



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

SECRETARY OF LABOR,

Complainant,

v.

JLD CUSTOM CARPENTRY,

Respondent.

OSHRC Docket No. 12-0972

**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 May 30, 2012, the Solicitor of Labor, by Attorney Michael P. Doyle, filed a document titled "Complainant's Response in Opposition to Respondent's Motion for Leave to File Late Notice of Contest." The undersigned treated this filing as the functional equivalent of a motion to dismiss the notice of contest, and consequently issued an order on June 21, 2012, directing the Respondent, JLD Custom Carpentry, to file a written response to the motion. The Respondent, through Mr. Patrick Westcott, timely filed a one-page typewritten response dated July 8, 2012.

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

Background¹

On February 10, 2012, the Pittsburgh, Pennsylvania, area office of the Occupational Safety and Health Administration (OSHA) inspected the Respondent's job site in Jeanette, Pennsylvania, where the Respondent was engaged in re-roofing activities in residential construction. On March 2, 2012, as result of that inspection, OSHA issued to the Respondent a "Citation and Notification of Penalty" (Citation). The Citation alleged five "serious" violations with proposed penalties totaling \$18,000.00. OSHA mailed the Citation to the Respondent by certified mail at its address of 2426 Silverthorne Road, New Church, Virginia.

The Citation included the following provision intended to alert the Respondent to the imperative of filing any notice of contest within fifteen business days of receipt of the Citation (boldface and underlined typeface are in the original):

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.**

On March 6, 2012, Patrick Westcott's wife, Ms. Amy Westcott, accepted delivery of the certified letter containing the Citation, as reflected by the certified mail return receipt card that she signed on that day. The fifteenth working day following delivery of the Citation was March 27, 2012.

¹ The background is based on the representations of fact set forth in the Secretary's motion to dismiss, and the exhibits to that motion. In the undersigned's order dated June 21, 2012, the Respondent was instructed to state whether it disagreed with any of the factual representations set forth in the motion to dismiss. The Respondent did not assert any disagreement, and thus for purposes of this order the representations of fact in the motion are regarded as uncontested.

On March 15, 2012, Amy Westcott contacted OSHA's Pittsburgh area office and scheduled an informal telephone conference for March 26, 2012, at 1:00 p.m. This telephone conference did not occur because the Respondent failed to contact the area office for the scheduled event.

The Respondent did not inform the OSHA area director in writing on or before March 27, 2012, that the Respondent intended to contest the Citation.

On March 28, 2012, Amy Westcott telephoned OSHA's Pittsburgh area office and told the OSHA area director that she had miscommunicated the date of the March 26, 2012, telephone conference to her husband. The area director explained to Ms. Westcott that the time period for contesting the Citation had expired. The area director provided Ms. Westcott with contact information for the late filing of a notice of contest with the Commission.

On April 23, 2012, OSHA's Pittsburgh area office mailed a letter to the Respondent requesting information regarding abatement of the violations described in the Citation.

By letter to the Commission dated April 30, 2012, Mr. Westcott stated, "I am writing this late letter of contest in regards to the Citations and notification of penalties that I received on March 23, 2012." The Commission treated this letter as a late-filed notice of contest and issued a notice of docketing on May 4, 2012.

In the notice of contest, Mr. Westcott described circumstances surrounding the inspection of the worksite and the measures that he took to correct violations that the inspector had identified. The notice of contest does not expressly challenge any of the violations alleged in the Citation, but does request "that the penalties that were incurred as a result of the inspection be dismissed." In the notice of contest, Mr. Westcott stated that he had become unemployed and

that he “cannot afford to pay” the penalties. Mr. Westcott stated further that “I take this matter very seriously” and that “if I am fortunate enough to go into business for myself, I will take with me the lessons I have learned from this experience.”

In the Respondent’s written response of July 8, 2012, to the motion to dismiss, Mr. Westcott stated that he remained unemployed and that he had no means to pay the penalties. He reiterated further that he had “tried to comply with each and every violation, most of them at the time of the visit and some after as I had to purchase a few things.” Mr. Westcott acknowledged that no timely notice of contest was filed, explaining that “I was so overwhelmed with trying to find work to support my family and the time got away from me.” Mr. Westcott concluded as follows: “It was an oversight on my part and I apologize. [It] was not intentional as I do understand the seriousness of this matter.... Please, if you would, reverse these fines imposed upon me. I would appreciate anything you could do for me in my favor.”

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 its notice of contest dated April 30, 2012, was not filed within the time period

prescribed by the Act.² By operation of law, therefore, the Citation and imposed penalty became a final order of the Commission. *Id.*

An employer may be relieved from such a deemed final order of the Commission through Rule 60(b) of the Federal Rule of Civil Procedure 60(b) [“Rule 60(b)”]. *George Harms Constr. Co. v. Chao*, 371 F.3d 156, 20 BNA OSHC 1745 (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 partly to blame for the delay, while relief pursuant to Rule 60(b)(6) contemplates the party having been blameless in the delay. *See Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P’ship.*, 507 U.S. 380, 393 (1993). 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).

In the response to the motion to dismiss, Mr. Westcott explained that his “oversight” in failing to file a timely notice of contest was because “I was so overwhelmed with trying to find work to support my family and the time got away from me.” No other reason for the late filing is

² In the notice of contest, Mr. Westcott stated that he received the Citation on March 23, 2012 (in contrast with the day Amy Westcott accepted delivery of the Citation on March 6). Even if March 23 had been the day that the Respondent received the Citation, the notice of contest would still have been filed more than fifteen business days after receipt.

provided.³ The undersigned treats this explanation as constituting a request for relief from the final order pursuant to Rule 60(b)(1) due to “excusable neglect.”⁴

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 (No. 07-1409, 2010). In this case, as in many others, in

³ In the late notice of contest dated April 30, 2012, Mr. Westcott stated that “a few days” after the work site inspection on February 10, 2012, he had faxed an undated one-page typewritten note to the OSHA inspector wherein Mr. Westcott indicated he had taken certain corrective action after the inspection. The Respondent does not contend that this fax transmission constitutes a notice of contest to the subsequently issued Citation. Indeed, no writing sent to OSHA *before* the issuance of a Citation could be deemed to be a notice of contest to some *future* citation – the law does not recognize “anticipatory” notices of contest.

⁴ The Respondent is appearing *pro se* through Mr. Westcott, who is not an attorney. The undersigned has thus liberally construed all the material submitted by the Respondent. *See Monroe & Sons, Inc.*, 4 BNA OSHC 2016 (No. 6031, 1977) (pleadings of *pro se* non-lawyers appearing before the Commission are liberally construed). Having accorded the Respondent’s filings the most liberal of constructions, “excusable neglect” is the only cognizable ground for relief under Rule 60(b) that is fairly stated therein.

In the Respondent’s filings, Mr. Westcott states that the inspection was the result of a report made by a disgruntled worker. Be this as it may, the reason the inspection was conducted is not pertinent to any cognizable ground of relief under Rule 60(b).

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.⁵ See *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 n.5 (No. 98-367, 2000).

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. The Citation unambiguously stated in conspicuous typeface that the Respondent had fifteen working days after receipt within which to file a notice of contest. The reason that the Respondent failed to file a notice of contest within this required period was due solely to Mr. Westcott's admitted "oversight," which he indicates arose from the pressures of operating a business and earning a living in a challenging economic environment. The undersigned is not unsympathetic to the effect of such pressures on small business owners, but such pressures are not uncommon, and here the record does not show that such pressures gave rise to circumstances that could reasonably be regarded as constituting "excusable neglect" under Rule 60(b). The Respondent's admitted "oversight" in failing to file the notice of contest in a timely manner was wholly within the Respondent's control. The late filing could have been avoided if the Respondent had exercised reasonable diligence. The late filing was not the result of "excusable neglect" within the meaning of Rule 60(b).

A long line of Commission decisions compels this conclusion. It is well settled that an

⁵ With regard to the other enumerated factors set out in *Pioneer*, the late filing in this case has resulted in little prejudice to the Secretary. The length of the delay, which was thirty-four days after the notice of contest period expired, is not substantial and the impact of this delay on the proceedings is likewise insubstantial. Finally, the Respondent has not acted in bad faith in connection with the late filing.

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). *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) 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 pursuant to Rule 60(b). Accordingly, the Secretary’s motion to dismiss Respondent’s untimely notice of contest is GRANTED, and the Citation and Notification of Penalty issued on March 2, 2012, is AFFIRMED in all respects.

SO ORDERED.

/s/
William S. Coleman
Judge, OSHRC

DATED: August 13, 2012
Washington, D.C.