

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

Secretary of Labor,	)	
	)	IN MANDATORY SETTLEMENT
Complainant,	)	PROCEEDING
	)	
v.	)	OSHRC Docket Nos. 22-0074, 22-0291
	)	
Amazing Vitamins, LLC,	)	CONSOLIDATED FOR MANDATORY
	)	SETTLEMENT PROCEEDING
Respondent.	)	PURPOSES
	)	

**ORDER DENYING RESPONDENT’S MOTION FOR RECONSIDERATION  
PURSUANT TO 29 C.F.R. 2200.40(i) OF THE ORDER DISMISSING LATE  
NOTICES OF CONTEST FOR MATTERS OSHRC 22-0074 AND 22-0291**

**I. BACKGROUND**

On July 7, 2022, the Court issued its undated Notice of Decision Granting the Secretary’s Motion to Dismiss Late Notices of Contest in Docket Nos. 22-0074 and 22-00291 (Decision and Order Granting Mot. to Dismiss issued July 7, 2022).

On July 12, 2022, Respondent filed its Motion for Reconsideration Pursuant to 29 C.F.R. 2200.40(i) of the Order Dismissing Late Notices of Contest for Matters OSHRC 22-0074 and 22-0291 (Mot. for Recon.). Respondent “requests reconsideration of that decision due to the reference to Second Circuit law as opposed to Third Circuit law. Respondent asserts that the precedent from the Third Circuit warrants granting Respondent’s request for relief pursuant to Fed.R.Civ.P. 60(b)(1).”<sup>1</sup> (Mot. for Recon., at 1).

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<sup>1</sup> Respondent asserted that the Court did not consider three of the factors in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 395 (1993), including: 1) length of delay and its potential impact on judicial proceedings, 2) danger of prejudice to the Secretary, and 3) whether the company acted in good faith. (Mot. for Recon., at 4-5). Respondent agrees the Court examined the Pioneer factor pertaining to reasons for delay in its Decision and Order Granting the Secretary’s Mot. to Dismiss issued July 7, 2022. (Mot. for Recon., at 4).

As of July 18, 2022, the undated Decision and Order Granting Mot. to Dismiss issued July 7, 2022 had not yet been filed with the Commission's Executive Secretary and the Court had the authority to correct errors in the undated Decision and Order Granting Mot. to Dismiss issued July 7, 2022.

On July 18, 2022, the Court issued its “Decision and Order Granting the Secretary’s Motion to Dismiss Late Notices of Contest [in Docket Nos. 22-0074 and 22-0291][Corrected Copy]” (Decision and Order Granting Mot. to Dismiss issued on July 18, 2022) that corrected the error at page 32 of the Decision and Order Granting Mot. to Dismiss issued on July 7, 2022. The Court ordered page 32 of the Decision and Order Granting Mot. to Dismiss issued July 7, 2022 to be amended as follows:

- 1) At the beginning of the first complete paragraph, deleting "In the Second Circuit, where this case arose," and changing "the" to "The";
- 2) after "jurisdiction" in first complete paragraph, adding "But, since this case arose in the Third Circuit, *see also J.I. Hass Co., Inc. v. OSHRC and Marshall*, 648 F.2d 190, 195 (3<sup>rd</sup> Cir. 1981), where the Court held "that the Commission has jurisdiction to entertain a late notice of contest under rule 60(b)"; and
- 3) After "applies" in second complete paragraph, adding "'Third Circuit and".

(Decision and Order Granting Mot. to Dismiss issued July 18, 2022).

On July 19, 2022, the Court issued its “Briefing Schedule and Order Relating to Respondent’s Motion for Reconsideration Pursuant to 29 C.F.R. 2200.40(i) of the Order Dismissing Late Notices of Contest for Matters OSHRC 22-0074 and 22-0291” (Briefing Scheduling Order). The Briefing Scheduling Order stated:

The Secretary shall file his response to the Motion for Reconsideration by July 26, 2022.

Respondent may file a reply to the Secretary's response by August 5, 2022, or within ten calendar days after being served with the Secretary's response, whichever comes first.

The Secretary may file a sur-reply by August 15, 2022 in the event Respondent files a

reply, or within ten calendar days after being served with any reply, whichever comes first.

(Briefing Scheduling Order, at 1).

On July 26, 2022, the Secretary filed his Opposition to Respondent's Motion for Reconsideration (Opp. To Mot. To Recon.). The Secretary argues Respondent's Motion for Reconsideration is improper and should be denied because there is no: 1) newly discovered evidence, 2) intervening development or change in controlling law, or 3) need to correct a clear error of law or fact. The Secretary noted that the undated Decision and Order Granting Mot. to Dismiss issued on July 7, 2022's mistaken reference that the case arose in the Second Circuit, instead of the Third Circuit, was corrected by the Court's Decision and Order Granting Mot. to Dismiss issued on July 18, 2022, thereby rendering Respondent's argument moot. (*Id.*, at 1-2).

On August 2, 2022, Respondent filed its Reply to Complainant's Opposition to the Motion for Reconsideration Pursuant to 29 C.F.R. 2200.40(i) of the Order Dismissing Late Notices of Contest for Matters OSHRC 22-0074 and 22-0291 (Reply). In its reply, Respondent acknowledges that the Court corrected the error in its undated Decision and Order Granting Mot. to Dismiss issued on July 7, 2022 that mistakenly indicated that the case arose in the Second Circuit, instead of the Third Circuit, by its Decision and Order Granting Mot. to Dismiss issued on July 18, 2022. (Reply, at 1). But, Respondent argued its Motion for Reconsideration was not moot because the Court, in its decision, did not properly address three factors set forth in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. at 395, including: 1) length of delay and its potential impact on judicial proceedings, 2) danger of prejudice to the Secretary, and 3) whether the company acted in good faith. (Mot. for Recon., at 4-5; Reply at 2-4). Respondent also asserted that it had satisfied the requirement to raise a meritorious defense "with

minimal allegations that the employer could prove a defense if given the opportunity.” (Reply, at 5).

The Secretary did not file any sur-reply.

## II. DISCUSSION

A. The Court has properly considered the three factors at issue set forth in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. at 395, in its Decision and Order Granting Mot. to Dismiss issued on July 18, 2022.

As stated in its undated Decision and Order Granting Mot. to Dismiss issued on July 18, 2022, the Court “applies Third Circuit and Commission precedent when deciding whether Respondent’s Late Notices of Contest may be excused pursuant to Federal Rule of Civil Procedure 60(b)(1), and the result here is the same.”<sup>2</sup> (Decision and Order Granting Mot. to Dismiss issued July 18, 2022, at 32).

In its Decision and Order Granting Mot. to Dismiss issued on July 18, 2022, the Court stated:

When evaluating such claims, the Commission applies the criteria set forth by the Supreme Court in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380 (1993); *E.g., Nw. Conduit Corp.*, No. 97-851, 1999 WL 820636, at \*3 (O.S.H.R.C., Sept. 3, 1999). Under the *Pioneer* test, the Commission takes into account “all relevant circumstances,” including: (1) “the reason for the delay,”<sup>3</sup> including whether it was within the reasonable control of the [company]”;<sup>4</sup> (2) “the length of the delay and its potential impact on judicial

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<sup>2</sup> Although the Court mistakenly stated that the case arose in the Second Circuit, it applied the same criteria set forth in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. at 395 as required by the Third Circuit in its Decision and Order Granting Mot. to Dismiss issued on July 7, 2022. (Decision and Order Granting Mot. to Dismiss issued on July 7, 2022, at 33). Thus, the mistaken statement that the case arose in the Second Circuit in the Decision and Order Granting Mot. to Dismiss issued on July 7, 2022 had no effect on the outcome of the case.

<sup>3</sup> Typically, courts give the most weight to “the reason for the delay” in determining excusable neglect under Rule 60(b). *AR Med. LLC d/b/a San Pablo Med Clinic*, 24 BNA OSHC 1665, 1666 (No. 12-2023, 2013), *see also A.W. Ross Inc.*, 19 BNA OSHC 1147, 1148 (No. 99-0945, 2000)(“A key factor in evaluating whether a party’s delay in filing was due to excusable neglect is ‘the reason for the delay, including whether it was within the reasonable control of the movant.’”); *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”).

<sup>4</sup> The Court finds that the reasons for the delays here were within Respondent’s reasonable control. If the party

proceedings";<sup>5</sup> (3) "the danger of prejudice to the [Secretary];"<sup>6</sup> and (4) "whether the [company] acted in good faith." *Id.* (quoting *Pioneer*, 507 U.S. at 395).<sup>7</sup> (Decision and Order Granting Mot. to Dismiss issued on July 18, 2022, at 33-34).

As to the "good faith" factor, in its Motion for Reconsideration Respondent asserts that "[t]here is no allegation that Respondent ignored the citations or the Area Office" and "it was always cooperative with the OSHA Area office." (Mot. for Recon., at 7).

The Court disagrees. As stated in its Decision and Order Granting the Secretary's Mot. to Dismiss issued on July 18, 2022:

The Court finds that there is insufficient evidence in the record to support Respondent's assertion that it "was lulled into thinking it was working toward a resolution of the outstanding citations and that no further filings were required." (Sur-reply to Sec'y's Reply, at 1). The Citations and Notification of Failure to Abate Alleged Violations provided clear notice to Respondent that a written letter of intent to contest the citations and Failure to Abate Alleged Violations must be submitted to OSHA within 15 working days of receipt of the Citations and Failure to Abate Alleged Violations. **Respondent ignored these instructions and unilaterally delayed its filings of notices of contests for lengthy periods of time.** This is not a case where Respondent was misled by OSHA as to the date a NOC must be filed. [footnote omitted]. There is no evidence that OSHA committed any fraud, misrepresentation, or misconduct within the meaning of Rule 60(b). There is no evidence that anyone at OSHA suggested that Respondent disregard the written notice of contest instructions. [footnote omitted]. (emphasis added)

(Decision and Order Granting Mot. to Dismiss issued July 18, 2022, at 34-35).

The Court's finding in its Decision and Order Granting Secretary's Mot. to Dismiss issued on

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fails to properly articulate a sound reason for the delay in filing its NOC, excusable neglect is often not granted. *CalHar Constr. Inc.*, 18 BNA OSHC 2151, 2153-54 (No. 98-367, 2000) (CalHar's neglect was not excusable under Rule 60(b)(1) where delay in filing its NOC was within its reasonable control).

<sup>5</sup> The passage of many months from the deadline when Respondent was due to file its Notice of Contest in Docket No. 22-0074 and 130 calendar days in Docket No. 22-0291 has a significant impact on the Secretary's ability to fully prepare his case for trial; thereby prejudicing the Secretary. During that lengthy timeframe, evidence can be lost or misplaced, witnesses may become unavailable, and memories fade.

<sup>6</sup> See n. 5, above.

<sup>7</sup> The identical language was also in the Decision and Order Granting Mot. to Dismiss issued on July 7, 2022.

July 18, 2022 that Respondent ignored the Secretary's instructions regarding when to file a notice of contest and delayed its filing of notices of contest for lengthy periods of time were actions by Respondent that were not made in good faith. Respondent's lack of good faith was considered by the Court in its Decision and Order Granting Mot. to Dismiss issued on July 18, 2022. (*Id.*).

B. Respondent has failed to show the existence of any meritorious defenses.

Respondent asserts that it has satisfied the requirement to raise a meritorious defense by simply alleging that it could prove a defense if given the opportunity. (Reply, at 5). The Court disagrees.

The Court incorporates by reference its discussion and finding in its Decision and Order Granting Mot. to Dismiss issued on July 18, 2022 at Section IVB, at pages 36-37, that Respondent has not sufficiently shown the existence of any meritorious defenses in Docket Nos. 22-0074 and 22-0291.

### **III. CONCLUSION**

The Court has carefully considered Respondent's Motion for Reconsideration Pursuant to 29 C.F.R. 2200.40(i) of the Order Dismissing Late Notices of Contest for Matters OSHRC 22-0074 and 22-0291 and finds it to be without merit.

### **IV. ORDER**

WHEREFORE, Respondent's Motion for Reconsideration Pursuant to 29 C.F.R. 2200.40(i) of the Order Dismissing Late Notices of Contest for Matters OSHRC 22-0074 and 22-0291 is DENIED WITH PREJUDICE, and IT IS FURTHER ORDERED that the Court's Decision and Order Granting the Secretary's Motion to Dismiss Late Notices of Contest [in Docket Nos. 22-0074 and 22-

0291][Corrected Copy] issued on July 18, 2022 is the Court's final Decision and Order in these matters.<sup>8</sup>

SO ORDERED.

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

Dated: September 19, 2022  
Washington, D.C.

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<sup>8</sup> The Judge's report, which includes the Decision and Order Granting Mot. to Dismiss issued on July 18, 2022, will be filed with the Commission's Executive Secretary on September 19, 2022. *See* Commission Rule 90(b), 29 C.F.R. § 2200.90(b) and accompanying Notice of Decision.



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

Secretary of Labor,	)	
	)	IN MANDATORY SETTLEMENT
Complainant,	)	PROCEEDING
	)	
v.	)	OSHRC Docket Nos. 21-1295, 22-0074
	)	22-0291
	)	
Amazing Vitamins, LLC,	)	CONSOLIDATED FOR
	)	MANDATORY
	)	SETTLEMENT PROCEEDING
Respondent.	)	PURPOSES
	)	

**DECISION AND ORDER GRANTING THE SECRETARY’S MOTION TO DISMISS  
LATE NOTICES OF CONTEST [IN DOCKET NOS. 22-0074 AND 22-0291]  
[CORRECTED COPY]**

This proceeding is before the Occupational Safety and Health Review Commission (Commission or OSHRC) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act). Respondent is a corporation which, up until May 2022, manufactured and packaged nutritional supplements. (Resp’t’s Opp’n to Mot. to Dismiss and Mot. For Relief pursuant to Fed.R.Civ.P. 60(b)(1), at Certification (Cert.) of Chief Executive Officer (CEO) Samir Bhatia, at 1)(Samir Bhatia Cert., at ¶2)).

I. Docket No. 22-0074

A. Citations – Inspection No. 1418803

The Occupational Safety and Health Administration (OSHA) inspected Respondent’s worksite at 190-A Jony Drive, Carlstadt, New Jersey 07072 from July 29, 2019 through December 5, 2019 under OSHA Inspection No. 1418803.



On January 24, 2020, OSHA issued Respondent two citations alleging eleven serious citation items and one other-than-serious citation item relating to Inspection Number No. 1418803. (Mot. to Dismiss, at 3, Ex. A). The citations were mailed via certified mail, return receipt requested (Article No. 70191120000126298425) to Respondent at address 190-A Jony Drive, Carlstadt, New Jersey 07072 by correspondence dated January 24, 2020.<sup>1</sup> (Secretary Motion to Dismiss Respondent’s Late Notices of Contest (Mot. To Dismiss), at 3; Ex. B). OSHA sought a penalty in the amount of \$46,268 for these citation items. The citations were as follows:

Citation 1 Item 1 a Type of Violation: **Serious**

29 CFR 1910.95(c)(1): The employer did not administer a continuing, effective hearing conservation program as described in 29 CFR 1910.95(c) through (o) whenever employee noise exposures equal or exceed an 8-hour time-weighted average sound level of 85 decibels measured on the A scale, or equivalently a dose of fifty percent:

a) Tablet Machine Operator: An employee was monitored over 7 hours 16 minutes and was exposed to continuous noise at 87.9 decibels averaged over 8-hours with zero exposure averaged for any unsampled time. The equivalent dose was 74.8% of OSHA’s Permissible Exposure Limit for Noise, which is 90 decibels. The employer did not administer a hearing conservation program, thus exposing the employee to irreversible hearing loss, on or about September 5, 2019.

Date By Which Violation Must be Abated:	02/27/2020
Proposed Penalty:	\$3084.00

Citation 1 Item 1 b Type of Violation: **Serious**

29 CFR 1910.95(g)(1): The employer did not establish and maintain an audiometric testing program as provided in this paragraph by making audiometric testing available to all employees whose exposures equal or exceed

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<sup>1</sup> The US Postal Service Certified Mail Receipt attached to the Mot. to Dismiss, Ex. B, is not filled in. (Mot. to Dismiss, Ex. B).

an 8-hour time-weighted average of 85 decibels.

a) Tablet Machine Operator: An employee was monitored over 7 hours 16 minutes and was exposed to continuous noise at 87.9 decibels averaged over 8-hours with zero exposure averaged for any unsampled time. The equivalent dose is 74.8% of OSHA's Permissible Exposure Limit for noise, which is 90 decibels. The employer did not establish baseline and maintain an audiometric testing program for the employee, on or about September 5, 2019.

Date By Which Violation Must be Abated: 03/26/2020

Citation 1 Item 1 c Type of Violation: **Serious**

29 CFR 1910.95(i)(3): Employees were not given the opportunity to select their hearing protectors from a variety of suitable hearing protectors provided by the employer.

a) Tablet Machine Operator: An employee was monitored over 7 hours 16 minutes and was exposed to continuous noise at 87.9 decibels averaged over 8-hours with zero exposure averaged for any unsampled time. The equivalent dose was 74.8% of OSHA's Permissible Exposure Limit for Noise, which is 90 decibels. The employer did not give employees the opportunity to select their hearing protectors from a variety of suitable hearing protectors provided by the employer, on or about September 5, 2019.

Date By Which Violation Must be Abated: 02/27/2020

Citation 1 Item 1 d Type of Violation: **Serious**

29 CFR 1910.95(k)(1): The employer did not train each employee who is exposed to noise at or above an 8-hour time-weighted average of 85 decibels in accordance with the requirements of 29 CFR 1910.95(k). The employer did not institute a training program and ensure employee participation in the program:

a) Tablet Machine Operator: An employee was monitored over 7 hours 16 minutes and was exposed to continuous noise at 87.9 decibels averaged over 8-hours with zero exposure averaged for any unsampled time. The equivalent dose was 74.8% of OSHA's Permissible Exposure Limit for Noise, which is 90 decibels. The employer did not institute a training program and ensure employee participation in the program, on or about September 5, 2019.

Date By Which Violation Must be Abated: 02/27/2020

Citation 1 Item 2 a Type of Violation: **Serious**

29 CFR 1910.132(d)(1)(iii): The employer did not select PPE that properly fit each affected employee:

a) Packaging and Manufacturing areas: The host employer provided Personal Protective Equipment for workers who work with or around chemicals or mixtures that are flammable, corrosive, and pose health hazards or are irritants. Workers dispensed cleaners that contained chemicals, such as, but not limited to acetone, butanol, isopropyl alcohol and sodium hypochlorite, however the employer did not provide gloves in the correct sizes. The employer did not provide gloves that fit the workers. Only size large gloves were provided which reduced the dexterity of the workers with small hands, on or about July 29, 2019.

Ensure that appropriately sized Personal Protective Equipment is provided for the workers who must wear it.

Date By Which Violation Must be Abated: 02/27/2020  
Proposed Penalty: \$5398.00

Citation 1 Item 2 b Type of Violation: **Serious**

29 CFR 1910.132(d)(2): The employer did not verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated, the person certifying that the evaluation has been performed, the date(s) of the hazard assessment, and, which identifies the document as a certification of hazard assessment:

a) Packaging and Manufacturing areas: The employer provided Personal Protective Equipment for workers who work with or around chemicals or mixtures that are flammable, combustible, corrosive, and pose health hazards or are irritants. Workers dispensed and processed chemicals or mixtures to manufacture products, however the employer did not verify that the required workplace hazard assessment had been performed through a written certification that identifies the workplace evaluated, the person certifying that the evaluation had been performed, the date of the hazard assessment, and, which identified the document as a certification of hazard assessment on or about July 29 2019.

**ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM**

Date By Which Violation Must be Abated:

02/27/2020

Citation 1 Item 3 Type of Violation: **Serious**

29 CFR 1910.132(f)(1): The employer did not provide training to each employee who is required by this section to use personal protective equipment:

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a) Packaging and Manufacturing Areas: Employees clean using chemicals such as but not limited to Sodium Hypochlorite, Isopropyl Alcohol and Butanone. Employees may also be exposed to dust from the manufacturing area. Although rules had been instituted requiring the use of gloves and safety glasses or goggles, the employer did not provide training to each employee who is required by this section to use personal protective equipment or about July 29 2019.

Provide training to each worker who is required to use personal protective equipment (PPE).

The training must teach, at minimum, when PPE is necessary; what PPE is necessary; how to properly use the PPE; the limitations of the PPE; and the proper care, maintenance, useful life, and disposal of the PPE.

Date By Which Violation Must be Abated:

03/12/2020

Proposed Penalty:

\$3084.00

Citation 1 Item 4 a Type of Violation: **Serious**

29 CFR 1910.134(c): The employer did not develop and implement a written respiratory protection program with required worksite-specific procedures and elements for required respirator use:

(a) Manufacturing Areas: A written respiratory protection program was not developed and implemented for employees that were required to wear either dust masks or 3M 53P71 dual cartridge respirators, on or about July 29, 2019.

Develop and implement a written Respiratory Protection Program

" Designate a qualified program administrator to oversee the program. ¥"

Provide respirators, training, and medical evaluations at no cost to the employee.

Ensure the program addresses each of the following elements:

- (i) Procedures for selecting respirators for use in the workplace;
- (ii) Medical evaluations of employees required to use respirators;
- (iii) Fit testing procedures for tight-fitting respirators;
- (iv) Procedures for proper use of respirators in routine and reasonably foreseeable emergency situations;
- (v) Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators;
- (vi) Procedures to ensure adequate air quality, quantity, and flow of breathing air for atmosphere- supplying respirators;
- (vii) Training of employees in the respiratory hazards to which they are potentially exposed during routine and emergency situations;
- (viii) Training of employees in the proper use of respirators, including putting on and removing them, any limitations on their use, and their maintenance; and
- (ix) Procedures for regularly evaluating the effectiveness of the program.

Date By Which Violation Must be Abated:	02/12/2020
Proposed Penalty:	\$3856.00

**ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM**

Citation 1 Item 4 b Type of Violation: **Serious**

29 CFR 1910.134(e)(1): General. The employer did not provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace. The employer may discontinue an employee's medical evaluations when the employee is no longer required to use a respirator.

(a) Manufacturing Areas: Medical evaluations were not completed and documented for each employee that were required to wear either dust masks or 3M 53P71 dual

cartridge respirators, on or about July 29, 2019.

Identify a physician or other licensed health care professional (PLHCP) to perform all medical evaluations.

Using the medical questionnaire in Appendix C of the Respiratory Protection standard or a provide employees who are required to wear respirators a medical examination that obtains the same information. (See Paragraph (e)(2)(i).)

Administer medical questionnaire and examinations confidentially during the employees normal working hours or at a time and place convenient to the employee and in a manner that ensures that he or she understands its content.

Provide the employee with an opportunity to discuss the questionnaire and examination results with the PLHCP. (See Paragraph (e)(3)(i).)

Do not review the employees responses, the questionnaire must be provided directly to the PLHCP. (See Paragraph (e)(4)(i).)

#### **ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM**

Date By Which Violation Must be Abated: 02/12/2020

Citation 1 Item 4 c Type of Violation: **Serious**

29 CFR 1910.134(f)(1): The employer did not ensure that employee(s) required to use a tight-fitting facepiece respirator passed the appropriate qualitative fit test (QLFT) or quantitative fit test (QNFT):

a) Manufacturing Areas: Fit tests were not completed and documented for each employee that was required to wear either dust masks or 3M 53P71 dual cartridge respirators, on or about July 29, 2019.

#### **ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM**

Date By Which Violation Must be Abated: 03/26/2020

Citation 1 Item 5 Type of Violation: **Serious**

29CFR 1910.147(c)(4)(i): Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section:

a) Establishment: The employer did not develop detailed site specific procedural steps for shutting down equipment, including but not limited to, tablet machines, capsule machines (NJP 3500, NJP 2500 NJP 2000, NJP 1200), and the Sunmatch tumble blender, prior to maintenance/servicing, to prevent unexpected release of stored energy, thus exposing employees to an amputation hazard, on or about September 5, 2019.

Date By Which Violation Must be Abated: 03/12/2020  
Proposed Penalty: \$3856.00

Citation 1 Item 6 Type of Violation: **Serious**

29 CFR 1910.178(1)(1)(i): The employer did not ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (1):

a. Alongside storage racks: The employer did not ensure that employees operating a Crown RR 5200 Series powered industrial truck were trained, exposing employees to falls and struck-by hazards, on or about July 29, 2019.

**ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM**

Date By Which Violation Must be Abated: 02/27/2020  
Proposed Penalty: \$5398.00

Citation 1 Item 7 Type of Violation: **Serious**

29 CFR 1910.303(b)(2): Listed or labeled electrical equipment was not used or installed in accordance with instructions included in the listing or labeling:

(a) Manufacturing areas: Vacuums that were intended for household use were used to collect dust created during the manufacture of nutritional supplements. The dust created consisted of powders (particulate) including but not limited to microcrystalline cellulose, croscarmellose sodium and white rice flour. Dust taken from the dust collector bag was determined explosive by OSHA. The workers used the vacuums to clean in and around the dust collector bag when it was emptied, on or about September 5, 2019.

Date By Which Violation Must be Abated: 02/27/2020  
Proposed Penalty: \$3856.00

Citation 1 Item 8 Type of Violation: **Serious**

29 CFR 1910.I000(a)(2): Engineering controls were not sufficient to maintain an employee's exposure to an airborne concentration of particulates not otherwise regulated, total dust, below the Permissible Exposure Limit listed in Table Z1: an 8 hour Time Weighted Average concentration of 15 mg/m<sup>3</sup> :

a) Manufacturing areas: An employee was exposed to components of nutritional supplements, which were evaluated as particulates not otherwise regulated, at 17.7 mg/m<sup>3</sup> total dust, averaged over 8-hours with zero exposure averaged for any unsampled time. The worker operate machines to process ingredients to manufacture nutritional supplements, but the employer did not institute sufficient engineering controls on or about September 5, 2019.

**ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM**

Date By Which Violation Must be Abated: 02/27/2020  
Proposed Penalty: \$5398.00

Citation 1 Item 9 a Type of Violation: **Serious**

29 CFR 1910.1200(e)(1): The employer did not develop, implement, and/or maintain at the workplace a written hazard communication program which describes how the criteria specified in 29 CFR 1910.1200(f), (g), and (h) will be met: (Construction Reference: 1926.59)

(a) Establishment: Workers operated and cleaned machines that are used to manufacture and package nutritional supplements. The powdered raw materials, inks and cleaning agents used contained hazardous chemicals including, but not limited to sodium hypochlorite, isopropyl alcohol, butanone, and acetone. Various nutritional supplement raw materials including but not limited to microcrystalline cellulose and white rice flour, are combustible particulate solids. A written hazard communication program was not developed nor implemented on or about July 29, 2019.

**ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM**

Date By Which Violation Must be Abated: 02/27/2020  
Proposed Penalty: \$5398.00



Citation 1 Item 9 b Type of Violation: **Serious**

29 CFR 1910.1200(f)(6)(ii): Except as provided in 29 CFR 1910.1200(f)(7) and 29 CFR 1910.1200(f)(8), the employer did not ensure that each container of hazardous chemicals in the workplace was labeled, tagged or marked with the product identifier and words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemicals and which, in conjunction with the other information immediately available to employees under the hazard communication program, would provide employees with the specific information regarding the physical and health hazards of the hazardous chemical:

a) Packaging Area: The employer did not ensure labels were placed on containers of isopropyl alcohol that provided the necessary information including the product identifier and general information concerning the hazards of the chemical, on or about July 29, 2019.

Date By Which Violation Must be Abated: 02/27/2020

Citation 1 Item 9 c Type of Violation: **Serious**

29 CFR 1910.1200(h)(1): Employers did not provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.

(a) Establishment: Workers operated and cleaned machines that are used to manufacture and package nutritional supplements. The powdered raw materials, inks and cleaning agents used contained hazardous chemicals including, but not limited to sodium hypochlorite, isopropyl alcohol, butanone, and acetone. Various nutritional supplement raw materials including but not limited to microcrystalline cellulose and white rice flour, are combustible particulate solids. Effective Hazard Communication training was not provided to all employees who work with or around the hazardous chemicals, on or about July 29, 2019.

**ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM**

Date By Which Violation Must be Abated: 02/27/2020

Citation 1 Item 10 Type of Violation: **Serious**

OSH ACT of 1970 Section (5)(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to dust deflagration, explosion or other fire hazard:

a) Manufacturing Area: Employees scooped powdered ingredients including, but not limited to Flocel xx (microcrystalline cellulose), Vivasol (croscarmellose sodium), and white rice powder into the encapsulation and tablet machines to make nutritional supplement capsules and tablets. The dust collector for these rooms was a Donaldson Torit 1200. The dust was sampled and determined to have a Kst of 56.17 bar\*meters per second. The dust collection system including ductwork was not adequately grounded to prevent a dust deflagration, explosion or other fire hazard, on or about July 29, 2019.

b) Manufacturing Area: Employees scooped powdered ingredients including, but not limited to Flocel xx (icrocrystalline cellulose), Vivasol (croscarmellose sodium), and white rice powder into the encapsulation and tablet machines to make nutritional supplement capsules and tablets. The dust collector for these rooms was a Powermatic model PMI900PX. The dust was sampled and determined to have a Kst of 56.17 bar\*meters per second. The dust collection system including ductwork was not adequately grounded to prevent a dust deflagration, explosion or other fire hazard, on or about September 5, 2019.

c) Loading Dock area, adjacent to the Manufacturing Area: Employees scooped powdered ingredients including, but not limited to Flocel xx (microcrystalline cellulose), Vivasol (croscarmellose sodium), and white rice powder into the encapsulation and tablet machines to make nutritional supplement capsules and tablets. The dust collector for the room was a Donaldson Torit Model VS 550. The dust was sampled and determined to have a Kst of 56.17 bar\*meters per second. The dust collection system including ductwork was not adequately grounded to prevent a dust deflagration, explosion or other fire hazard, on or about September 5, 2019.

ABATEMENT NOTE: Among other methods, feasible and acceptable abatement method to correct this hazard include:

Complying with industry standards such as but not limited to the National Fire Protection Association (NFPA) 652 (2019 Edition), "Standard on the Fundamentals

of Combustible Dust" sections including but not limited to:

a) 5.1 The owner/operator of a facility with potentially combustible dusts shall be responsible for determining whether the materials are combustible or explosible, and, if so, for characterizing their properties as required to support the DHA

b) 5.1.1 Where dusts are determined to be combustible or explosible, the hazards associated with the dusts shall be assessed in accordance with Chapter 7 (Dust Hazard Analysis).

c) 5.1.2 Where dusts are determined to be combustible or explosible, controls to address the hazards associated with the dusts shall be identified and implemented in accordance with 4.2.4 (Compliance Options).

d) 9.3.3.1.1 Where used to handle combustible particulate solids, systems shall be designed by and installed under the supervision of qualified persons who are knowledgeable about these systems and their associated hazards.

e) 9.4.7.1.3 Bonding and grounding with a resistance of less than  $1.0 \times 10^6$  ohms to ground shall be provided for conductive components.

#### **ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM**

Date By Which Violation Must be Abated:	03/26/2020
Proposed Penalty:	\$3856.00

Citation 1 Item 11 Type of Violation: **Serious**

OSHACT of 1970 Section (5)(a){1}: Section 5(a){1} of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to a fall hazard.

a. Warehouse Area: An employee was exposed to a fall hazard of approximately 8 feet while elevated on the forks of a Crown RR 5200 Series powered industrial truck, without using the approved work platform with fall protection, on or about July 29, 2019.

Among other methods, one feasible and acceptable abatement method to correct this hazardous condition would be to ensure the use of the approved work platform attachment that was approved for use according to the manufacturer or licensed engineer.

Comply with the manufacturer's operating instructions for the powered industrial truck and any platform used.

Date By Which Violation Must be Abated:	Corrected During Inspection
Proposed Penalty:	\$5398.00

Citation 2 Item 1 Type of Violation: **Other-than-Serious**

29 CFR 1910.134(d)(1)(ii): The employer did not select a NIOSH-certified respirator. The respirator shall be used in compliance with the conditions of its certification.

a) Establishment: The employer provided and required workers to wear ear loop, surgical style, face masks in the production area, but the face masks were not NIOSH-certified, on or about July 29, 2019.

#### **ABATEMENT DOCUMENTATION REQUIRED FOR THIS ITEM**

Date By Which Violation Must be Abated:	02/27/2020
Proposed Penalty:	\$0.00

The citations issued on January 24, 2020 were received by Respondent not later than February 27, 2020. (Mot. to Dismiss, at 3; Ex. C).<sup>2</sup> The Court finds that the citations issued on January 24, 2020 were received by Respondent not later than February 27, 2020.<sup>3</sup> The Court also finds that it is not necessary for it to conclusively determine that Respondent received the January 24, 2020 citations on either February 25 or February 27, 2020, but instead finds that the

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<sup>2</sup> Respondent's Late Notice of Contest dated December 3, 2021 states "A copy of citations, which was received via certified mail on February 27, 2020." (Mot. To Dismiss, at 3, Ex. C; Vignesh Vijayakumar (VV) email to OSHA's Rhonda Conklin (Conklin) dated 2/27/20; VV email to AD Levy dated Mar 3, 2020).

<sup>3</sup> In its Opposition to the Secretary's Motion to Dismiss, Respondent acknowledges that its December 3, 2021 Late Notice of Contest states it received "some documents on February 27, 2020." (Resp't's Opp'n to Mot. to Dismiss and Mot. for Relief pursuant to Fed.R.Civ.P. 60(b)(1), at 5). The December 3, 2021 Late Notice of Contest actually states: "A copy of citations, which was received via certified mail on Feb 27, 2020." (Mot. To Dismiss, Ex. C).

January 24, 2020 citations were received by Respondent no later than February 27, 2020. (Mot. to Dismiss, at 3, Exs. A-B; VV email to Conklin dated 2/27/20; VV email to OSHA Area Director (AD) Lisa Levy dated Mar 3, 2020).

The Citations included a 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.** [emphasis in the original]  
(Mot. to Dismiss, Ex. A at 4).

On February 27, 2020, Respondent's Purchase & Operations Manager Vijayakumar, emailed OSHA's Conklin that stated Respondent received citations that were issued on January 24, 2020 during that week.<sup>4</sup> Mr. Vijayakumar further stated in his email that the package containing the citations was found in Respondent's facility mail area on February 27, 2020.

By an email sent on March 3, 2020, Mr. Vijayakumar informed AD Levy that Respondent had received the OSHA citation[s] issued on January 24, 2020 "last week. They delivered it on Feb 25<sup>th</sup> and it [s]ays (sic) it was issued on Jan 24<sup>th</sup>." (VV email to AD Levy dated Mar 3, 2020).

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<sup>4</sup> Mr. Vijayakumar stated: "We received the citations this week, but the issuance date says January 24<sup>th</sup> and deadline for informal was 15 days from that. But we found the package in our facility mail area today with the delivery slip on it. They dropped it unlike the other citation they took our signature for the delivery proof." (VV email to Conklin dated 2/27/20; VV email to AD Levy dated Mar 3, 2020).

The deadline for Respondent to file its Notice of Contest for the Citations issued on January 24, 2020 was not later than March 19, 2020. (Mot. To Dismiss, Ex. A, at 4). OSHA did not receive a timely Notice of Contest from Respondent for the Citations issued on January 24, 2020. The Court finds that the Citations issued by OSHA on January 24, 2020 became a final order of the Commission no later than March 19, 2020.

By letter dated January 28, 2021 mailed to Respondent at 190-A Jony Drive, Carlstadt, New Jersey 07072, AD Levy directed Respondent to submit its abatement response relating to the Citations that were issued on January 24, 2020 to OSHA by February 11, 2021, and if not, she informed Respondent that OSHA would issue a citation to Respondent for failure to abate (FTA).

By an email concerning a “Payment Issue – Inspection # 1418803” sent on February 4, 2021, Mr. Vijayakumar informed AD Levy that Respondent had received a collection letter for Inspection No. 1418803. He advised her “we have been sending payments every month on time.” (VV email to AD Levy dated Feb 4, 2021).

By an email concerning a “Payment Issue – Inspection # 1418803” sent on May 17, 2021, Mr. Vijayakumar informed AD Levy and OSHA’s Boris Kukovitskiy that Respondent had “been making payment every month on time.” (VV email to AD Levy dated May 17, 2021).

By an email concerning a “Payment Issue – Inspection # 1418803 sent on May 18, 2021, Mr. Vijayakumar informed AD Levy and other Department of Labor and OSHA personnel that Respondent had “been paying regularly every month.” (VV email to AD Levy dated May 18, 2021).

By an email concerning a “Payment Issue – Inspection # 1418803” sent on May 28, 2021, Mr. Vijayakumar informed AD Levy and other Department of Labor and OSHA personnel that “We have been receiving notice from the Department of Treasury regarding payment collection. All our payments were made till (sic) this month regularly.” (VV email to AD Levy dated May28, 2021).

By an email regarding a “Payment Issue – Inspection # 1418803”, sent on June 1, 2021, Mr. Vijayakumar indicated to AD Levy and other OSHA personnel that “per our informal agreement, the amount due was \$16,344.00, which both party agree to pay in 36 consecutive payments.” (VV email to OSHA’s Yimy Zapata with a copy to AD Levy and others dated June 21, 2021).

#### B. FTA Citations – Inspection Nos. 1537913 and 1418803

From April 19, 2021 through June 22, 2021, OSHA conducted a follow-up Inspection No. 1537913 (Original Inspection No. 1418803) at Respondent’s worksite at 190-A Jony Drive, Carlstadt, NJ 07072. (Mot. to Dismiss, Ex. E).

On October 19, 2021, OSHA issued the following “Failure to Abate Alleged Violations” under Original OSHA Inspection No. 1418803 and Follow-up OSHA Inspection No. 1537913 to Respondent:

Citation I Item 4a Type of Violation: **FTA- Serious**

29CFR 1910.134(c): The employer did not develop and implement a written respiratory protection program with required worksite-specific procedures and elements for required respirator use:

a) Manufacturing Areas: A written respiratory protection program was not

developed and implemented for employees who were required to wear 3M elastomeric dual cartridge respirators. Violation occurred on or about 04/19/21 and thereafter.

**ABATEMENT DOCUMENTATION REQUIRED  
FOR THIS ITEM**

**Date By Which Violation Must be Abated:** November 05, 2021

**Proposed Penalty:** \$128,740.00

Citation I Item 4 b Type of Violation: **FTA - Serious**

29 CFR 1910.134(e)(I): General. The employer did not provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace. The employer may discontinue an employee's medical evaluations when the employee is no longer required to use a respirator.

a) Manufacturing Areas: Medical evaluations were not completed and documented for each employee who was required to wear 3M elastomeric dual cartridge respirator. Violation occurred on or about 04/19/21 and thereafter.

Citation 1 Item 7 Type of Violation: **FTA - Serious**

29 CFR 1910.303(b)(2): Listed or labeled electrical equipment was not used or installed in accordance with instructions included in the listing or labeling:

a) Manufacturing Areas: Vacuums that were intended for household usage were used to collect dust created during the manufacture of nutritional supplements. The dust sampled from the tablet and capsule machine rooms was determined to be explosive. The workers used the vacuums to clean dust off the machine surfaces and floor in the tablet and capsule machine rooms. Violation occurred on or about 04/19/21 and thereafter.

**ABATEMENT DOCUMENTATION REQUIRED  
FOR THIS ITEM**

**Date By Which Violation Must be Abated:** November 05, 2021

**Proposed Penalty:** \$128,740.00



The total proposed penalty for the two FTA Citation items is \$257,480.<sup>5</sup> (Mot. to Dismiss, Ex. E).

As discussed in more detail below in Section II, the Court finds that Respondent received the Notification of Failure to Abate Alleged Violations pertaining to Inspection Nos. 1418803 and 1537913 and Docket No. 22-0074 on October 21, 2021. (Mot. to Dismiss; Exs. F-G). OSHA did not receive a timely Notice of Contest of the FTA Citation from Respondent. The Court finds that the FTA Citation issued by OSHA on October 19, 2021 became a final order of the Commission no later than November 12, 2021.

By letter dated December 3, 2021, Respondent submitted to OSHA its Late Notice of Contest, “Re: Employer’s Notice of Contest of OSHA Citation and Notice of Penalty # 1418803, dated January 24, 2020”. Mr. Vijayakumar, “Title: Operations Manager” advised the OSHA AD that “Amazing Vitamins LLC, intendts (sic) to contest the citations and Notice of Penalty proposed under the inspection # 1418803, Dated January 24, 2020 and referenced above.” The Late Notice of Contest further stated that the citations [issued by OSHA on January 24, 2020] “was received [by Respondent] via certified mail on February 27, 2020.”<sup>6</sup>

## II. Docket Nos. 22-0074 and 22-0291

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<sup>5</sup> The Notification of Failure to Abate Alleged Violations stated that “[t]he additional penalty is computed by multiplying a daily penalty times the number of days the violation(s) remained unabated.” (Mot. to Dismiss, Ex. E, at 1).

<sup>6</sup> The Secretary’s position is that Respondent’s Late Notice of Contest relating to the citations that OSHA issued on January 24, 2020 was submitted to OSHA on December 3, 2021; six hundred and twenty-four days late. (Mot. to Dismiss, at 3; Secretary’s Reply to Respondent’s Opposition to Secretary’s Motion to Dismiss Respondent’s Late Notices of Contest and Opposition to Respondent’s Motion for relief Pursuant to Fed.R.Civ.P. 60(B)(1) (Sec’y’s Reply and Opp’n), at 3). Respondent acknowledges that the Secretary’s Motion to Dismiss “pertains to proposed penalties of \$46,268, 257,480, and \$30,037.” (Resp’t’s Reply to Sec’y’s Opp’n, at 4).

From April 19, 2021 through June 22, 2021, OSHA conducted a follow-up inspection of Respondent relating to Inspection No. 1537913 at 190-A Jony Drive, Carlstadt, New Jersey 07072.

On October 19, 2021, OSHA also issued two citations to Respondent with a proposed penalty amounting to \$30,037 under Inspection No. 1537913. The two Citations' items were as follows:

Citation 1 Item 1    Type of Violation: **Serious**

29 CFR 1910.1000(e): Feasible engineering controls were not determined and implemented to achieve compliance with the limits prescribed in 29 CFR 1910.1000(a) through (d):

a) Manufacturing Areas: Employees were exposed to components of nutritional supplements, which were evaluated as particulates not otherwise regulated, at 19.0 mg/m<sup>3</sup> and 41.0 mg/m<sup>3</sup> total dust, averaged over 8- hours with zero exposure averaged for any unsampled time. The employees operated machines to process ingredients to manufacture nutritional supplements, but the employer did not institute sufficient engineering controls. Violation occurred on or about 06/22/21. The proposed penalty was \$6,007.

Citation 2 Item 1 a Type of Violation: **Repeat - Serious**

29 CFR 1910.134(e)(1): General. The employer did not provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace. The employer may discontinue an employee's medical evaluations when the employee is no longer required to use a respirator.

a) Manufacturing Areas: Medical evaluations were not completed and documented for each employee who was required to wear a 3M elastomeric dual cartridge respirator. Violation occurred on or about 6/22/21 and thereafter.

Amazing Vitamins LLC was previously cited for a violation of this occupational safety and health standard 1910.134(e)(1)), which was contained in OSHA inspection number 1418803, citation number 1, item number 4b and was affirmed as a final order on

08/31/20,<sup>7</sup> with respect to a workplace located at 190-A Jony Drive, Carlstadt, NJ 07072 .

The proposed penalty was \$12,015.

Citation 2 Item 1 b Type of Violation: **Repeat - Serious**

29 CFR 1910.134(f)(1): The employer did not ensure that employee(s) required to use a tight-fitting facepiece respirator passed the appropriate qualitative fit test (QLFT) or quantitative fit test (QNFT):

a) Manufacturing Areas: Fit tests were not completed and documented for each employee who was required to wear 3M 53P71 dual cartridge respirators. Violation occurred on or about 06/22/21 and thereafter.

Amazing Vitamins LLC was previously cited for a violation of this occupational safety and health standard or its equivalent standard (1910.134(f)(1)), which was contained in OSHA inspection number 1418803, citation number 1, item number 4c and was affirmed as a final order on 08/31/20,<sup>8</sup> with respect to a workplace located at 190-A Jony Drive, Carlstadt, NJ, 07072.

Citation 2 Item 2 Type of Violation: **Repeat - Serious**

29 CFR 1910.1000(a)(2): Employee(s) were exposed to an airborne concentration of particulates not otherwise regulated, total dust, listed in Table Z-1 in excess of the 8 hour Time Weighted Average concentration of 15 mg/m<sup>3</sup>:

a) Manufacturing Areas: Employees were exposed to components of nutritional supplements, which were evaluated as particulates not otherwise regulated, at 19.0 mg/m<sup>3</sup> and 41.0 mg/m<sup>3</sup> total dust, averaged over 8- hours with zero exposure averaged for any unsampled time. Violation occurred on or about 06/22/21.

Amazing Vitamins LLC was previously cited for a violation of this occupational safety and health standard or its equivalent standard (1910.1000(a)(2)), which was contained in OSHA inspection number 1418803, citation number 1, item number 8 and was affirmed as a final order on 08/31/20,<sup>9</sup> with respect to a workplace located at 190-A Jony Drive, Carlstadt, NJ, 07072.

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<sup>7</sup> As indicated above, the Court found that all items contained in OSHA Inspection 1418803 were deemed a final order of the Commission as of March 19, 2020. For the purposes of this decision, it makes no difference whether these items were deemed a final order of the Commission as of March 19, 2020 or August 31, 2020. The result is the same.

<sup>8</sup> See n. 7.

<sup>9</sup> See n. 7.

The proposed penalty was \$12,015.

The total proposed penalty for these two citations was \$30,037.00.

Sometime on or after October 19, 2021, OSHA mailed by certified mail, return receipt requested, to Respondent at Amazing Vitamins, LLC, 190-A Joy (sic) Drive, Carlstadt, NJ 07072 the two Citations pertaining to Inspection No. 1537913 [Docket No. 22-0291] and the Notification of Failure to Abate pursuant to Inspection No. 1537913 proposing additional penalties associated with Inspection No. 1418803 [Docket No. 22-0074].<sup>10</sup> (Mot. to Dismiss, at 4; Exs. D-G).

The Citations pertaining to Inspection No. 1537913 and Docket No. 22-0291 included a reference to a 15 working day time period within which a 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.** [emphasis in the original]

(Mot. to Dismiss, at 3-4; Ex. D).

The Notification of Failure to Abate Alleged Violations pertaining to Inspection Nos. 1418803 and 1537913 and Docket No. 22-0074 also included a reference to a 15

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<sup>10</sup> Respondent's counsel stated in Respondent's Late Notice of Contest dated March 2, 2022 that "management at Amazing Vitamins, LLC did not become aware of it [Citations issued October 19, 2021] until January 19, 2022." Late Notice of Contest dated March 2, 2022, at 2; Sec'y's Reply and Opp'n, at 3). The Court need not determine whether Respondent received a written version of the October 19, 2021 Citation on October 19, 2021, as the Court will start the running of the 15-day deadline on October 21, 2021 when Respondent received the October 19, 2021 Citations in the mail.

working day time period within which a NOC must be filed, stating:

You are further notified that you must pay the ADDITIONAL PENALTY unless you inform the Area Director in writing that you intend to contest the Notification or the Additional Penalty within 15 working days (excluding weekends and Federal holidays) from your receipt of this notification. If you do not contest within 15 working days after receipt, the Notification and the additional penalties will become the final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.

(Mot. to Dismiss, at 4, Ex. E, at 2).

On October 21, 2021, Respondent received the two citations pertaining to Inspection No. 1537913 [Docket No. 22-0291] and the Notification of Failure to Abate Alleged Violations pertaining to Inspection Nos. 1418803 and 1537913 and Docket No. 22-0074, as evident by the Domestic Return Receipt [Green Card] of the US Postal Service that shows someone initialed receipt of materials relating to Inspection No. 1537913 on October 21, 2021.<sup>11</sup> (Mot. to Dismiss; Exs. F-G). The US Postal Service's Tracking document also shows that unidentified material was delivered at Carlstadt, NJ on October 21, 2021, at 4:07 PM.<sup>12</sup> (Mot. to Dismiss, Ex. G). In Respondent's Reply to Secretary's Opposition, Respondent admits that it received the Notification of Failure to Abate Violations pertaining to Inspection Nos. 1418803 and 1537913 and Docket No. 22-0074 on October 21, 2021. Respondent stated:

In its motion papers, the Secretary has only proven that it served the Respondent with a Notification of Failure to Abate Notice with additional penalties which was issued October 19, 2021. Secretary's Exhibit E. The green card attached to the Secretary's

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<sup>11</sup> Both of these materials show that they were sent to the same address at 190-A Jony Drive, Carlstadt, NJ 07072. (Mot. To Dismiss, Exs. D, at 1; E at 1).

<sup>12</sup> In its Opposition to Mot. to Dismiss and Mot. For Relief pursuant to Fed.R.Civ.P. 60(b)(1), Respondent states the FTA Citation was mis-delivered to 190 Jony Drive, instead of 190-A Jony Drive. Respondent further states that the initials by the person receiving the FTA Citation indicated on the Green Card of the US Postal Service are unreadable. Respondent states that it received the FTA citation on January 19, 2022. (Resp't's Opp'n to Mot. to Dismiss and Mot. For Relief pursuant to Fed.R.Civ.P. 60(b)(1) at 6; Late Notice of Contest, dated March 2, 2022, at 2).

motion papers is proof that this particular document was delivered to Respondent's premises on October 21, 2021. Secretary's Exhibit F.

(Resp't's Reply to Sec'y's Opp'n, at 3).

The deadline for Respondent to submit its Notice of Contest pertaining to the two Citations and the Notification of Failure to Abate Alleged Violations that OSHA issued on October 19, 2019 was November 12, 2021 based upon its receipt of the two Citations and the Notification of Failure to Abate Alleged Violations on October 21, 2021.<sup>13</sup> OSHA did not receive a timely Notice of Contest from Respondent contesting the two Citations issued on October 19, 2021. (Mot. to Dismiss, at 4). Respondent asserts that its "first Late Notice of Contest dated December 3, 2021 was in response to the Failure to Abate Notice (delivered October 21, 2021), making it beyond the required fifteen (15) day period." (Mot. to Dismiss, Ex. C). OSHA also did not receive timely notices of contest from Respondent contesting the two Citations and the Failure to Abate alleged violations that OSHA issued on October 19, 2021. (Mot. to Dismiss, at 4; Resp't's Reply to Sec'y's Opp'n, at 3).

The Court finds that the two Citations issued under OSHA Inspection No. 1537913 in the amount of \$30,071 (Docket No. 22-0291) and the Failure to Abate Alleged Violations issued by OSHA under Inspection Nos. 1537913 and 1418803 in the amount of \$257,480 on October 19, 2021 became final orders of the Commission no later than November 12, 2021.<sup>14</sup>

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<sup>13</sup> Respondent indicates that the deadline for Respondent to file its Notice of Contest relating to the FTA Citation was November 11, 2021. The Secretary mistakenly identified November 4, 2021 as the "last day to contest these citations..." in its Motion to Dismiss. (Mot. to Dismiss, at 4). Both parties are mistaken.

<sup>14</sup> In its Late Notices of Contests dated February 28, 2022 and March 2, 2022, Respondent admits that it became aware of the two citations issued by OSHA on January 19, 2021 by January 19, 2022. Fifteen working days beyond January 19, 2022 is February 9, 2022. Respondent concedes that it submitted its first of two Late Notices of Contest 27 additional working days (or 40 calendar days) beyond the deadline calculated from January 19, 2022. The Court finds that it actually submitted its February 28, 2022 late notice of contest 130 calendar days late; *i.e.*

By Late Notice of Contest dated February 28, 2022, Respondent’s counsel contested these two Citations and proposed penalties that were issued on October 21, 2021 (sic).<sup>15</sup> The Late Notice of Contest was sent to AD Levy “Via Electronic Mail ([Levy.Lisa@dol.gov](mailto:Levy.Lisa@dol.gov))”. (Mot. to Dismiss, Ex. H).

By Late Notice of Contest dated March 2, 2022, Respondent’s counsel again contested these two Citations and proposed penalties pertaining to OSHA Inspection No. 1537913. This Late Notice of Contest was sent to AD Levy “Via Electronic Mail ([Levy.Lisa@dol.gov](mailto:Levy.Lisa@dol.gov))” and to the Commission at the Commission’s address in Washington, D.C.<sup>16</sup>

On March 10, 2022, the Commission docketed the OSHA Inspection No. 1537913 matter as Docket No. 22-0291.

On March 30, 2022, Ellen Marie Walsh, Esq. filed her Notice of Appearance in Docket No. 22-0291.

The case was assigned to the undersigned on March 31, 2022.

### III. Docket Nos. 21-1295, 22-0074 and 22-0291

On January 24, 2022, the Court conducted a scheduling conference to schedule a mandatory settlement conference in Docket No. 21-1295.<sup>17</sup> During the scheduling conference the parties indicated their intention to file a motion to consolidate for mandatory settlement

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from October 21, 2021 through February 28, 2022, in Docket No. 22-0291. (Sec’y’s Reply and Opp’n, at 6).

<sup>15</sup> OSHA issued the two citations on October 19, 2021. (Mot. To Dismiss, at 4; Mot. To Dismiss, Ex D).

<sup>16</sup> This second Late Notice of Contest pertaining to OSHA Inspection No. 1537913 was mailed to the Commission “Via First Class Mail”. The envelope containing the Late Notice of Contest addressed to the Commission is dated March 3, 2022. The envelope containing the Late Notice of Contest was received at the Commission’s Office of the Executive Secretary on March 8, 2022.

<sup>17</sup> The Court does not adjudicate the case in Docket No. 21-1295 by this Order. Docket No. 21-1295 remains the subject of the July 14, 2022 mandatory settlement conference.

purposes Docket No. 22-0074 and a third case [later identified as Docket No. 22-0291] with Docket No. 21-1295. By Order dated January 24, 2022, the Court directed the parties to attend a mandatory settlement conference on July 14, 2022 at Newark, NJ.

By Order dated January 14, 2022, the Court suspended all discovery in Docket No. 21-1295; except for Respondent producing financial-related documents regarding Respondent's inability to pay any penalties.

On February 10, 2022, the Court consolidated Docket Nos. 21-1295 and 22-0074 for mandatory settlement proceedings.

On March 30, 2022, Chief Judge Rooney granted the Secretary's unopposed Motion to Consolidate Docket No. 22-0219 (sic)[22-0291] with Docket Nos. 21-1294 (sic)[21-1295] and 22-0074 in settlement proceedings.

On May 24, 2022, the Secretary filed his Motion to Dismiss Late Notices of Contest [in Docket Nos. 22-0074 and 22-0291] (Mot. To Dismiss). The Secretary asserts that Respondent filed untimely letters of contest "that do not provide any valid grounds for relief from the Commission's final orders." The Secretary also argues that Respondent has not proffered a meritorious defense to the citations sufficient to be eligible for relief under Rule 60(B)(1). (*Id.*, at 8-9). The Secretary "moves to dismiss Respondent's Late Notices of Contest [relating to Docket Nos. 22-0074 and 22-0291] and to affirm the Secretary's citations and proposed penalties as issued." (*Id.*, at 2).

On June 3, 2022, Respondent filed its Opposition to the Motion to Dismiss Respondent's Late Notice of Contest and Motion for Relief Pursuant to Fed.R.Civ.P. 60(b)(1). Respondent



asserts that: 1) the Secretary “Cannot engage in settlement negotiations over proposed penalties for months and then take the position that the proposed penalties are final, 2) Respondent’s November 30, 2021 Notice of Contest in Docket No. 21-1295 attached to the cases in Docket Nos. 22-0074 and 22-0291,<sup>18</sup> and 3) Respondent filed its notices of contest in Docket Nos. 22-0074 and 22-0291 “outside the 15-day prescribed timeline due to excusable neglect.”

Respondent also asserts that it has “meritorious defenses to the citations.” (*Id.*, at 1).

Respondent asks the Court to deny the Secretary’s Motion to Dismiss and grant it relief pursuant to Fed. R. Civ. P. 60(b)(1) allowing it to pursue its contest of the citations in Docket Nos. 22-0074 and 22-0291.

On June 23, 2022, the Secretary filed his Reply to Respondent’s Opposition to Secretary’s Motion to Dismiss Respondent’s Late Notices of Contest and Opposition to Respondent’s Motion for Relief Pursuant to Fed.R.Civ.P. 60(B)(1).<sup>19</sup> The Secretary asserts that the citations and proposed penalties in Docket Nos. 22-0074 and 22-0291 are final orders of the Commission and are now not subject to review by any court or agency. He also argues that Respondent is not entitled to relief from the Commission’s final orders under Fed. R. Civ. P. 60(b)(1). The Secretary argues that there is no legal support for the arguments advanced by Respondent regarding the Secretary engaging in settlement negotiations and Respondent’s November 30, 2021 Notice of Contest in Docket No. 21-1295 attaching to the cases in Docket

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<sup>18</sup> From February 5 through August 3, 2021, OSHA conducted an inspection of Respondent’s worksite at 190-A Jony Drive, Carlstadt, NJ 07072 under Inspection No. 1513451. On August 3, 2021, OSHA issued three citations involving willful, repeat and serious items and a proposed penalty of \$202,319. On November 30, 2021, Respondent contested the citations “for our inspection # 1513451”; a case later docketed by the Commission on December 3, 2021 as Docket No. 21-1295.

<sup>19</sup> The Sec’y’s Reply and Opp’n is mis-dated May 23, 2022.

Nos. 22-0074 and 22-0291. He also argues Respondent has not established grounds for relief from Judgment under Fed. R. Civ. P. 60(b)(1). (*Id.*, at 5-6).

On June 27, 2022, Respondent filed its Reply to the Secretary's Opposition to Respondent's Motion for Relief and Sur-reply to Secretary's Reply to the Opposition to Secretary's Motion to Dismiss Respondent's Late Notice of Contest (Sur-reply to Sec'y's Reply). In its Sur-reply to Sec'y's Reply, Respondent argues that it was unaware that a Notice of Contest was necessary, presumably because it was engaged in settlement discussions with the Secretary.<sup>20</sup> It argues that the Secretary waived its ability to move for dismissal of a late notice of contest by engaging in settlement discussions with Respondent. (*Id.*, at 1). It also argues that the Secretary should not now be able to move to dismiss any late notice of contest because the Secretary did not raise a late notice of contest issue during the January 24, 2022 MSC scheduling conference conducted by the Court. (*Id.*, at 6). Respondent also reiterated its argument that it has established grounds for Relief from Judgment under Fed. R. Civ. P. 60(b)(1). And lastly, without providing adequate evidence supporting its blanket assertion, Respondent again states that it "has meritorious defenses to all citations." (Resp't's Reply to Sec'y's Opp'n, at 3).

For the reasons that follow, the Secretary's Motion to Dismiss is GRANTED.

#### IV. DISCUSSION

A. Respondent filed Untimely Notices of Contest in Docket Nos. 22-0074 and 22-0291.

Pursuant to section 10(a) of the Act, if an employer fails to notify the Secretary within 15

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<sup>20</sup> Respondent asserts that it "was lulled into thinking it was working toward a resolution of the outstanding citations and that no further filings were required." (Sur-reply to Sec'y's Reply, at 1).

working days from receipt of the Citation and Notification of Penalty issued by the Secretary that it intends to contest the citation, the citation shall be deemed a final order of the Commission.<sup>21</sup> 29 U.S.C. § 659(a); *Sec’y of Labor v. Barretto Granite Corp.*, 830 F.2d 396, 398 (1st Cir. 1987) (“Failure to contest a citation in a timely fashion results in the citation becoming a final order of the Commission.”).<sup>22</sup> 29 C.F.R. § 1903.17(a) requires that the employer notify OSHA 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.”

1. Docket No. 22-0074

a. OSHA Inspection No. 1418803

The Court finds that Respondent did not timely submit a NOC within 15 working days of its receipt of the Citations issued by OSHA on January 24, 2020 under Inspection no. 1418803 as section 10(a) of the Act and 29 C.F.R. § 1903.17(a) require. Respondent’s office received the Citations no later than February 27, 2020. (Mot. to Dismiss, at 3, Exs. A-C; VV email to Conklin dated 2/27/20; VV email to AD Levy dated Mar 3, 2020). The fifteenth workday following this date, excluding weekends and federal holidays, was March 19, 2020. OSHA did not receive any NOC from Respondent on or before March 19, 2021. Respondent’s Late Notice of Contest submitted on December 3, 2021 was filed by Respondent long after its notice of

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<sup>21</sup> 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.

<sup>22</sup> The 15-day period is activated by the employer’s receipt of the notice. *Barretto Granite Corp.*, 830 F.2d at 396.

contest was due. As discussed above, the Court finds that the Citations issued by OSHA on January 24, 2020 became a final order of the Commission no later than March 19, 2020.

b. OSHA Inspection No. 1537913

Similarly, the Court finds that Respondent did not timely submit a NOC within 15 working days of its receipt of the Citations issued by OSHA on October 19, 2021 under Inspection no. 1537913 as section 10(a) of the Act and 29 C.F.R. § 1903.17(a) require. Respondent's office received the Citations no later than October 21, 2021. The fifteenth workday following this date, excluding weekends and federal holidays, was November 12, 2021. OSHA did not receive any NOC from Respondent on or before November 12, 2021. Respondent's late Notice of Contest filed on February 28, 2022 was filed by Respondent long after its notice of contest was due.<sup>23</sup> (Mot. to Dismiss, Ex. H). As discussed above, the Court finds that the Citations issued by OSHA on October 19, 2021 became a final order of the Commission no later than November 12, 2021.

c. OSHA Inspection Nos. 1418803 and 1537913

Any NOC postmarked after the 15-day contest period has no effect. *Barretto Granite Corp.*, 830 F.2d at 397-98; *Therrel-Kizer, Inc.*, No. 80-3845, 1981 WL 19289, at \*2 (O.S.H.R.C.A.L.J., Mar. 4, 1981) (citing *Kerr-McGee Chem. Corp.*, 4 BNA OSHC 1739 (No. 9890, 1976) ("filing (mailing) the notice on the sixteenth day after receipt of the citation was one (1) day too late and the citation had become a final order of the Commission.")). The Commission also holds that because OSHA's notifications clearly warn of the deadline, the

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<sup>23</sup> See n. 14, above.

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.” *Acrom Constr. Servs., Inc.*, No. 88-2291, 1991 WL 132730, at \*4 (O.S.H.R.C. Jun 28, 1991). Respondent bears the burden of its own failure to timely contest the Citations.

d. Respondent’s argument that the Secretary “Cannot engage in settlement negotiations over proposed penalties for months and then take the position that the proposed penalties are final,” is without merit.

In his Sec’y’s Reply and Opp’n, the Secretary asserts that Respondent advances this contention without citing to any legal support that the Secretary waives the right to move for dismissal once he begins settlement negotiations. (Resp’t’s Opp’n to Mot. to Dismiss and Mot. For Relief pursuant to Fed.R.Civ.P. 60(b)(1), at 6-7; Sec’y’s Reply and Opp’n, at 4). As noted by the Secretary, such a rule would limit the parties’ ability to settle late notice of contest cases by compelling the Secretary to make an early choice between settlement efforts and motion practice. The Secretary states that “[t]here is no basis for such a claim”; and the Court agrees.

e. Respondent’s argument that the November 30, 2021 Notice of Contest in Docket No. 21-1295 attached to the cases in Docket Nos. 22-0074 and 22-0291 is also without merit.

Respondent also asserts without any legal support that its notice of contest specifically related to separate Docket Number 21-1295 should “attach to” Docket Numbers 22-0074 and 22-0291 because the cases have now been consolidated by the Court for mandatory settlement proceedings. (Resp’t’s Opp’n to Mot. to Dismiss and Mot. For Relief pursuant to Fed.R.Civ.P. 60(b)(1), at 7-8). The Secretary correctly asserts that notices of contest do not work that way. (Sec’y’s Reply and Opp’n, at 4). Per Section 10(a) of the

Act, an employer must timely file a notice of contest as to the citation that it seeks to dispute. Respondent apparently timely contested the citations associated with OSHA Inspection No. 1513451 and Docket Number 21-1295. It did not timely contest the citations associated with OSHA Inspection Nos. 1418803 and Docket Number 22-0074 and OSHA Inspection No. 1537913 and Docket No. 22-0291.

The subsequent court ordered consolidation of the three cases in 2022 now before the Court in mandatory settlement proceedings does not alter that fact. Moreover, notwithstanding the consolidation for settlement proceedings, the cases docketed at 21-1295, 22-0074 and 22-00291 deal with separate citations and facts which would be considered independently on their respective merits in any Court decision after any trial.

f. Respondent has failed to establish excusable neglect.

Respondent asserts that its notices of contest “pertain to the proposed penalties of \$257,480 and \$30,037 [which] were late due to excusable neglect.” (Resp’t’s Reply to Sec’y’s Opp’n, at 4).<sup>24</sup>

Federal Rule of Civil Procedure 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.”<sup>25</sup>

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<sup>24</sup> But as discussed above, the Court agrees with the Secretary that Respondent’s Notice of Contest dated December 3, 2021 also includes Respondent contesting all of the OSHA Citations issued on January 24, 2020.

<sup>25</sup> 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;
- (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;

Respondent has not shown any occurrence of “mistake, inadvertence, surprise or excusable neglect” from which relief may be granted. (*Id.*).

The Second Circuit Court of Appeals has ruled that the Commission may not exercise jurisdiction based on Rule 60(b). *See Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2022). Under *Chao v. Russell P. Le Frois Builder, Inc.*, the Court would deny Respondent’s Motion for Relief pursuant to Rule 60(b)(1) for lack of jurisdiction. But, since this case arose in the Third Circuit, *see also J.I. Hass Co., Inc. v. OSHRC and Marshall*, 648 F.2d 190, 195 (3<sup>rd</sup> Cir. 1981), where the Court held “that the Commission has jurisdiction to entertain a late notice of contest under rule 60(b)”.

The Court applies Third Circuit and Commission precedent when deciding whether Respondent’s Late Notices of Contest may be excused pursuant to Federal Rule of Civil Procedure 60(b)(1), and the result here is the same. Fed. R. Civ. P. Rule 60(b); *Ricop Constr. Co.*, No. 01-0955, 2002 WL 171637 (O.S.H.R.C.A.L.J., Jan 25, 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”<sup>26</sup>; 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.*, No. 80-1920, 1981 WL 18814, at \*4 (O.S.H.R.C., July 31, 1981) (finding “a judgment may be vacated when it is shown that the

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- (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).

<sup>26</sup> This is not a case where the Secretary’s deception or failure to follow proper procedures is responsible for Respondent’s late filings. *See Atl. Marine, Inc. v. OSHRC*, 524 F.2d 476, 478 (5<sup>th</sup> Cir. 1975).

party against whom a judgment was entered had no actual knowledge of the service of process due to a mistake of fact, inadvertence or excusable neglect.”); *Monroe & Sons, Inc.*, 4 BNA OSHC 2016, 2020 (No. 6031, 1977) (Commission has authority to use Rule 60(b)), *aff’d*, 615 F.2d 1156, 1160 (6th Cir. 1980) (Commission has authority to apply Rule 60(b)).<sup>27</sup>

Respondent has the burden to show excusable neglect. *Roy Kay Inc.*, No. 88-1748, 1989 WL 223306, at \*1 (O.S.H.R.C., Jan. 28, 1989). When evaluating such claims, the Commission applies the criteria set forth by the Supreme Court in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380 (1993); *E.g., Nw Conduit Corp.*, No. 97-851, 1999 WL 820636, at \*3 (O.S.H.R.C., Sept. 3, 1999). Under the *Pioneer* test, the Commission takes into account “all relevant circumstances,” including: (1) “the reason for the delay,”<sup>28</sup> including whether it was within the reasonable control of the [company]”;<sup>29</sup> (2) “the length of the delay and its potential impact on judicial proceedings”;<sup>30</sup> (3) “the danger of prejudice to the

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<sup>27</sup> *Marshall v. Monroe & Sons, Inc.* 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.” 615 F.2d at 1160.

<sup>28</sup> Typically, courts give the most weight to “the reason for the delay” in determining excusable neglect under Rule 60(b). *AR Med. LLC d/b/a/ San Pablo Med. Clinic*, 24 BNA OSHC 1665, 1666 (No. 12-2023, 2013), *see also A.W. Ross Inc.*, 19 BNA OSHC 1147, 1148 (No. 99-0945, 2000) (“A key factor in evaluating whether a party’s delay in filing was due to excusable neglect is ‘the reason for the delay, including whether it was within the reasonable control of the movant.’”); *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”).

<sup>29</sup> The Court finds that the reasons for the delays here were within Respondent’s reasonable control. If the party fails to properly articulate a sound reason for the delay in filing its NOC, excusable neglect is often not granted. *CalHar Constr. Inc.*, 18 BNA OSHC 2151, 2153-54 (No. 98-367, 2000) (CalHar’s neglect was not excusable under Rule 60(b)(1) where delay in filing its NOC was within its reasonable control).

<sup>30</sup> The passage of many months from the deadline when Respondent was due to file its Notice of Contest in Docket No. 22-0074 and 130 calendar days in Docket No. 22-0291 has a significant impact on the Secretary’s ability to fully prepare his case for trial; thereby prejudicing the Secretary. During that lengthy timeframe, evidence can be lost or misplaced, witnesses may become unavailable, and memories fade.



[Secretary];”<sup>31</sup> and (4) “whether the [company] acted in good faith.” *Id.* (quoting *Pioneer*, 507 U.S. at 395).

The Secretary asserts that Respondent’s December 3, 2021 and February 28, 2022 Late Notices of Contest “do not provide any valid grounds for relief from the Commission’s final orders.” (Mot. to Dismiss, at 8-9). The Court agrees. Respondent has failed to meet its burden that relief should be granted under Rule 60(b). Notwithstanding the absence of Respondent asserting any adequately support meritorious defenses to any of the citations at issue in Docket Nos. 22-0074 and 22-0291, Respondent’s assertion that the October 19, 2021 Citations were mis-delivered to an unrelated adjacent address at 190 Joy (sic) Drive, Carlstadt, New Jersey 07072 and not to Respondent’s warehouse address at 190-A Joy (sic) Drive, Carlstadt, New Jersey 07072 is not dispositive of the issue as to when Respondent received the OSHA citations that were issued on October 19, 2021.<sup>32</sup> (Resp’t’s Opp’n to Mot. to Dismiss and Mot. For Relief pursuant to Fed.R.Civ.P. 60(b)(1), at 6; Samir Bhatia Cert., at ¶¶ 13-15; Resp’t’s Reply to Sec’y’s Opp’n, at 3). The Court has found that the OSHA Citations issued on October 19, 2021 were received by Respondent no later than October 21, 2021.

The Court finds that there is insufficient evidence in the record to support Respondent’s assertion that it “was lulled into thinking it was working toward a resolution of the outstanding citations and that no further filings were required.” (Sur-reply to Sec’y’s Reply, at 1). The

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<sup>31</sup> See n.30, above.

<sup>32</sup> Respondent has asserted that mail and deliveries addressed to 190-A Jony Drive are often misdelivered to 190 Joy (sic) Drive. (Resp’t’s Opp’n to Mot. to Dismiss and Mot. For Relief pursuant to Fed.R.Civ.P. 60(b)(1), at 6).

Citations and Notification of Failure to Abate Alleged Violations provided clear notice to Respondent that a written letter of intent to contest the citations and Failure to Abate Alleged Violations must be submitted to OSHA within 15 working days of receipt of the Citations and Failure to Abate Alleged Violations. Respondent ignored these instructions and unilaterally delayed its filings of notices of contests for lengthy periods of time. This is not a case where Respondent was misled by OSHA as to the date a NOC must be filed.<sup>33</sup> There is no evidence that OSHA committed any fraud, misrepresentation, or misconduct within the meaning of Rule 60(b). There is no evidence that anyone at OSHA suggested that Respondent disregard the written notice of contest instructions.<sup>34</sup> This is not a case where an employer had no opportunity to timely file its NOC because its offices suffered water damage requiring numerous repairs that occurred during and after the fifteen-day contest period,<sup>35</sup> or a key employee suffered serious ill health issues that adversely effected the employer's ability to submit a timely NOC. To allow an employer to unilaterally extend the fifteen-day contest period for an open-ended period eviscerates the statutory mandated requirement for an employer to submit a NOC within the 15 working day period. Many days, weeks, or months (as here) could pass. *See* section 10(a) of the Act.

There is no persuasive evidence of mistake, inadvertence, surprise, or excusable neglect

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<sup>33</sup> *See Bueme*, No. 94-0868, 1995 WL 121508, at \*3 (O.S.H.R.C.A.L.J., Mar. 16, 1995) (Employer obligated to file a contest within 15 workdays even where an informal conference requested).

<sup>34</sup> In CEO Bhatia's Certification, he asserts that during settlement discussions OSHA personnel never stated "the proposed penalties were final orders or that the time to file a Notice of Contest had passed." (Resp't's Opp'n to Mot. To Dismiss and Mot. For Relief pursuant to Fed.R.Civ.P. 60(b)(1), at Bhatia Cert., ¶ 9). Even if true, their silence does not constitute any fraud, misrepresentation, or misconduct within the meaning of Rule 60(b).

<sup>35</sup> *See Evergreen Env'tl. Serv.*, 26 BNA OSHC 1982 (No. 16-1295, 2017) (Untimely filing of NOC excusable where unanticipated water damage to its offices hampered employer's procedures for handling and directing the processing of an OSHA citation).

in the record that justifies grounds for relief under Rule 60(b)(1). Having reviewed the record, the Court also finds that no evidentiary hearing is necessary to determine whether Respondent's delay in filing its NOC was due to excusable neglect and/or whether it is entitled to relief from the final order under Rule 60(b)(1).

B. Respondent has not shown the existence of its Meritorious Defenses in Docket Nos. 22-0074 and 22-0291.

Respondent must also allege a meritorious defense to the Citations before any relief can be granted under Rule 60(b)(1). As the First Circuit has stated, "it is the invariable rule . . . that a litigant, as a precondition to relief under Rule 60(b), must give the trial court reason to believe that vacating the judgment will not be an empty exercise." *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 20 (1st Cir. 1992) (describing the requirement as "an additional sentry that guards the gateway to Rule 60(b) relief"); *see also United States v. Proceeds of Sale of 3,888 Pounds Atl. Sea Scallops*, 857 F.2d 46, 48 (1st Cir. 1988) (explaining that the party arguing excusable neglect also "bears the heavy burden of showing . . . the existence of a meritorious defense"). The attempted contests therefore fail for yet another independent reason since Respondent has failed to show the existence of meritorious defenses here. *See also Nw. Conduit Corp.*, 1999 WL 820636, at \* 5. Respondent states that it has meritorious defenses to the citations in Docket Nos. 22-0074 and 22-0291, including "actual abatement of the offenses, unpreventable employee misconduct, Respondent's ability to pay and excessive penalties."<sup>36</sup> (Resp't's Opp'n to Mot. to Dismiss

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<sup>36</sup> Actual abatement of the offenses and Respondent's ability to pay are not defenses to any of the Citations at issue. A general assertion of excessive penalties not directed toward any specific citation or item also does not adequately establish the existence of a meritorious defense sufficient to satisfy the requirement for eligibility for a late notice of

and Mot. For Relief pursuant to Fed.R.Civ.P. 60(b)(1), at 11). Other than asserting that it has a blanket unpreventable employee misconduct defense to all of the citations at issue in Docket Nos. 22-0074 and 22-0291, Respondent provides nothing more. More is required to show that Respondent has established the existence of a meritorious defenses to each of the violations alleged in all of the citations contained within Docket Nos. 22-0074 and 22-0291.

Since the record does not show that the untimeliness of the NOC was due to “excusable neglect,” whether or not Respondent has raised a meritorious defense to the Citation need not be addressed. *JP Gallagher Elec.*, 24 BNA OSHC 1585, 1590 (No. 12-1495, 2013) (ALJ) (“before reaching the issue of whether Respondent has a meritorious defense to the citation, the record first must establish that the untimely filing was the result of ‘excusable neglect,’ entitling Respondent to relief under Rule 60(b).”). *See also Nw. Conduit Corp.*, 1999 WL 820636, at \*3.

Respondent had ample opportunity to timely file notices of contest and its delay is not excusable neglect. (Mot. to Dismiss, at 8).

Based on the above considerations, the Court finds Respondent’s failure to file a timely NOC was not due to mistake, inadvertence, surprise, or excusable neglect, or result from any erroneous representations of the Secretary.

## V. CONCLUSION

The Court finds that Respondent did not timely file notices of contest contesting any or all the citations that are included within Docket Nos. 22-0074 and 22-0291. Respondent has not

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contest to be excused pursuant to Federal Rule of Civil Procedure 60(b)(1).

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 Citations. Respondent has also not demonstrated that the delay in filing its late notices of contest was excusable under Rule 60(b). Pursuant to section 10(a) of the Act, all the Citations and their proposed penalties that are included within Docket Nos. 22-0074 and 22-0291 are deemed final orders of the Commission.

## VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings 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 timely notices of contest and no relief under Rule 60(b) is justified; and it is ORDERED that:

- 1) Complainant's Motion to Dismiss Respondent's Late Notices of Contest is GRANTED;
- 2) Docket No. 22-0074 and Respondent's Late Notice of Contest dated December 3, 2021 pertaining to OSHA Inspection Nos. 1418803 and 1537913, including Citations issued on January 24, 2020 and FTA Citations issued on October 19, 2021, are dismissed in their entirety with prejudice as untimely filed;
- 3) Docket No. 22-0291 and Respondent's Late Notices of Contest dated February 28, 2022 and March 2, 2022 pertaining to OSHA Inspection No. 1537913 are dismissed in their entirety with prejudice as untimely filed;
- 4) OSHA Citations, including the eleven serious citations and one other-than-serious citation, that were issued to Respondent on January 24, 2020, with proposed penalties amounting to

\$46,268,<sup>37</sup> are deemed a final order of the Commission;<sup>38</sup>

5) OSHA Citations issued to Respondent on October 19, 2021 pertaining to Failure to Abate Alleged Violations under OSHA Inspection Nos. 1418803 and 1537913 and their proposed penalties amounting to \$257,480, are deemed a final order of the Commission;<sup>39</sup> and

6) OSHA Citations issued on October 19, 2021 pertaining to OSHA Inspection No. 1537913 and their proposed penalties amounting to \$30,071 are deemed a final order of the Commission.<sup>40</sup>

SO ORDERED.

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

Date:

Washington, D.C.

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<sup>37</sup> This Order is not intended to affect any later informal agreement between the parties that adjusted the penalties due for the citations issued on January 24, 2020 as there is evidence that the parties may have adjusted the original penalties due in the amount of \$46,268 to an amount at about \$16,344.00. (VV email to AD Levy dated June 21, 2021).

<sup>38</sup> The Court's jurisdiction is limited to entertaining the Secretary's Motion to Dismiss. "[W]hen [a NOC] is untimely and there are no grounds for relief under Rule 60(b)", as untimely NOC "deprives the Commission of jurisdiction." *GT Tile Loading*, 25 BNA OSHC 1470, 1471 n. 1 (No. 15-0190, 2015). With the granting of the Secretary's Motion to Dismiss, the Court has no further jurisdiction in this case. The Citations included with Docket Nos. 22-0074 and 22-0291 are deemed final orders of the Commission by operation of law and are left undisturbed. Accordingly, the Court concludes it has no authority to "affirm" the Citations along with their proposed penalties as requested by the Secretary. Nonetheless, to any extent allowed and/or required, the Court affirms all of the Citations and their proposed penalties in their entirety that are included with Docket Nos. 22-0074 and 22-0291.

<sup>39</sup> See n. 38.

<sup>40</sup> See n. 38.