

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant,

v.

Subzero Technologies, Inc.,
Respondent.

OSHRC Docket No. 12-1244

Appearances: Karen E. Mock, Esq., U. S. Department of Labor, Office of the Solicitor
Atlanta, Georgia
For the Complainant

Gregory Iovine, *Pro Se*, President, Subzero Technologies, Inc.
Jacksonville, Florida
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (Act), to determine whether relief should be granted pursuant to Federal Rule of Civil Procedure 60(b) (Rule 60(b)). Subzero Technologies, Inc. (Subzero) seeks relief from the final order issued against it as a result of its failure to contest the Citation and Notification of Penalty within the prescribed time period.

For the reasons that follow, Subzero has not shown a sufficient basis to warrant relief pursuant to Rule 60(b).

Background¹

Subzero engages in the business of converting delivery trucks and vans into fuel-efficient refrigerated delivery vehicles (June 4, 2012, Letter to Executive Secretary). During the period

¹ The background information set forth herein is based on the representations of fact set forth in the Secretary's Motion to Dismiss and attached Exhibits; Subzero's Opposition to the Secretary's Motion; and Subzero's February 20, 2012, and June 4, 2012, Letters.

July 18, 2011 through September 26, 2011, the Occupational Safety and Health Administration (OSHA) inspected Subzero's work site located at 6215 Wilson Boulevard #4, Jacksonville, Florida. The inspection was conducted by Compliance Officer Sheila Kapitzke (Kapitzke Declaration, hereinafter "Dec.", ¶ 1; Romeo Dec., ¶¶ 2, 3, 4; Citation). As a result of the inspection, on December 7, 2011, OSHA issued a Citation and Notification of Penalty (Citation) to Subzero alleging twenty-one serious and two other than serious violations of the Act, and proposing penalties in the amount of \$37,800.00. OSHA mailed the Citation to Subzero at its business address located at 144 Van Dyke Street, Brooklyn, New York 11231. The OSHA 300 booklet, outlining employer rights and responsibilities regarding procedures relating to the issuance of citations was included in the citation package (Romeo Dec., ¶¶ 3,4; Citation). Subzero received the Citation on December 12, 2011, by certified mail (Certified Mail Receipt). The citation provided in bold underlined text that a contest must be sent in writing within fifteen days of receipt (Citation). Based on Subzero's receipt of the Citation on December 12, 2011, the last date to contest the citation was January 4, 2012.

Subzero did not contest by the final contest date, and did not pay the assessed penalty. Therefore, a demand letter was sent to Subzero by OSHA on February 6, 2012 (Romeo Dec., ¶ 8). On February 16 and 17, 2012, Subzero contacted OSHA regarding contesting the citation. Subzero was advised that it was too late to contest, but that if it wanted to try, it could send a letter directly to the Commission. OSHA provided the Commission's address (Kapitzke Dec., ¶¶ 5, 6). Instead of sending the letter to the Commission, Subzero sent a letter dated February 20, 2012, to the OSHA Jacksonville Area Office, which was received on March 7, 2012. On March 8, 2012, OSHA advised Subzero that the letter was untimely and that Subzero needed to contact the Commission directly regarding filing a contest, and again provided the Commission's address (Romeo Dec., ¶¶ 9, 10). Nearly three months later, on June 4, 2012, Subzero filed a letter with the Executive Secretary of the Commission seeking relief from the judgment resulting from its failure to contest the Citation within the required time period (June 4, 2012, Letter to Executive Secretary).

The Secretary construed Subzero's June 4, 2012, letter to the Executive Secretary to be a Late Notice of Contest and on December 28, 2012, filed a Motion to Dismiss Respondent's Late Notice of Contest alleging that it is untimely and that relief is not warranted because Subzero has not established excusable neglect (Secretary's Motion, p. 4). Subzero filed an Opposition to the

Secretary's Motion, asserting therein that its delay in filing was due to excusable neglect, that it has meritorious defenses and that the Secretary was not prejudiced by the delayed filing (Opposition, pp. 2-4).

A hearing in this matter was set for April 5, 2013. On March 28, 2013, one week before the scheduled hearing date, counsel for Subzero filed a Motion to Withdraw Appearance setting forth therein that Subzero had ceased all business operations and was in the process of dissolving, and therefore was not in a position to litigate the excusable neglect issue. As a result of the motion to withdraw, the undersigned held a conference call with counsel for the parties on April 1, 2013. During the conference call, Subzero's counsel represented that neither Subzero nor its counsel would appear at the scheduled hearing. The undersigned advised the parties during the call that based on Subzero's counsels' representations, the hearing would be canceled, the undersigned would issue a decision on the Secretary's Motion to Dismiss, and said decision would be issued based on the record as it existed at that time. The hearing was canceled by Order issued on the date of the conference call, and Subzero's Motion to Withdraw Appearance was granted by Order issued April 2, 2013.

Discussion

Pursuant to the requirements of the Act, an employer is required to notify the Secretary of its intent to contest (notice of contest) a citation within 15 working days of receipt of the citation. Failure to timely file a notice of contest results in the citation becoming a final order of the Commission by operation of law. The record in this case reveals Subzero did not file a notice of contest within the requisite 15-working day period set out in the Act. The undersigned construes Subzero's June 4, 2012, letter to the Executive Secretary to be a request for relief under Rule 60(b) of the Federal Rules of Civil Procedure.

An employer who has filed an untimely notice of contest may be granted relief under Rule 60(b) in certain circumstances. *George Harms Constr. Co. v. Chao*, 371 F.3d 156 (3d Cir. 2004). A late filing may be excused under Rule 60(b)(1) if the final order was entered as a result of "mistake, inadvertence, surprise or excusable neglect." A late filing also may be excused under Rule 60(b)(3), if the late filing was caused by the Secretary's "deception or failure to follow proper procedures." See *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2116-17 (No. 80-1920, 1981); *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1476 (No. 76-2165, 1979); *Keppel's Inc.*, 7 BNA OSHC 1442, 1443-44 (No. 77-3020, 1979). Further, a late filing may be excused under

Rule 60(b)(6), for any other reason that justifies relief, such as when “absence, illness, or a similar disability prevent[s] a party from acting to protect its interests.” *Branciforte Builders*, 9 BNA OSHC 2113, 2116-17 (No. 80-1920, 1981). The moving party has the burden of proving it is entitled to relief under Rule 60(b).

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 Inv. Serv. Co. v. Brunswick Assoc. Ltd. P’ship*, 507 U.S. 380, 393 (1993) is applicable. *George Harms Constr. Co.*, 371 F.3d 155, 163 (3d Cir. 2004). In *Pioneer*, *supra*, 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. *Pioneer*, 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). The Commission has held that whether the reason for the delay was within the control of the respondent is a “key factor” in determining the presence of “excusable neglect.” *A. S. Ross, Inc.*, 19 BNA OSHC 1147 (No. 99-0945, 2000); *See also Calhar Constr., Inc.*, 18 BNA OSHC 2151 (No. 98-0367, 2000).

That Subzero did not contest the Citation within the requisite time period is not disputed. The record reveals Subzero sent a letter to OSHA on February 20, 2012, more than six weeks after the contest due date, and filed a subsequent letter with the Commission on June 4, 2012, six months after the contest date expired. Therefore, by operation of law, the citation and proposed penalty must be deemed a final order of the Commission, unless Subzero can demonstrate that it is entitled to relief.

In its Opposition, Subzero sets forth reasons for the delay, contending that the delay primarily was due to a family medical crisis requiring the owner to be away from the office which precluded him from giving due attention to the citation and other important mail. Subzero also contends that its late filing was not in bad faith (Opposition, p. 2). Neither Subzero’s

explanations for its late filing, nor the record evidence show deception or a failure to follow proper procedures on behalf of the Secretary. The Citation unambiguously stated in conspicuous typeface that Subzero had fifteen working days after receipt within which to file a notice of contest. The undersigned finds that the Secretary did not engage in deception and followed proper procedures in this matter.

The record demonstrates that Subzero's late filing of the notice of contest was merely the simple negligence of its owner, due to the owner's inattentiveness to the citation as result of a family medical crisis. Although the undersigned is sympathetic, this explanation fails to rise to the level of excusable neglect. It was within Subzero's control to ensure that business affairs were taken care of when its principal was unavailable. 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.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (notice of contest was overlooked due to personnel change in operations manager position). Moreover, 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). The undersigned finds that the delayed filing was entirely within the control of Subzero. The late filing could have been avoided if Subzero had exercised reasonable diligence. It was not the result of "excusable neglect" within the meaning of Rule 60(b).

A party seeking relief under Rule 60(b)(6) "must show 'extraordinary circumstances' suggesting that the party is faultless in the delay." Where a party is partly to blame for the delayed filing, relief from the final order must be sought under Rule 60(b)(1) and the party's neglect must be excusable. *See Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 393 (1993). Subzero has not shown extraordinary circumstances demonstrating that it is faultless in the delay; therefore circumstances which would warrant relief have not been established. 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.* 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991).

In considering all relevant circumstances surrounding the delayed filing here, the undersigned has considered whether Subzero acted in good faith. Subzero asserts that it did not act in bad faith regarding its late filing. The record however brings its motive into question. Subzero did not send a contest to OSHA until after it had received a demand letter from OSHA for payment of the penalties, nearly six weeks after the contest date had elapsed. Subzero's failure to contest until it received a demand letter from OSHA suggests a lack of good faith. Further, Subzero's request for relief from the Commission was filed six months after the final contest date. Both the motive and the excessive length of time to file a contest indicate Subzero's actions were lacking in good faith.

The undersigned also has considered, in determining whether relief is warranted, whether the Secretary was in danger of being prejudiced by the late filing. Subzero contends that the Secretary was not prejudiced by its delayed filing. Subzero waited nearly six weeks before sending a contest to OSHA, even though it was advised that the proper forum for filing a late contest was with the Commission. Further, despite being advised again by OSHA on March 8, 2012, to contact the Commission, if it wanted to file a late contest, Subzero took no action until June 4, 2012, three months after being advised by OSHA to file with the Commission, and six months after the final contest date. Whether six weeks or six months, the delay is substantial and is likely to have prejudiced the Secretary in preparing this case for hearing, thereby adversely impacting these proceedings.

In order to be eligible for relief under Rule 60(b)(1), the moving party also must allege a meritorious defense. *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1951 (No. 97-851, 1999). This is "satisfied with minimal allegations that the employer could prove a defense if given the opportunity." *Jackson Assoc. of Nassau*, 16 BNA OSHC 1261, 1267 (No. 91-0438, 1993). A meritorious defense is one that is valid at law with respect to the underlying action. As a meritorious defense, Subzero primarily alleges that the citations were over classified as serious because there was no risk of death or serious bodily harm. (Opposition, p. 3, Exh. H). The citations, however, allege violations for failure to provide appropriate personal protective equipment and respirator training for employees exposed to hazardous chemical vapor and splash hazards while working with methylene bisphenyl isocyanate and other injurious corrosive skin-

sensitizing and occupational asthma inducing chemicals. The Secretary's burden of proving a serious violation is not difficult. The Commission has held that if a standard is intended to protect against a life-threatening disease, then a violation of the standard is considered serious. *Anaconda Aluminum Co.*, 9 BNA OSHC 1460, (No. 13102, 1981). *Accord, Mahone Grain Corp.*, 10 BNA OSHC 1275 (No. 77-3041, 1981). Subzero's claims are mere assertions and do not provide any indication that they could be proven if given an opportunity. Therefore, the undersigned finds that Subzero's alleged defenses are not meritorious.

Based on the facts of this case and Commission precedent, the undersigned finds Subzero is not entitled to relief pursuant to Rule 60(b).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is HEREBY ORDERED that Respondent's requests for relief are DENIED and the Secretary's Motion to Dismiss is GRANTED.

It is further ORDERED that the purported notice of contest filed in this case is DISMISSED and the Citation and Notification of Penalty is AFFIRMED in all respects.

SO ORDERED.

/s/
SHARON D. CALHOUN
Judge

Date: May 14, 2013
Atlanta, Georgia