

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

ALL STEEL, INC.

And Its Successors

Respondent.

OSHRC DOCKET NO. 15-1302

For Complainant: Timothy S. Williams, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd.
Suite 515, Denver, CO

For Respondent: Calvin Inda, All Steel Inc., 8498 61.5 Road, Montrose, CO 81401

BEFORE: Administrative Law Judge Patrick B. Augustine

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

Jurisdiction

This proceeding is before the Occupational Safety and Health Review Commission (the "Commission") pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the "Act") due to a filing of a *Notice of Contest* ("NOC") by Respondent with the Commission.

Procedural Background

The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's worksite located at 8498 61.5 Road, Montrose, Colorado from March 23, 2015 to March 24, 2015. On May 8, 2015, OSHA issued two Citations with four items to Respondent. The two Citations proposed Respondent pay a penalty in the amount of \$2,800.00. OSHA mailed the Citations to Respondent's worksite via United States Postal Service (USPS) certified

mail. Based on the certified mail return receipt provided by USPS, the citations were received by and signed for by Respondent on May 14, 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, ¶ 2.

Because Respondent received the citations on May 14, 2015, Respondent's NOC was due by June 5, 2015. Respondent failed to file its NOC by that date. Respondent contacted the OSHA area office on June 23, 2015 to discuss the Citations. Respondent was informed that: (i) Respondent had missed the 15 working day contest period; (ii) the Citations had become a final order of the Commission; and (iii) it should contact the Commission's Executive Secretary to file an untimely NOC. Two weeks later Respondent submitted an untimely NOC to OSHA via electronic mail.² OSHA responded by again informing Respondent that the date to contest the Citations had passed. OSHA also provided the address of the Commission if Respondent wished to petition the Commission to reopen the matter.

By letter dated June 24, 2015 (which was not postmarked until July 28, 2015) addressed to the Commission's Executive Secretary, Respondent indicated that it would like to submit a late NOC. In its NOC, Respondent does not dispute the Citations were received and signed for at its office. Respondent asserts that the violations were corrected during the inspection. Calvin

¹ See Motion, Exh. A.

² Although the NOC is dated June 24, 2015, Respondent did not email it to OSHA until July 6, 2015. Motion, Exh. B.

Inda states on behalf of Respondent that “[due to illness in my family and also working and keeping my employees working, I have been unable to respond before now.]”

Thus, if Respondent filed its NOC after the fifteen-day window, the Citations become a final order of the Commission. Respondent filed its NOC fifty-three days after the expiration of the fifteen-day window.³ Thus, by operation of law, the Citations have become a final order of the Commission.

By filing a late NOC Respondent has, in effect, requested relief from the operation of § 10(c) of the Act. Rule 60(b) states that “[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding” Fed.R.Civ.P. 60(b)(“Rule 60(b)”). The rule lists the reasons that would provide a sufficient basis for granting the relief requested. *Id.* Subsection (b)(1) states that “mistake, inadvertence, surprise, or excusable neglect” constitute sufficient bases upon which Rule 60(b) relief can be granted. *Id.*

On September 24, 2015, Complainant filed his *Opposition to Request To File Untimely Contest* (“Motion”)⁴ Complainant 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 Rule 60(b) nor a meritorious defense. Respondent has not filed any response to the Motion. Complainant contends Respondent has failed to establish mistake, inadvertence, surprise, or excusable neglect. Finally, Complainant argues Respondent received actual notice of the Citations and failed to comply with the instructions—typed in bold-face and underlined print—indicating the deadline for filing a NOC. *See* Motion, ¶2.

³ Although the NOC letter is dated June 24, 2015, the envelope in which it was mailed to the Commission was postmarked on July 28, 2015.

⁴ Even though Complainant’s pleading does not state specifically that it is a Motion to Dismiss Respondent’s Late NOC, in his requested relief Complainant requests an Order of Dismissal. The Court will treat Complainant’s pleading as a Motion to Dismiss under Commission Rule 40.

Controlling Case Law

Upon receiving a citation and notification of penalty, an employer has 15 working days within which it must file a NOC. *See* § 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).

However, the Commission has recognized two situations where the finality of § 10(a) of the Act, 29 U.S.C. § 659(a), does not preclude the Commission from hearing an employer’s challenge to the citations even when a timely notice of contest has not been filed. The first is where the Secretary has employed deceptive practices or fails to comply with required procedures. *See Secretary of Labor v. Louisiana-Pacific Corp.*, 13 BNA O.S.H.C. 2020 (No. 86-1266, 1989). Respondent does not contend this situation is present in this case.

The second situation is where the employer requests relief under Rule 60(b). The Commission has held that an employer may move under Rule 60(b) for permission to file a late NOC. *Branciforte Builders*, 9 BNA OSHC 2113 (No. 80-1920, 1981). The burden is on the employer to show sufficient basis for relief under the rule. *Id.*

Respondent may overcome the Commission’s final order under 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));⁵

⁵ *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)).

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). Under *Pioneer*, the Court must consider “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.” *Pioneer*, 507 U.S. at 395. 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”).

Analysis

Respondent seeks relief from the operation of § 10(a) of the Act, which 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 . . . 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.

29 U.S.C. § 659(a).

Respondent 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). Here, Respondent has provided no excusable basis for its failure to file a timely NOC before June 5, 2015.⁶ Respondent does not dispute that the Citations were received and signed for on May 14, 2015. Respondent does not explain why a letter dated June 24, 2015 containing the NOC was not postmarked until July 28, 2015 – over thirty days later.

Respondent's states that since he was "working and keeping my employees working, I have been unable to respond before now." In *JLD Custom Carpentry*, OSHA Docket 12-0972 (Aug. 13, 2012, ALJ Coleman), the Respondent failed to timely file a NOC and explained that his "oversight" was due to being "so overwhelmed with trying to find work to support [his] family and the time got away from [him]." *Id.* The ALJ considered the factors relevant to "excusable neglect" and determined that "the third enumerated factor – the reason for the delay, including whether it was within the reasonable control of the movant – is the most relevant factor." *Id.* The ALJ found that the late NOC was the result of Respondent's simple negligence and oversight which apparently arose from the pressures of operating a business and held that these reasons were insufficient to constitute "excusable neglect" under Rule 60(b). *Id.* The ALJ also found that Respondent's admitted "oversight" in failing to timely file a NOC was wholly within the Respondent's control. *Id.* As in *JLD Custom Carpentry*, this Court finds that simple

⁶ The Court also finds that Respondent has not presented adequate evidence to support the proffering of any meritorious defense(s) to the citations.

negligence and oversight are not grounds for relief under Rule 60(b)⁷ and the filing of the NOC was within Respondent's control to accomplish.

In addition, the Court also finds Respondent did not act in good faith. The late NOC while dated June 24, 2015 was not postmarked until July 28, 2015. The delay demonstrates Respondent's lack of good faith in wanting to timely act to protect its interests. In addition, it is clear that Respondent failed to have into place proper business processes and practices to ensure timely action as may be required during the course of business operations. To the extent that Respondent's request for relief is premised on its failure to properly handle mail or documents, the Court would note that the Commission expects employers to "maintain orderly procedures for handling important documents." *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020 (No. 86-1266, 1989); *see also NYNEX*, 18 BNA OSHC 1967 (No. 95-1671, 1999) ("The Commission has consistently denied relief to employers whose procedures for handling documents were to blame for untimely filings' of [Notices of Contest]." (quoting *E.K. Constr. Co., Inc.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991))).

Respondent also states that its failure to file a timely NOC was due in part "to illness in my family...." Respondent only provides the barest of allegations with no supporting detail. As noted previously, it is Respondent's burden to show its entitlement to relief on this basis. Respondent has failed to do so with respect to the assertion of illness. *See Subzero Technologies*, 24 BNA OSHC 1767 (No. 12-1244, 2013)("late filing of the notice of contest was merely simple negligence of its owner, due to the owner's inattentiveness to the citation as result of a family medical crisis", which did not constitute excusable neglect).

⁷ As noted in *JLD Custom Carpentry*, a long line of Commission decisions rejects the notion that negligence or carelessness can justify relief under Rule 60(b). *See Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No.88-2291, 1991); *see also Roy Kay, Inc.*, 13 BNA OSHC 2021, 2122 (no. 88-1748, 1989); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991).

Respondent has remained silent on the NOC issues after this case was docketed at the Commission. Respondent has not presented sufficient evidence for the Court to conclude that Respondent's 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 Respondent failed to file a timely NOC and no relief under Rule 60(b) is justified.

The Complainant'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/ Patrick B. Augustine

Patrick B. Augustine
Judge - OSHRC

Date: October 26, 2015
Denver, CO