prejudice to the debtor, [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith."

Pioneer Inv. Servs., 507 U.S. at 395.

The Court grants the most weight to the third factor, the reason for the delay, in determining excusable neglect under Rule 60(b). *AR Med. LLC d/b/a/ San Pablo Med. Clinic*, 24

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[5] *Supra* note 1.

[6] *Monroe & Sons* creates a two-part test for relief under 60(b)(1). The movant must demonstrate: "(1) The existence of mistake, inadvertence, surprise, or excusable neglect. (2) That he has a meritorious defense." *Monroe & Sons, Inc.*, 615 F.2d at 1160.

BNA OSHC 1665, 1666 (No. 12-2023, 2013), *see also A.W. Ross Inc.*, 19 BNA OSHC 1147, 1148 (No. 99-0945, 2000); *Hosp. Del Maestro v. NLRB*, 263 F.3d 173, 174-75 (1st Cir. 2001) ("The four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import"). If the party lacks clear reason for the delay, excusable neglect is often not granted. *CalHar Constr. Inc.*, 18 BNA OSHC 2151 (No. 98-367, 2000); *NYNEX*, 18 BNA OSHC 1944, 1947 (No. 95-1671, 1999) (finding because employer failed to present evidence on the reason for the delay, employer did not establish excusable neglect).

The Court finds that the delay was entirely the fault of Employment 2000. As seen by the accepting signature, Employment 2000 knew as of November 30, 2015 that it had received a Citation. Nishimura Aff. at ¶ 7. The Citation gives clear reference to the contest process. *Id.* at Ex. A.[7] Further, the Citation states that the Citation would become a final order of the commission without a properly filed NOC given within 15 working days. *Id.*[8] BSAO also followed standard protocol and sent Employment 2000 an OSHA 3000 booklet which outlines its rights and responsibilities. *Id.* at ¶ 6. Despite having all of this information upon receipt of the citation, Employment 2000 failed to properly contest the Citation and file a NOC within the requisite time frame. *Id.* For the aforementioned reason, the Court finds Employment 2000 is responsible for its failure to act upon the received Citation and its failure to file a NOC. *See Toby Bell d/b/a S. Tex. Pigeon Removal, Lnoc*, 24 BNA OSCHC 1936, 1938 (No. 13-0487, 2013)[9] ("An employer that has filed a late notice of contest 'must bear the burden of its own lack of diligence in failing to carefully read and act upon the information contained in the citations.'") (quoting *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88 2291, 1991)).

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[7] *Supra* note 2. Right to Contest section of Citation and Notification of Penalty.
[8] *Id.* Stating the citation "will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency."
[9] In *Toby Bell* the court found the employer should have contested the Citation timely, and that the late filing was not a result of excusable neglect. *Toby Bell*, 24 BNA OSCHC at 1938.

The Commission has held that employers must have a system in place for the handling of important documents and the processing of mail. *Max Bayroff Corp.*, 1990 OSHD (CCH) ¶ 29,004, p. 38,727 (No. 90-0724, 1990). The failure of such is not "excusable neglect," and it does not warrant relief under Rule 60(b). *Id.* Furthermore, the Commission will not excuse an untimely NOC based on excusable neglect where no evidence is shown of the employer's procedures. *NYNEX*, 18 BNA OSHC 1944, 1947 (No. 95-1671, 1999) (holding NYNEX failed to show its untimely notice of contest was not the result of excusable neglect because it "did not even introduce evidence as to its procedures for handling important documents"). In *NYNEX*, the citation received in the mail was misdirected to another office, where it sat for six weeks. *Id.*

The Court finds, here, Employment 2000 failed to explain its procedures for the processing and handling of important documents received in the office. Mr. Doyle is on record for signing for the Citation on November 30, 2015, and yet, the company has no explanation for how the Citation was overlooked. This is analogous to *NYNEX*, and as mentioned above, the Commission held there that the procedures did not give rise to excusable neglect and Rule 60(b) relief. *See NYNEX*, 18 BNA OSHC at 1947. Furthermore, Employment 2000 has also not offered an explanation as to its failure to respond to the debt collection letter, dated January 26, 2016. In considering both of these facts, the Court finds that Employment 2000 has offered no basis for Rule 60(b) relief.

This is in line with earlier decisions. The Commission has consistently denied relief to employers who have negligently handled documents. *J.F. Shea Co.*, 15 BNA OSHC 1092, 1094 (No. 89-976, 1991) ("[t]he Commission has not granted relief when the negligent handling of the document occurred, as it did here, in the employer's own office") (citing *La.-Pac. Corp.*, 13

BNA OSCHC 2020, 2021 (No. 86-1266, 1989)).[10] These findings have held true for circumstances including, but not limited to, the negligent handling of documents,[11] an increased workload,[12] and a failure to read the Citation and act upon it.[13]

Further, the Court finds with respect to the first *Pioneer* factor, the untimely filing of the NOC would prejudice the Secretary. In *US Pagoda*, *Inc*. the employer filed a notice of contest more than ten weeks late. *US Pagoda*, *Inc*., No. 10-2035, 2011 WL 651433, at *2 (O.S.H.R.C.A.L.J. Jan. 13, 2011). In that case, the Commission held that the delay was a significant length of time, finding that it could "prejudice the Secretary and impact the judicial proceedings in this matter." *Id.* Similarly, the length of time of the delay here would have an effect on the Secretary because Employment 2000 filed its NOC four months late. *See Custom Copper & Slate, Ltd.*, No. 09-0022, 2009 WL 1504102 at *3 (O.S.H.R.C.A.L.J. Apr. 6, 2009) (finding a delay of three months would "prejudice the Secretary and have an impact on judicial proceedings").

In contrast, the Commission has been known to recognize that in many Rule 60(b) late filing cases, "it is a given that there is a lack of prejudice to the Secretary or to the interests of efficient judicial administration, combined with a lack of bad faith by the employer." *George Harms Constr. Co. v. Chao*, 371 F.3d 156, 164 (3d Cir. 2004) (citing *CalHar Constr., Inc.*, 18 BNA OSHC at 2153 n.5). This is not the case here because the inspection took place over a year ago, and the impacts of this delay would significantly prejudice the Secretary, as the time

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[10] This is routinely supported by appellate courts. *See Sadowski v. Bombardier Ltd.*, 539 F.2d 615, 618 (7th Cir. 1976) (finding Rule 60(b) cannot be invoked "to give relief to a party who has chosen a course of action which in retrospect appears unfortunate or where error or miscalculation is traceable really to a lack of care.").

[11] *Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185 (No. 01-0830, 2003) (denying relief when the company mishandled their mail); *La.-Pac. Corp.*, 15 BNA OSCHC at 2021 (holding "[e]ven during a management transition, a business must maintain orderly procedures for handling important documents").

[12] *United States v. One 1978 Piper Navajo PA-31 Aircraft*, 748 F.2d 316, 319 (5th Cir. 1984) (holding that assertions of office workload are not sufficient to overcome a default judgment under Rule 60(b)).

[13] *A.W. Ross Inc.*, 19 BNA OSHC at 1149 (finding employer president's failure to carefully read and act upon the Citation not excusable).

between the Citation and the proceedings grow the evidence may seem to grow "stale." *Coughlan Constr. Co.*, 3 BNA OSHC 1636, 1638 (No. 5303, 1975) (consolidated) ("if evidence becomes stale, it may become more difficult for [the Secretary] to prove a violation").

On the basis of these factors and considerations, Employment 2000's failure to file a timely NOC was not due to excusable neglect, and it would prejudice the Secretary.

IV. Conclusion

The Court finds that Respondent has not established a basis for relief under Rule 60(b). Respondent has failed to proceed as provided by the requirements set forth in the Act and in the Citation, has not demonstrated that the delay in filing the NOC was excusable under the Federal Rules of Civil Procedure, and has prejudiced the Secretary by its untimely action. Pursuant to section 10(a) of the Act, the Citation and proposed penalty are deemed a final order of the Commission.

V. Penalties

The Secretary has proposed a total penalty of $25,200 for the Citation at issue. This breaks down to $6,300 for Citation 1, Item 1; $5,400 for Citation 1, Item 2a; $6,300 for Citation 1, Item 3; $3,600 for Citation 1, Item 4; and $3,600 for Citation 1, Item 5. Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Compass Envtl., Inc.,* 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010). Based on the record of this case, the Court finds that the Secretary properly considered the statutory factors in his penalty proposals. The court finds the total proposed penalty of $25,200, along with the classification of all five of the items as serious as alleged by the Secretary for the Citation item at issue, to be appropriate.

VI. Findings of Fact and Conclusions of Law

All finding of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found and appear in the decision above. *See* Fed. R. Civ. P. 52(a).

VII. Order

WHEREFORE, the Court finds Respondent failed to file a timely NOC and no relief under Rule 60(b) is justified; and it is ORDERED that

1) Complainant's Motion to Dismiss Respondent's Untimely Notice of Contest is GRANTED,

2) Respondent's Notice of Contest is dismissed in its entirety with prejudice as untimely filed, and

3) all five of the Citation items and proposed penalties are AFFIRMED in all respects.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC JUDGE

Date: July 26, 2016
Washington, D.C.