

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1120 20th Street, N.W., Ninth Floor

Washington, DC 20036-3457

**SECRETARY OF LABOR,**

**Complainant,**

**v.**

**TMD CONTRACTING,**

**Respondent.**

**OSHRC DOCKET NO. 12-0962**

**ORDER OF DISMISSAL OF  
LATE NOTICE OF CONTEST**

This matter is before the Occupational Safety and Health Review Commission (the Commission) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act).

On July 23, 2012, the Solicitor of Labor, by Attorney Jeffrey Rogoff, filed a “Motion to Dismiss Respondent’s Late Notice of Contest.” The Respondent, appearing *pro se* through a non-lawyer representative, did not file a response to the motion within the time specified by Commission Rule 40(c), 29 C.F.R. § 2200.40(c). Consequently, by order dated August 16, 2012, the Respondent was directed to show cause why it had not filed a response to the motion, and further to include therein an explanation why the Respondent believes the Secretary’s motion should be denied. The Respondent timely filed an undated written response that was received on August 30, 2012.

For the reasons set forth below, the Respondent’s late-filed notice of contest is dismissed.

## **Background**

On January 13, 2012, the Buffalo, New York, area office of the Occupational Safety and Health Administration (OSHA) inspected the Respondent's job site in Albion, New York, which was at a commercial construction project known as the "Swan Library construction site."

As result of that inspection, on February 8, 2012, OSHA issued to the Respondent a "Citation and Notification of Penalty" (Citation). The Citation alleged two "serious" violations with proposed penalties totaling \$2,850.00.

The Citation included the following provision regarding the method of contesting the Citation, as well as the consequences of not contesting the Citation within fifteen working days of receipt:

**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.**

(Boldface and underlined typeface are in the original).

OSHA sent the Citation via certified mail, return receipt requested, to the Respondent's business address of 80 Beadle Road, Spencerport, New York, 14559. On February 14, 2012, at about 4:17 p.m., a representative for the Respondent accepted delivery of the Citation.

The fifteenth working day following delivery of the Citation was March 7, 2012. The Respondent did not file a notice of contest on or before that date.

On March 21, 2012, the Respondent sent a letter to OSHA's Buffalo area office (OSHA Office) stating that it "would like to contest" the alleged violations and proposed penalties set forth in the Citation.

By letter to the Respondent dated April 11, 2012, the OSHA Office's Area Director (AD) informed the Respondent that its March 21, 2012 letter was not filed on time and that OSHA therefore would not be forwarding it to the Commission. The AD referred the Respondent to the Commission for information regarding the "appeal process."

By an unsigned letter from the Respondent dated April 26, 2012, which was delivered to the Commission on April 30, 2102, the Respondent sought to contest the Citation. This notice of contest stated in part as follows:

TMD Contracting would like to contest the citation; 29 CFR 1926.152(i)(6); and citation 29 CFR 1926.502(i)(1). We sent a letter to the US Department of Labor located in Buffalo, NY requesting to hear our case and their office denied our request to contest due to having no jurisdiction to hear the case because the notice of contest was not filed within 15 working days allowed. Please review our notification of penalties that were issued on February 8, 2012. TMD understands that the time to contest was past. We apologize that this was over looked. TMD Contracting has been in business for 10 years and being that this is the first commercial job that TMD Contracting has worked, we were unaware of the 15 working day contest period. TMD Contracting has been in business for 10 years and the first time we have ever been penalized by OSHA. Thank You for taking the time and consideration in this matter.

The Commission treated this letter as a late-filed notice of contest and issued a notice of docketing on May 3, 2012.

In its response to the order to show cause, the Respondent stated that at the time of the inspection on January 13, 2012, it was involved in “two large commercial construction jobs,” each with a different deadline, and that “It was very difficult to pay attention to two jobs at the same time and people breathing down your back to get it completed in a timely manner.” The Respondent stated it was “unaware” of the fifteen working day period for filing a notice of contest, but also acknowledged that it did not file a timely notice of contest and that it “should have paid more attention” to the Citation.

#### **Discussion**

After receiving a citation, the Act allows an employer “fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.” 29 U.S.C. § 659(a). If the employer fails to file such a notice of contest within this fifteen-day period, “the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.” *Id.*

The Respondent acknowledges that neither its letter to the area office dated March 21, 2012, nor its letter to the Commission dated April 26, 2012, was filed within the fifteen working day period prescribed by 29 U.S.C. § 659(a). By operation of law, therefore, the Citation and proposed penalties must be deemed to be a final order of the Commission pursuant to § 659(a).

An employer may be relieved from such a deemed final order of the Commission when the delay in filing was caused by the Secretary's deception or failure to follow proper procedures. *See B. J. Hughes, Inc.*, 7 BNA OSHC 1471 (No. 76-2165, 1979). In its response to the order to show cause, the Respondent indicated that it had been unfairly singled out at the time of the inspection, stating as follows:

TMD believes that he was not treated fairly, being that there were five other contractors working that day and being that the only company fined. In addition the question remains, Why was it that TMD Contracting was the only company that remained working while OSHA entered the site. The other trades had taken their break. TMD feels that they have nothing to hide. Our company was just doing their job.

The Respondent's belief that it was not fairly treated in the conduct of the inspection does not amount to an assertion that the Respondent's late filing was due to any deceptive conduct by the Secretary or any failure of the Secretary to follow proper procedures. Accordingly, there is no basis for excusing the late filing because of any alleged wrongful or improper conduct by the Secretary.

An employer may also be relieved from such a deemed final order of the Commission through Rule 60(b)(1) and (6) of the Federal Rule of Civil Procedure [Rule 60(b)]. *George Harms Constr. Co. v. Chao*, 371 F.3d 156 (3d Cir. 2004). A late filing may be excused pursuant to Rule 60(b)(1) if the final order was entered as a result of "mistake, inadvertence, surprise, or excusable neglect," and also pursuant to Rule 60(b)(6) for "any other reason justifying relief" including "circumstances such as absence, illness, or a similar disability [that would] prevent a party from acting to protect its interests." *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981).

Relief pursuant to Rule 60(b)(1) contemplates the moving party having been at least partly to blame for the delay, while relief pursuant to Rule 60(b)(6) contemplates “extraordinary circumstances” for which the moving party was without fault. *See Pioneer Inv. Serv. Co. v. Brunswick Assoc.*, 507 U.S. 380, 393 (1993) (*Pioneer*). The party seeking relief under Rule 60(b) bears the burden of demonstrating that it is entitled to relief. *See Burrows Paper Corp.*, 23 BNA OSHC 1131 (No. 09-1559, 2010); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989).

The Respondent’s description of the pressured business environment that existed at the time that it received the Citation does not amount to such “extraordinary circumstances” as would permit relief pursuant to Rule 60(b)(6). Moreover, the Respondent’s recognition that “it should have paid more attention” to the Citation indicates that the Respondent was at least partly to blame for the delay in filing the notice of contest. Accordingly, relief from the deemed final order of the Commission is not available pursuant to Rule 60(b)(6). *Pioneer*.

“If a party is partly to blame for the delay, relief must be sought within one year under [Rule 60(b)(1)] and the party’s neglect must be excusable.” *Id.* In determining whether the late filing of a notice of contest may be found to be due to “excusable neglect” under Rule 60(b)(1), the equitable analysis enunciated by the Supreme Court in *Pioneer* is applicable. *George Harms Constr. Co.*, 371 F.3d at 163. In *Pioneer*, the Court held that “excusable neglect” is determined based upon equitable considerations that take into account all relevant circumstances, and includes consideration of the following factors: (1) the danger of prejudice to the opposing party; (2) the length of the

delay and its potential impact on the proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the party seeking relief, and (4) whether the party seeking relief acted in good faith. 507 U.S. at 395; *see also Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1950 (No. 97-851, 1999). “[N]either a lack of prejudice to the Secretary nor good faith on the part of Respondent in attempting to comply with the statutory filing requirement alone will excuse a late filing.” *Prime Roofing Corp.*, 23 BNA OSHC 1329, 1335 (No. 07-1409, 2010). In this case, as in many others, in evaluating whether an employer’s late filing of a notice of contest was due to “excusable neglect” under Rule 60(b)(1), the third enumerated factor -- the reason for the delay, including whether it was within the reasonable control of the movant -- is the most relevant factor.<sup>1</sup> *See CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 n.5 (No. 98-367, 2000).

In its notice of contest filed with the Commission, the Respondent acknowledged having overlooked the conspicuous notice regarding the contest period, and in its response to the order to show cause the Respondent indicated that this oversight was the result of other deadline pressures associated with the two large commercial construction projects in which it was then engaged. While the time pressures on contractors involved in multiple commercial construction projects may well be significant, such pressures are not uncommon in the construction arena, and the record here does not show that such

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<sup>1</sup> With regard to the other three specified *Pioneer* factors, the late filing in this case has resulted in little prejudice to the Secretary. The length of the delays (two weeks for the notice sent to the OSHA Office, and about ten weeks for the notice sent to the Commission) are not substantial, and the impact of the delay on the proceedings is likewise insubstantial. Finally, the Respondent has not acted in bad faith in connection with the late notices.

pressures gave rise to circumstances that could reasonably be viewed to result in “excusable neglect.” Rather, the record demonstrates that the reason for the late filing of the notice of contest (i.e., the “reason for the delay” under the *Pioneer* analysis) was the simple negligence of the Respondent in overlooking the conspicuous notice in the Citation regarding the contest period. The Respondent’s simple failure to carefully review all provisions of the Citation was a matter wholly within the Respondent’s control. The late filing could have been avoided if the Respondent had exercised reasonable diligence in reviewing the Citation, and thus the late filing was not the result of “excusable neglect” within the meaning of Rule 60(b)(1).

A long line of Commission decisions compels this conclusion. It is well settled that an employer that has filed a late notice of contest “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. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *see also Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). An employer’s mere carelessness or negligence, even by a layperson, in failing to timely file a notice of contest does not amount to “excusable neglect” that would justify relief under Rule 60(b)(1). *Acrom Constr. Serv.*; *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). Moreover, the Commission has consistently ruled that “[e]mployers must maintain orderly procedures for handling important documents,” and that when the lack of such procedures results in the untimely filing of a notice of contest, relief under Rule 60(b)(1) is not warranted. *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1149 (No. 99-0945, 2000) (employer’s president failed to carefully read and act upon information

contained in citation); *see also Louisiana-Pacific Corp.* (notice of contest was overlooked due to personnel change in operations manager position).

For the foregoing reasons, the Respondent has not met its burden of showing that it is entitled to relief from the deemed final order of the Commission. Accordingly, the Secretary's Motion to Dismiss is GRANTED, and the Citation and Notification of Penalty issued on February 8, 2012, is AFFIRMED in all respects.<sup>2</sup>

SO ORDERED.

/s/

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William S. Coleman  
Judge, OSHRC

DATED: September 24, 2012  
Washington, D.C.

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<sup>2</sup>The United States Second Circuit Court of Appeals, whose territorial jurisdiction includes the state of New York, has held that the Commission lacks jurisdiction under 29 U.S.C. § 659(a) to apply Rule 60(b) to excuse a late-filed notice of contest. *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002). The Commission is aware of the Second Circuit's decision but has continued to accord *stare decisis* effect to its long line of decisions that recognize the Commission to have such jurisdiction. *See Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185 (No. 01-0830, 2003). In *Villa Marina* the Commission indicated it would revisit its Rule 60(b) precedent in an appropriate case in the future, but it has not yet done so. *Id.* at n.3. Regardless, under both the Commission precedent and the Second Circuit's decision in *Russell P. Le Frois Builder*, the result here is the same.