

**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.

G.E.R.I.N. Home Improvements LLC,

Respondent.

OSHRC DOCKET NO. 15-0992

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

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act). On July 7, 2015, the Secretary filed his Motion to Dismiss Untimely Notice of Contest (Motion). Complainant seeks the dismissal of G.E.R.I.N. Home Improvements LLC's (Respondent) Notice of Contest (NOC) as untimely filed, and an order affirming the citations and proposed penalties in their entirety. For the reasons that follow, the Secretary's Motion is GRANTED.

Background

The Occupational Health and Safety Administration (OSHA) conducted an inspection of Respondent's worksite located at 271 West Putnam Avenue, Greenwich, Connecticut 06830 on December 18, 2014. On February 12, 2015, OSHA issued a four item serious citation and a one item willful citation to Respondent. The two citations proposed Respondent pay a penalty in the amount of \$21,600. OSHA mailed the citations to the Respondent's address at 50 Maple Tree

Ave., Stamford, Connecticut via certified mail on February 13, 2015. The citations were received by Respondent on February 18, 2015.¹

The citations informed Respondent of its right to contest the citations and stated, in part:

Right to Contest: ...

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.

(Motion, Exh. A, at p. 2; Biasi Aff., ¶ 6).

On March 2, 2015, OSHA's Assistant Director, Steven Biasi, informed Respondent's owner, Gerin Santiago, the deadline for filing a NOC was March 11, 2015. (Biasi Aff., ¶ 7).

Because Respondent received the citations on February 18, 2015, Respondent's Notice of Contest (NOC) was due by March 11, 2015. Respondent failed to file its NOC by that date.

On March 16, 2015, OSHA's Area Office received a NOC, dated March 12, 2015, from Respondent's counsel, postmarked March 13, 2015. (Bias Aff., ¶ 9).

In a letter dated March 16, 2015, OSHA's Area Office informed Respondent's counsel that the fifteen working day period expired on March 11, 2015; and as such the citations and proposed penalty were deemed a final order of the Occupational Safety and Health Review Commission (Commission) and are not subject to review by any court or agency. (Biasi Aff., ¶ 10, Exh D).

On June 17, 2015, OSHA's Area Office received an unsigned NOC dated June 16, 2015, that was addressed to the Commission's Executive Secretary. In it, Respondent stated that it "never received a notice which indicated the date of appeal. We now seek to appeal this determination both because the items were minor violations and immediately corrected once the

¹ See Motion, at p. 2; Steven Biasi Affidavit (Biasi Aff.), at ¶¶ 3, 4, 6.

employer was notified of same. The fines assessed seem exorbitant in view of the matters involved and also since the corrections have been made.” A similar NOC dated June 23, 2015, along with a June 23, 2015 certificate of service, both signed by Respondent’s counsel, were sent to the Commission’s Executive Secretary.

OSHRC docketed the matter as Docket No. 15-0992.

On July 7, 2015, Complainant filed his Motion. The Secretary’s seeks affirmance of both citations and their proposed penalties because Respondent failed to file a timely NOC and has demonstrated neither “excusable neglect” pursuant to Fed. R. Civ. P. 60(b) nor a meritorious defense.

Respondent has not filed any response to the Secretary’s Motion.

Discussion

Upon receiving a citation and notification of penalty, an employer has 15 working days within which it must file a NOC. *See* section 10(a) of the Act, 29 U.S.C. § 659(a). If the employer does not file a NOC within the specified time period, “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.” *Id.* An uncontested citation is generally unreviewable. *See Culver v. U.S. Dept. of Labor Occupational Safety & Health Administration*, 248 Fed. Appx. 403 (3rd Cir. 2007).

Respondent may overcome the Commission’s final order under Federal Rule of Civil Procedure 60(b) (Rule 60(b)), if it was entered as a result of “mistake, inadvertence, surprise or excusable neglect.” *See George Harms Constr. Co., Inc. v. Chao*, 371 F.3d 156, 163 (3rd Cir. 2004) (Commission “has jurisdiction to entertain a late notice of contest under” the excusable

neglect standard of Rule 60(b)(1));² *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981). In determining whether a late-filed NOC was due to “excusable neglect,” the Commission follows the Supreme Court’s test in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 381 (1993). In *Pioneer*, “excusable neglect” is defined as an equitable determination of all relevant circumstances surrounding the party’s omission, and the prejudice these circumstances presented to the opposing party. This definition has been applied to other federal procedural rules, including proceedings by the Commission. See *NW Conduit Corp.*, 18 BNA OSHC 1948, 1950 (No. 97-851, 1999). In *NW Conduit*, the Commission quoted *Pioneer*, noting that the “reason for the delay, including whether it was within the reasonable control of the movant,” is a “key factor” and, in appropriate circumstances, the dispositive factor. *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148 (No. 9-0945, 2000); *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-0367, 2000); *NYNEX*, 18 OSHC 1944, 1947 (No. 95-1671, 1999) (finding because employer failed to present evidence on the reason for delay, it did not establish excusable neglect). See also *Hospital Del Maestro v. NLRB*, 263 F.3d 173, 174-75 (1st Cir. 2001) (“excuse given for the late filing must have the greatest import”).

Here, Respondent has provided no excusable basis for its failure to file a timely NOC before March 11, 2015.³ In its NOC postmarked March 13, 2015, Respondent asserted that it “never received a notice which indicated the date of appeal.” It does not deny receiving the citations on February 18, 2015. It does not deny receiving citations that stated that its NOC must be submitted in writing within 15 working days after receipt of the citations. It does not deny

² But see *Chao v. Russell P. Le Frois Builder Inc.*, 291 F.3d 219 (2d Cir. 2002) (concluding Commission may not exercise jurisdiction based on Rule 60(b)(1)).

³ The Court also finds that Respondent has not presented adequate evidence to support the proffering of any meritorious defense(s) to the citations. Instead, Respondent argues that it should be allowed to appeal the citations because the items were minor violations and immediately corrected, and the proposed fines were exorbitant. An alleged willful violation is not a minor violation.

that on March 2, 2015, Assistant Director Biasi informed Mr. Santiago that the deadline for filing a NOC was March 11, 2015. Instead, Respondent stated that it did not receive a notice which indicated the date of appeal. OSHA is not required to specify “the date of appeal” in its Citation and Notification of Penalty. Moreover, Respondent was told by OSHA’s Assistant Director that the deadline for filing a NOC was March 11, 2015. Respondent failed to heed Mr. Biasi’s notice and proceeded on its own noncompliant timeline.

Respondent has remained silent on the NOC issues after this case was docketed at the Commission. Respondent has not filed a response to the Secretary’s motion. Respondent has not presented sufficient evidence for the Court to conclude that Respondent timely filed a NOC, or that its failure to timely file a NOC was due to excusable neglect. Respondent has not demonstrated any sort of mistake, inadvertence, surprise or excusable neglect that justifies grounds for relief from the Commission’s final order under Rule 60(b). *See Burrow Paper Corp*, No. 09-1559, 2010 WL 1715389, at *2 (O.S.H.R.C.A.L.J. Jan. 19, 2010) (Employer has burden of its own lack of diligence in acting upon information contained in the citation.). Respondent also has the burden of proving that it is entitled to Rule 60(b) relief; something it has failed to do here. *NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999).

Order

The Court finds that Respondent failed to file a timely NOC and no relief under Rule 60(b) is justified.

The Secretary’s Motion is GRANTED, Respondent’s NOC is dismissed in its entirety with prejudice as untimely filed, and the citations and penalties are AFFIRMED in all respects.

SO ORDERED.

/s/

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

Date: October 5, 2015
Washington, D.C.