

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

Secretary of Labor,

Complainant

v.

Employment 2000 Corp.,

Respondent.

OSHRC Docket 16-0858

**DECISION AND ORDER GRANTING THE SECRETARY’S MOTION TO DISMISS
RESPONDENT’S UNTIMELY NOTICE OF CONTEST AND FINDING: 1) THE
COURT LACKS JURISDICTION TO APPROVE PROPOSED SETTLEMENT
AGREEMENT AND 2) RELIEF FROM THE CITATION IS NOT WARRANTED
UNDER RULE 60(b)(1)**

I. BACKGROUND

On November 25, 2015, the Occupational Safety and Health Administration’s (OSHA) Boston South Area Office (BSAO) issued a five-item Serious Citation 1 (the Citation) with proposed penalties totaling \$25,200 to Employment 2000 (Employment 2000 or Respondent). BSAO sent the Citation through certified mail to Employment 2000 Corp., 73 Belmont Street, Easton, Massachusetts 02334. On November 30, 2015, Respondent’s Sales Manager, David Doyle, signed the certified mailing receipt for the Citation.

BSAO did not receive any Notice of Contest (NOC) or any payment from Respondent before December 21, 2015.

On April 22, 2016, Stephen Lang, Respondent’s President, sent a NOC to BSAO that was

received on April 25, 2016.¹ In this NOC, Mr. Lang stated he never received the Citation and he believed Respondent was not “at fault in this matter.” BSAO responded to the NOC by letter dated April 27, 2016 explaining that the Citation was deemed a final order of the Occupational Safety and Health Review Commission (Commission) because the 15-day contest period had expired and that Employment 2000 could contact the Commission directly to continue pursuing the matter.²

On May 10, 2016, the Commission received another NOC from Respondent, dated May 6, 2016, concerning the Citation.³ 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. On May 26, 2016, the Commission docketed the instant matter as Docket No. 16-0858 following its receipt of the NOC, dated May 6, 2016.

On June 23, 2016, the Secretary filed his Motion to Dismiss Respondent’s Untimely Notice of Contest (Motion to Dismiss). The Secretary seeks the dismissal of Respondent’s

¹ Two addresses for Respondent appear atop this NOC. The address at the top left of Mr. Lang’s NOC identified Respondent’s address as 73 Belmont Street, Easton, MA 02375. This NOC, dated April 22, 2016, was not received by the Commission or Court until June 27, 2016, when it was received as an attachment to the Secretary’s dismissal motion.

² BSAO’s letter was addressed to “Mr. Stephen C. Lang, Employment 2000 Corp., 73 Belmont Street, Easton, MA 02375.” Without objection, the Court has taken judicial notice that zip code “02375” includes 73 Belmont Street, South Easton, Massachusetts. Unless otherwise noted, all other documents filed in this case at the Court or Commission by the Secretary, Court and/or Commission prior to July 26, 2016 were addressed to Respondent using the address at 73 Belmont Street, Easton, MA 02334. None of the Court filings mailed to this address by the Court were returned to the Court as undeliverable. The Court has also taken, without objection, judicial notice that zip code “02334” includes Easton, MA.

³ No return address of Respondent was identified in this NOC that caused the case to be docketed at the Commission. The Commission Rule at 29 C.F.R. § 2200.6 Record address states:

Every pleading or document filed by any party or intervenor shall contain the name, current address and telephone number of his representative or, if he has no representative, his own name, current address and telephone number. Any change in such information shall be communicated promptly in writing to the Judge, or the Executive Secretary if no Judge has been assigned, and to all other parties and intervenors. A party or intervenor who fails to furnish such information shall be deemed to have waived his right to notice and service under these rules.

untimely NOC because Respondent had not timely filed a NOC by December 21, 2015 and it cannot demonstrate “excusable neglect” pursuant to Federal Rule of Civil Procedure 60(b)(1). Respondent’s response to the Motion to Dismiss was originally due to be filed with the Court by July 10, 2016. Respondent did not file a response to the Secretary’s Motion to Dismiss by July 10, 2016, or thereafter.

On July 26, 2016, the Court granted the Secretary’s Motion to Dismiss.⁴

On August 11, 2016, the parties executed a Settlement Agreement regarding the case.⁵ The Settlement Agreement calls for Respondent to accept all of the citation items with the full penalty, pursuant to a payment schedule.⁶

On August 22, 2016, the Secretary filed an unopposed motion requesting that the Commission vacate the Court’s decision and approve the Settlement Agreement.

On September 28, 2016, the Commission issued its Remand Order setting aside the Court’s July 26, 2016 decision. The Commission stated that it was not clear whether Respondent ever received the Secretary’s Motion to Dismiss:

as well as a number of other documents sent to it throughout the course of this case. Specifically, the following documents were sent to Respondent using the correct street address, city, and state, but not the correct zip code:⁷ (1) the citation and return receipt form; (2) a debt collection letter dated January 26, 2016; (3) the Secretary’s motion to dismiss; (4) the judge’s notice of decision; (5) the Commission’s notice of docketing of the judge’s decision; and (6) the Secretary’s motion currently pending before us. As to the citation, despite the signature from “Doyle” on the return receipt, Respondent’s president claims to have “never received” the citation. As to the other documents, there is nothing in the record to confirm whether Respondent received them.

⁴ The Court’s decision was mailed to Respondent and also sent by confirmed facsimile.

⁵ The Settlement Agreement includes a stipulation that Respondent filed an untimely notice of intent to contest the citation and penalties. The Settlement Agreement further states that “[i]t is agreed that jurisdiction of this proceeding is conferred upon said Commission by section 10(c) of the Act.”

⁶ The settlement agreement fails to specify if and when the settlement agreement was posted in accordance with Rules 7 and 100 of the Commission Rules of Procedure. *See* 29 C.F.R. §§ 2200.7 and 2200.100.

⁷ The zip code used on these documents was 02334 – the correct zip code is 02375, as identified in the return address included on Respondent’s April 22, 2016 NOC.

Nor does it appear that the judge was aware of the mailing address error at the time he issued his decision granting the Secretary's motion to dismiss.

In these circumstances, it is not clear whether Respondent received or had an opportunity to respond to the Secretary's motion to dismiss or the judge's decision granting the motion. We therefore set aside the judge's decision, as requested in the Secretary's motion to the Commission, and remand this case for the judge to: (1) provide Respondent with a copy of all the documents filed in this case; (2) allow Respondent an opportunity to respond to the Secretary's dismissal motion; and (3) reconsider whether relief from a final order is warranted under Rule 60(b)(1).

The Commission's remand order directed the Court to: "(1) provide Respondent with a copy of all the documents filed in this case; (2) allow Respondent an opportunity to respond to the Secretary's dismissal motion; and (3) reconsider whether relief from a final order is warranted under Rule 60(b) (1)."

On September 29, 2016, this case was again assigned to the Court for disposition.

On October 17, 2016, the Court issued its Order: 1) Providing Respondent with copy of all documents filed in the case, and 2) allowing Respondent an opportunity to respond to the Secretary's Dismissal Motion, dated June 23, 2016.⁸ The Court ordered Respondent to file "its response to the Secretary's dismissal motion with the Court no later than by November 30, 2016." The Court further ordered that "Respondent's response to the Secretary's dismissal motion shall include a complete discussion as to whether relief from a final order in this case is warranted under Fed. R. Civ. P., Rule 60(b) (1)⁹ and the basis for it." Lastly, the Court stated that Respondent's "failure to comply with all parts of this order may result in sanctions, including the dismissal of claim(s), notice of contest, or defense(s), as well as the Court's

⁸ Copies of all of the documents filed in this case were attached to the Order and served upon Respondent.

⁹ 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:

(1) **mistake, inadvertence, surprise, or excusable neglect**; (emphasis in the original).

affirmance of the underlying citation and proposed penalties.” The Court’s Order was sent to Respondent by certified first class mail, return receipt requested, on October 17, 2016. The order was addressed to: Stephen C. Lang, Employment 2000 Corp., 73 Belmont Street, South Easton, MA 02375. It was delivered to, and signed by, Respondent’s agent at that address. The Domestic Return Receipt, dated November 3, 2016, was received by the Court on November 8, 2016.

Neither party filed any objection to the Court taking judicial notice that zip code 02375 included 73 Belmont Street, South Easton, MA on or before November 7, 2016, or thereafter.

Respondent did not file a response to the Secretary’s Dismissal Motion, dated June 23, 2016, by November 30, 2016, or thereafter.¹⁰

II. DISCUSSION

A. The Secretary’s Motion to Dismiss has Merit and is Granted.

The Court’s Decision and Order Granting the Secretary’s Motion to Dismiss Respondent’s Untimely Notice of Contest, issued July 26, 2016, is incorporated by reference in its entirety into this Decision and Order and reaffirmed in its entirety. In it, the Court found that Respondent’s office received the Citation on November 30, 2015, as is proven by the signed certified mailing receipt for the Citation, and that the NOC was due to be filed at BSAO no later than December 21, 2015. The Court further found Employment 2000 did not timely file a NOC within 15 working days of its receipt of the Citation as section 10(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659 (the Act) and 29 C.F.R. § 1903.17(a) require. The Court also found that Respondent was not entitled to relief under Rule 60(b)(1). Pursuant to section 10(a) of the Act, the Court concluded that the Citation and proposed penalty were

¹⁰ The Secretary has not filed anything with the Court on or after September 29, 2016.

deemed a final order of the Commission. The Court reaffirms these findings and again grants the Motion to Dismiss.

B. The Court Lacks Jurisdiction to Approve the Proposed Settlement Agreement.

The Commission has held that when the facts of a case raise questions about jurisdiction, the judge, *sua sponte*, is required to insure that there is evidence supporting jurisdiction. *See Taj Mahal Contracting*, 20 BNA OSHC 2020, 2023 (No. 03-1088, 2004) (Secretary bears “the ultimate burden of proof as to jurisdiction”). Here, the Court is compelled to address whether or not it is bound by the provisions in the parties’ settlement agreement that stipulated that Respondent filed an untimely notice of intent to contest the citation and penalties, while further stating that “[i]t is agreed that jurisdiction of this proceeding is conferred upon said Commission by section 10(c) of the Act.”¹¹ One of the Court’s first duties is to determine whether or not it has jurisdiction to adjudicate the matter before it. *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376, *reh’g denied*, 309 U.S. 695 (1940). It is always incumbent upon a court to evaluate its jurisdiction, *sua sponte*, to ensure that it does not decide controversies beyond its authority. *Costigan v. NYNEX*, Case No. 97B00026, 1997 WL 242199, at *3 (O.C.A.H.O. Mar. 5, 1997). Graven in stone is the maxim that parties cannot confer jurisdiction by consent or stipulation. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Rodick v. City of Schenectady*, 1 F.3d 1341, 1346 (2d Cir. 1993). This court is a court of limited jurisdiction. It is empowered to adjudicate only those cases authorized by Congress. Parties may not stipulate to, or waive lack of, subject matter jurisdiction. *Sosna v. Iowa*, 419 U.S. 393, 398 (1975). A party seeking to invoke the jurisdiction of the Commission

¹¹ Commission jurisdiction exists under section 10(c) of the Act where the employer notifies the Secretary it intends to contest a citation within fifteen working days of the issuance of the citation.

and its courts must prove that the case is within the court's subject matter. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178 (1936); *RSR Corp.*, No. 79-3813, 1981 WL 95612, at *2 (O.S.H.R.C.A.L.J. Feb. 18, 1981) (consolidated) ("parties cannot confer jurisdiction on, or withhold it from, the Commission.").

Here, both parties have failed to make a showing of Commission jurisdiction. Instead, the Secretary has met his initial burden establishing grounds for dismissal of Respondent's late NOC in its Motion to Dismiss for lack of jurisdiction. See *Taj Mahal Contracting*, 20 BNA OSHC at 2022, where the Commission noted:

[W]here an untimely NOC is docketed, under Commission practice it is incumbent upon the Secretary to file a motion to dismiss the NOC as untimely, and at the hearing, ... the judge places the initial burden on the Secretary to establish the grounds for dismissal of the NOC: namely the citation was issued and served upon the respondent, and that the Secretary did not receive any NOC from the respondent within 15 working days after receipt of the citation.

The Court sees no basis for any notion that, with the facts before it, the parties may stipulate to jurisdiction here and earn the Court's imprimatur on such a stipulation. Under section 10(a) of the Act, an employer's failure to timely file a notice of contest results in the citation and proposed penalty becoming a final order of the Commission "not subject to review by any court or agency."

Under Commission rules, a settlement agreement is not final until approved by the Judge. 29 C.F.R. § 2200.100 (b) and (c), Commission Rule 100 (b) and (c). These rules set forth technical requirements that must be met before the Judge or Commission can approve a settlement agreement.¹² Rules 100 (b) and (c) also make it clear that a settlement agreement is

¹² Rule 100(b) states that a settlement agreement must "specify the terms of settlement for each contested item, specify any contested item or issue that remains to be decided (if any remain), and state whether any affected employees who have elected party status have raised an objection to the reasonableness of any abatement time." Similarly, Rule 100(c) requires that all settlement agreements contain proof of service on all parties and authorized

not final until approved by the judge and an order terminating the litigation is issued by the Judge or the Commission.¹³ The proposed Settlement Agreement has never been approved or finalized by the Court or Commission.

The technical requirements set forth in Commission Rule 100 are not the exclusive grounds for refusing to approve a settlement agreement. Although the Commission does not have the authority to refuse approval of a settlement agreement because it disapproves of its substantive terms (*i.e.* characterization of the violation, penalty assessment, exculpatory language),¹⁴ it has made it clear that it will not just “rubber stamp” its approval of settlement agreements. Rather, the Commission “must be assured that a proposed settlement represents a genuine agreement between the parties and a true meeting of the minds on all provisions thereof.” *84 Components Co.*, 20 BNA OSHC 2063, 2064 (No. 02-0363, 2003); *Aerlex Corp.*, 12 BNA OSHC 1989 (No. 85-1257, 1986) (same). Under the Commission’s rules and case law, Court approval is a condition precedent to the settlement agreement being final and enforceable. *See Transcontinental Gas Pipe Line Corp. v. Fed. Energy Regulatory Comm’n*, 659 F.2d 1228, 1233 n. 45 (D.C. Cir. 1981) (“Approval by a third party is certainly a condition precedent.”). A condition precedent is an event which must occur before performance under a contract becomes

employee representatives, and posting of notice to non-party affected employees. Further, the parties “shall also file a final consent order for adoption by the Judge.” Finally, Rule 100(c) grants ten days after service on affected employees to consider objections to the abatement dates filed by any affected employee or authorized employee representative before the Judge or the Commission can issue “an order terminating the litigation before the Commission because of the settlement.”

¹³ The Court takes judicial notice that settlement agreements submitted to it are occasionally returned to the parties before court approval to correct errors relating to not specifying the terms of settlement for each contested item, item penalty amounts that do not add up to the overall amount to be paid, wrong dates shown for payments, omitted posting requirements, and/or missing signatures. Here, the evidence shows that the proposed settlement agreement is flawed because it fails to satisfy posting requirements.

¹⁴ Regarding substantive matters set forth in a settlement agreement, the Commission may only review the reasonableness of the abatement date when challenged by an authorized employee representative. *United Steelworkers of Am., Local No. 185 v. Herman*, 216 F.3d 1095, 1098 (D.C. Cir. 2000).

due.¹⁵ *Psaromatis v. English Holdings I, L.L.C.*, 944 A.2d 472, 482 (D.C. 2008). Similarly, a court has the discretion to decline approval of a settlement agreement when warranted by unusual circumstances. *Lloyd v. Mukasey*, 568 F.Supp.2d 2, 17-18 (D.D.C. 2008). While settlement agreements, deliberately entered into by the parties generally bind the parties and “ought not to be lightly set aside,” a court may set aside such agreements “wherever justice requires.” *Id.* at 17 (citing *Maiatico v. Novick*, 108 A.2d 540, 541 (D.C. Mun. App. 1954)).¹⁶ The Court declines to approve the proposed Settlement Agreement for lack of jurisdiction. The proposed Settlement Agreement is set aside.

C. Relief from the Citation is Not Warranted Under Rule 60(b)(1).

The Commission has held that rule 60(b) of the Federal Rules of Civil Procedure can be used as the basis for setting aside a section 10(a) final order; and the Court turns its attention to whether Employment 2000 is entitled to relief under Rule 60(b)(1).¹⁷ The record before the Court shows Employment 2000 is not entitled to relief under Rule 60(b)(1). There is no evidence of mistake, inadvertence, surprise or excusable neglect. No clear reason for any delay in filing a NOC with BSAO has been shown. Because Respondent has utterly failed to present any evidence on the reason for any delay, the Court finds it has not established excusable neglect.

The Court renews its prior finding that the delay in filing its NOC was entirely the fault

¹⁵ See *Moses v. Howard Univ. Hosp.*, 601 F.Supp.2d 1, 5 (D.D.C. 2009) (denying motion to enforce settlement agreement not approved by Bankruptcy Court, a condition precedent to performance), *aff'd*, 606 F.3d 789 (D.C. Cir. 2010).

¹⁶ See *Rose Steel Inc.*, No. 12-1899, Order Granting Respondent’s Motion to Rescind Settlement Agreement, (Jul. 31, 2013) (OSHR agency website), available at www.oshrc.gov/open/SignificantOrders_AdminLawJudge.html (settlement agreement rescinded based upon mistake).

¹⁷ See *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981) (Commission has jurisdiction to entertain a late NOC under Rule 60(b)); *but see Chao v. Russell P. Le Frois Builder*, 291 F.3d 219 (2d Cir. 2002) (Commission lacks jurisdiction to extend the time for filing a NOC based on excusable neglect).

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 gave clear reference to the contest process. Nishimura Aff. at Ex. A. Further, the Citation stated that it would become a final order of the commission without a properly filed NOC given within 15 working days. *Id.*¹⁸ BSAO also followed standard protocol and sent Employment 2000 an OSHA 3000 booklet which outlines its rights and responsibilities. Nishimura Aff. 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.* at ¶ 8.

Respondent has not taken advantage of the opportunity to satisfy its burden of proving that it is entitled to equitable relief for a late-filed NOC.¹⁹ Instead, it ignored the Court's Order to file a response to the Secretary's Motion to Dismiss by November 30, 2016. The Court finds that there is no additional need for further evidence to be presented by the parties on this issue.²⁰ For the aforementioned reason, the Court reaffirms its earlier finding that 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*, 24 BNA OSHC 1936, 1938 (No. 13-0487, 2013)²¹ ("An employer that has filed a late notice of contest 'must bear the burden of its own lack of diligence

¹⁸ Specific language from the citation notes that it "**will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.**" (emphasis in original).

¹⁹ *See Burrows Paper Corp.*, 23 BNA OSHC 1131, 1132 (No. 09-1559, 2010) (Respondent bears burden to establish basis for requested relief).

²⁰ It serves no purpose for the Court to conduct an evidentiary hearing to further address Respondent's receipt and handling of the Citation or hearing on the merits of the citation as Respondent has agreed to accept all of the citation items with full penalty; subject only to a payment schedule that could otherwise be agreed to by the parties. *Compare Rheem Mfg. Co.*, 25 BNA OSHC 1838, 1839 (No. 15-1248, 2016) (remanding for evidentiary hearing because "Order denying [Rule 60(b)(1)] relief is premature based on limited record" where Respondent detailed "the company's mail procedures in an affidavit from its human resource manager and claims that its failure to timely file the notice of contest was due to excusable neglect."). Here, Respondent has not even alleged its failure to timely file its NOC was due to excusable neglect and has proffered no details of its internal communication procedures.

²¹ 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 OSHC at 1938.

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)).

The Court finds Employment 2000 has completely 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. Mr. Lang’s statement “I never received it” asserted in his April 22, 2016 NOC, without more, is insufficient to override Respondent’s actual receipt of the Citation on November 30, 2015 by one of its managers. Although given the opportunity, Respondent has failed to advance any details sufficient to show excusable neglect based upon any internal miscommunication.²² Furthermore, Employment 2000 has also not offered an explanation as to its failure to respond to the debt collection letter, dated January 26, 2016. The Court finds that Employment 2000 has offered no basis for Rule 60(b) relief. On the basis of the factors and considerations discussed herein and in the Court’s prior July 26, 2016 Decision and Order, the Court finds Employment 2000’s failure to file a timely NOC was not due to excusable neglect.

III. CONCLUSION

The Court cannot approve the proposed settlement agreement for lack of jurisdiction and 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 and has not demonstrated that the delay in filing the NOC was excusable under the Federal Rules of Civil Procedure.

Pursuant to section 10(a) of the Act, the classification of all five of the Citation items as

²² See *Nw. Conduit Corp.*, 18 BNA OSHC 1948, 1949 (No. 97-851, 1999) (Misunderstanding between company’s president and its counsel excusable neglect where president testified he thought he told counsel to file a timely NOC that was actually filed a day late).

serious and underlying proposed penalties totaling \$25,200 are deemed a final order of the Commission.²³

IV. 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).

V. 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,
- 3) the proposed Settlement Agreement dated August 11, 2016 is not approved by the Court for lack of jurisdiction and is set aside, and
- 4) all five of the Citation serious items and proposed penalties totaling \$25,200 are deemed a final order of the Commission.

SO ORDERED.

²³ 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.

/s/

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

Dated: January 10, 2017
Washington, D.C.