



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

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 10-2035

US PAGODA, INC.,

Respondent.

**APPEARANCES:**

Charles F. James and Heather R. Phillips, Counsel for Appellate Litigation; Patricia Rodenhausen, Regional Solicitor; U.S. Department of Labor, Washington, DC and New York City, NY

For the Complainant

Adrian Elias Lee; Fort Lee, NJ

For the Respondent

**DIRECTION FOR REVIEW AND REMAND ORDER**

Former Chief Administrative Law Judge Irving Sommer denied the Respondent's request for relief under Federal Rule of Civil Procedure 60(b), and granted the Secretary's motion to dismiss Respondent's late-filed notice of contest. The notice of decision was issued to the parties on January 3, 2011, and the case was docketed on January 13, 2011. These events occurred after December 31, 2010, the date on which the judge retired.

We therefore direct this case for review and remand it to the Acting Chief Administrative Law Judge to address this discrepancy and to take any further action warranted under the circumstances.

SO ORDERED.

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/s/  
Thomasina V. Rogers  
Chairman

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/s/  
Horace A. Thompson III  
Commissioner

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/s/  
Cynthia L. Attwood  
Commissioner

Dated: February 8, 2011



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SECRETARY OF LABOR, :  
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Complainant, :  
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US PAGODA, INC., :  
 :  
Respondent. :

OSHRC DOCKET NO. 10-2035

Before: Irving Sommer  
Chief Judge

**DECISION AND ORDER**

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”), to determine whether the Secretary’s motion to dismiss Respondent’s late-filed notice of contest (“NOC”) should be granted.<sup>1</sup>

**Background**

On April 26, 2010, the Occupational Safety and Health Administration (“OSHA”) inspected a construction work site of Respondent, US Pagoda, Inc., located in Fort Lee, New Jersey. As a result of the inspection, OSHA issued a Citation and Notification of Penalty (“Citation”) to Respondent on June 14, 2010. OSHA mailed the Citation to Respondent’s address in Fort Lee, New Jersey, by certified mail, and Respondent received and signed for the Citation on June 17, 2010.<sup>2</sup>

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<sup>1</sup>In her motion, the Secretary’s counsel states that Respondent’s owner, Adrian Elias Lee, advised him that he does not consent to the motion.

<sup>2</sup>The Secretary points out that the address to which the Citation was mailed is the same address that appears on Respondent’s late NOC letter requesting that this matter be reopened.

The Act requires the employer to notify the Secretary of its intent to contest a citation within 15 working days of receipt, and the failure to file a timely notice of contest (“NOC”) results in the citation becoming a final order of the Commission by operation of law. Based upon the date it received the Citation, Respondent was required to file its NOC by July 9, 2010.<sup>3</sup> Respondent did not file an NOC by that date. Instead, Respondent sent a letter dated September 21, 2010, to the Commission.<sup>4</sup> The letter was captioned “REOPEN CASE REQUEST LETTER.” In the letter, Respondent stated that the “violations imposed by OSHA are not correct.” It also stated that the electrician who was involved in the accident was not an employee of Respondent. The letter indicated that important information regarding this matter could be provided and requested that the case be reopened. The Secretary filed her motion to dismiss on December 3, 2010.

### Discussion

The record plainly shows that Respondent’s NOC letter was not filed within the 15-day contest period set out in the Act. An otherwise untimely NOC may be accepted, however, where the delay in filing was caused by deception on the part of the Secretary or her failure to follow proper procedures. A late filing may also be excused, under Federal Rule of Civil Procedure 60(b) (“Rule 60(b)”), if the final order was entered as a result of “mistake, inadvertence, surprise or excusable neglect.” See *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981) (citations omitted). The moving party has the burden of proving it is entitled to Rule 60(b) relief.

There is no allegation and no basis for concluding that the late filing here was due to deception on the part of the Secretary or her failure to follow proper procedures. Respondent’s NOC letter is thus deemed to be a request for relief on the basis that its late filing was due to “excusable neglect” under Rule 60(b). In this regard, the Commission follows the Supreme Court’s test in *Pioneer Inv. Serv. v. Brunswick Assoc.*, 507 U.S. 380 (1993). See *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1950 (No. 97-851, 1999). Under that test, the Commission takes into account all relevant circumstances, including the danger of prejudice to the opposing party, the length of the

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<sup>3</sup>The Secretary asserts that the last day to file the NOC was July 8, 2010. By my count, that date was July 9, 2010.

<sup>4</sup>The letter was mailed on September 27, 2010, and the Commission received the letter the next day.

delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Id.* at 1950, quoting 507 U.S. at 395. The Commission has held that the “reason for the delay, including whether it was within the reasonable control of the movant,” is a “key factor” and, in appropriate circumstances, the dispositive factor. *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148 (No. 99-0945, 2000); *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-0367, 2000).

The delay in filing the NOC in this case was more than ten weeks. I find this delay significant. I further find that the delay could prejudice the Secretary and impact the judicial proceedings in this matter. As to good faith, I note, again, that Respondent waited for over ten weeks to file its NOC letter. As to the reason for the delay, and whether it was within the reasonable control of the movant, the Citation issued to Respondent states on page 2 as follows:

**Right to Contest** – You have the right to contest this Citation.... 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 [Commission] and may not be reviewed by any court or agency.**

The Commission has held that the OSHA citation clearly states the requirement to file an NOC within the prescribed period and that an 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.” *Roy Kay*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). The Commission has also held that ignorance of procedural rules does not constitute “excusable neglect” and that mere carelessness or negligence does not justify relief. *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). Finally, the Commission has held that a business must have orderly procedures in place for handling important documents and that if the lack of such procedures caused the late filing, Rule 60(b) relief will not be granted. *NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999); *E.K. Constr.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991); *Stroudsburg Dyeing & Finishing*, 13 BNA OSHC 2058 (No. 88-1830, 1989); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989).

Respondent has provided no reason whatsoever for its delay in filing, and, based on the foregoing, I find that the delay was within the reasonable control of Respondent. As noted above, the reason for the delay, including whether it was within the reasonable control of the movant, is a “key factor” and, where appropriate, the dispositive factor. *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148 (No. 99-0945, 2000); *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-0367, 2000). This factor, together with the other factors set out *supra*, is sufficient to establish that Respondent has not shown that its untimely filing of the NOC was due to “excusable neglect.”<sup>5</sup> There is, therefore, no justification for the granting of Rule 60(b) relief in this matter.<sup>6</sup> Respondent’s request for relief is DENIED, the Secretary’s motion is GRANTED, and the Citation and Notification of Penalty is AFFIRMED in all respects.

SO ORDERED.

/s/

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Irving Sommer  
Chief Judge

Dated: January 13, 2011  
Washington, D.C.

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<sup>5</sup>This conclusion is not inconsistent with the Third Circuit’s holdings with respect to showing excusable neglect in Rule 60(b) cases. *See George Harms Constr. Co. v. Chao*, 371 F.3d 156, 163-64 (3d Cir. 2004); *Avon Contractors, Inc. v. Secretary of Labor*, 372 F.3d 171, 174-75 (3d Cir. 2004).

<sup>6</sup>The Commission has held that, besides showing excusable neglect, an employer must allege a meritorious defense to the citation. *See, e.g., Northwest Conduit Corp., supra*. While its late NOC letter indicates a defense, Respondent must establish excusable neglect to be entitled to Rule 60(b) relief. It has not done so.