



OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

JP GALLAGHER ELECTRIC,

Respondent.

OSHR DOCKET NO. 12-1495

**ORDER DISMISSING RESPONDENT'S
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 August 24, 2012, Complainant, the Secretary of Labor (Secretary), filed a Response in Opposition to Respondent's request for leave to file a late notice of contest.¹ The Secretary's Response in Opposition requested that Respondent's request be denied and that the citation and penalty be deemed a final order of the Commission. In light of the relief requested, the Secretary's Response in Opposition is deemed a Motion to Dismiss Respondent's late-filed notice of contest (Secretary's Motion). A Certificate of Service accompanied the Secretary's Motion indicating service on Respondent by first class mail. Respondent, JP Gallagher Electric (Respondent or Gallagher), appearing *pro se* through James Gallagher, Respondent's non-attorney representative, did not respond to the Secretary's Motion within the time specified by Commission Rule 40(c), 29 C.F.R. § 2200.40(c).

On September 27, 2012, an Order issued directing Respondent to respond to the Secretary's Motion, on or before October 29, 2012. Respondent was advised that failure to

¹ The Secretary construed Respondent's "Late Contest," dated February 6, 2012, as a motion for leave to file a late notice of contest.

respond to the Order would indicate a lack of interest in pursuing its notice of contest. Respondent was further advised that failure to comply with the Order would result in its notice of contest being dismissed and the citation and proposed penalty being affirmed. *See* Commission Rule 101; 29 C.F.R. § 2200.101. This Order was sent by first class mail and by certified mail, return receipt requested, to James Gallagher, JP Gallagher Electric, 367 Main Street, Pittsburgh, PA 15201. The certified mail receipt (green card) was signed on September 29, 2012 and returned to my office. Mr. Gallagher filed a written response to the Secretary's Motion. The written response, dated October 4, 2012, was received in my office on October 15, 2012.²

For the reasons set forth below, the Secretary's Motion is Granted.

Background³

The Pittsburgh, Pennsylvania Area Office of the Occupational Safety and Health Administration (OSHA) inspected Respondent's job site, located at 205 Mary Street, Carnegie, Pennsylvania 15223, on August 16, 2011. This inspection resulted in OSHA issuing to Respondent a "Citation and Notification of Penalty," alleging one serious citation, with a proposed penalty of \$2,400.00, on October 6, 2011 (Citation). The citation advised Respondent that unless it informed OSHA in writing of its intention to contest the citation, within 15 working days after receipt, the citation would become a final order of the Commission.

On October 6, 2011, OSHA sent the citation by USPS certified mail, return receipt requested, to JP Gallagher Electric, 367 Main Street, Carnegie, PA 15201.⁴ The certified mail return receipt was signed by James Gallagher on October 7, 2011.

On October 7, 2011, Mr. Gallagher contacted the Pittsburgh OSHA Office (OSHA Office) and scheduled an informal conference to be held on October 18, 2011, at 1:00 p.m. On October 17, 2011, Mr. Gallagher called the OSHA Office to reschedule the informal conference to October 26, 2011, at 9:00 a.m.

² By November 13, 2012 Order, a copy of Respondent's written response was sent to the Secretary.

³ The background is based on the citation and on the other exhibits attached to the Secretary's Motion. These include the certified mail receipt, two letters OSHA sent to Respondent in November and December 2011, and the late-filed notice of contest dated February 6, 2012. The background also is based on Respondent's written response to the Secretary's Motion and on the April 13, 2012 letter from Mr. Gallagher's girlfriend Dianna Jackson, submitted by Respondent with its notice of contest. In the September 27, 2012 Order, Respondent was instructed to state whether it disagreed with any of the factual representations set forth in the Secretary's Motion. Where Respondent has indicated disagreement with those representations, that disagreement is noted in the background discussion. Where Respondent has indicated no disagreement, the representations are regarded as uncontested.

⁴ This same address is set out on all of the correspondence OSHA sent to Respondent; it is also set out on Respondent's late-filed notice of contest and its October 4, 2012 written response.

On October 26, 2011, Mr. Gallagher arrived at the OSHA Office, late for his 9:00 a.m. appointment. At the time of his arrival, the Area Director was no longer immediately available to meet with Mr. Gallagher. Rather than wait to meet with the Area Director later that day, Mr. Gallagher chose to reschedule his appointment, opting for a phone interview. As Mr. Gallagher stated in his October 4, 2012 response:

I . . . made an appointment and got the appointment time messed up. When I arrived I was told that I was an hour late and would have to wait to see if they would be able to fit me in. The male person who was sitting at the desk told me that I would have to wait but he could not say how long that wait would be. I told him that I wanted to reschedule and that's when he said that I could take care of this over the phone. So I told him that might be best and he would let who[m]ever I was to see [know] that I had opted for a phone interview. I should have set the appointment because I never received that call. For me it was just one [mishap] after the next. Then I received another letter saying I was late [or] something to that effect, but I did not [receive] that phone call, I just thought they were busy and would get to me when they could, but then another dreaded letter [arrived].

See Respondent's October 4, 2012 response, page 2. See also the late-filed notice of contest.

The Secretary's Motion, paragraph 7, states that "OSHA called the employer on October 26, 2011 and left a message to reschedule the informal conference."

Section 10(a) of the Act requires the employer to notify OSHA within fifteen working days of receiving the citation of its intent to contest the citation and/or proposed penalty. Based on the signed certified mail return receipt, Respondent's notice of contest was due on or before October 31, 2011. Respondent did not file a notice of contest on or before that date.

On November 9, 2011, the OSHA Office sent a letter to Respondent requesting abatement verification.⁵ On December 6, 2011, the OSHA Office sent a delinquent payment notice to Respondent. As indicated above, Respondent acknowledges receipt of these letters.

On February 6, 2012,⁶ a woman associated with Respondent called the OSHA Office and stated that she wanted to dispute the citation.⁷ The OSHA Area Director explained the contest period and provided information for filing a late notice of contest with the Commission.

⁵ Mr. Gallagher remembered calling the OSHA "downtown office" and advising them that Respondent had "completed all violations that the inspector . . . said [Respondent] needed to do," before receiving "that whopping fine" [the citation]. See October 4, 2012, response, page 2. See also late-filed notice of contest.

⁶ Although mailed later, Respondent's notice of contest is dated February 6, 2012.

⁷ The OSHA Office understood the caller to be the "employer's wife." Mr. Gallagher states that his girlfriend [Dianna Jackson] "called downtown [and] made a complaint . . ." Respondent's October 4, 2012 response, page 2. Although not specifically stated by Mr. Gallagher in Respondent's response that Ms. Jackson called the OSHA

More than six months after the citation was issued, Respondent mailed its notice of contest to the Commission. The notice of contest is dated February 6, 2012, and is signed by James Gallagher. In his October 4, 2012 response, Mr. Gallagher explained that the notice of contest was mailed in the same envelope that contained a letter dated April 13, 2012, written by Dianna Jackson. It is apparent, therefore, that the notice of contest was initially mailed to the Commission on or after April 13, 2012. Mr. Gallagher further explained that at a later date the notice of contest and Ms. Jackson's letter were re-mailed, although they retained their original dates. The Commission received Respondent's notice of contest and Ms. Jackson's letter on July 25, 2012. Mr. Gallagher's October 4, 2012 response does not address why he waited over two months to mail the notice of contest, considering that the OSHA Area Director provided information on February 6, 2012, regarding filing a late notice of contest with the Commission.

Positions of the Parties

In her Motion, the Secretary contends that the citation should be affirmed as a final order of the Commission because: (1) Respondent did not timely file its notice of contest, (2) OSHA's service of the citation, by USPS certified mail to the address Respondent provided to OSHA, was proper, (3) the late-filed notice of contest does not establish "excusable neglect" under Federal Rule of Civil Procedure 60(b) (Rule 60(b)), and (4) Respondent has not presented evidence establishing that the Secretary failed to follow proper procedures.

According to the notice of contest, Respondent from the beginning wanted to "dispute the charges" [contest the citation]. After arriving late for his scheduled meeting with the Area Director, Mr. Gallagher was told by the OSHA receptionist that he did not need another appointment; rather, he could take care of it over the phone and someone would get back to him. Thereafter, no one from OSHA called. Mr. Gallagher states that he "completed all of what the [OSHA] inspector wanted done" and that he then called the OSHA Office to give them this information. Mr. Gallagher's October 4, 2012 response reiterates these facts and adds that he has been in business for more than thirty years and has never had a problem like this. The response also adds that he is a small businessman and cannot afford problems like this.

In the September 27, 2012 Order, Respondent was asked to address the merits of the citation and penalty. The citation concerns Respondent's alleged work on de-energized

Office, on that date, it is reasonable to conclude that the woman who called for Respondent that day was Ms. Jackson.

equipment or circuits, where the “circuit was not locked out or in some other way rendered inoperative and tags attached appropriately,” thereby exposing a worker to the “hazard of having the electricity turned back on while working on a light switch.” In his October 4, 2012 response, Mr. Gallagher states that on the day of the inspection, he and Ms. Jackson were quickly working to “clean up a mess [left by] another electrical contractor,” to “fix the immediate things that were visible to the eye,” and to “bring things up to electrical code.” Ms. Jackson was putting on switch and receptacle covers. When the OSHA inspector arrived, she was replacing black tape around one switch. At that time, Ms. Jackson and Mr. Gallagher stated that the switch was de-energized, as Mr. Gallagher had shut down the power in that room, at the panel. Further, Ms. Jackson was “using her ticker to make sure that it was safe.” See Respondent’s October 4, 2012 response, page 2; Ms. Jackson’s April 13, 2012 letter.

Discussion

Pursuant to section 10(a) of the Act, 29 U.S.C. § 659(a), after receipt of a citation, an employer has “fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.” If the employer fails to file a notice of contest within the 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.” It is undisputed in this case that Respondent’s notice of contest was untimely. Therefore, by operation of law, the citation and proposed penalty must be deemed a final order of the Commission, unless Respondent can demonstrate that it is entitled to relief.

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 F3d 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.”⁸ 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

⁸ Rule 60(b)(3) provides that relief from a final order may be granted where there is fraud, misrepresentation, or misconduct by an opposing party.

similar disability prevent[s] a party from acting to protect its interests.” *Branciforte Builders*, 9 BNA OSHC 2113, 2116-17. It is the moving party’s burden to show that it is entitled to Rule 60(b) relief. *See Burrows Paper Corp.*, 23 BNA OSHC 1131 (No. 09-1559, 2010); *Elan Lawn and Landscape Serv., Inc.*, 22 BNA OSHC 1337, 1338 (No. 08-0700, 2008).

According to Respondent’s filings, it wanted to “dispute the charges” against it from the beginning. Mr. Gallagher scheduled an appointment with the OSHA Office on October 26, 2011. After missing the scheduled appointment time, rather than waiting to speak with the Area Director later that day, Mr. Gallagher chose to have a phone interview. He left the OSHA Office anticipating receipt of a telephone call from OSHA to schedule another appointment. Thereafter, Mr. Gallagher received letters from OSHA in November and December of 2011 regarding the citation. However, Mr. Gallagher contends that he never received the anticipated telephone call from OSHA.⁹ Ms. Jackson, who was assisting Mr. Gallagher on the day of the inspection, called the OSHA Office on February 6, 2012, and the Area Director gave her information about filing a late notice of contest with the Commission. Respondent nonetheless did not mail its notice of contest to the Commission until on or after April 13, 2012.

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) (*Pioneer*). Based on the above, Respondent is not entitled to relief under Rule 60(b)(6). Even accepting as true Mr. Gallagher’s assertion that he never received a phone call from OSHA, it was unreasonable for him to not contact OSHA after receiving letters from the agency in November and December of 2011. It was also unreasonable for him to wait until on or after April 13, 2012, to mail his late notice of contest to the Commission. This is particularly true since the OSHA Area Director gave Ms. Jackson information about filing a late notice of contest with the Commission on February 6, 2012. The undersigned thus regards Respondent’s filings to be a request for relief under Rule 60(b)(1), due to “excusable neglect,” and/or Rule 60(b)(3), due to the Secretary’s alleged failure to follow proper procedures.

⁹ As noted above, the Secretary asserts that OSHA called Respondent on October 26, 2011, and left a message to reschedule the informal conference.

The record in this case shows Respondent's failure to file a timely notice of contest was not due to the Secretary's failure to follow proper procedures. There is no allegation that the Secretary or her representatives misled Mr. Gallagher as to the notice of contest filing deadline. While Respondent's filings recount a conversation with an OSHA representative in regard to rescheduling an appointment with the Area Director, there is no claim the notice of contest filing deadline was discussed or even mentioned. *See Branciforte*, 9 BNA OSHC at 2115; *Keppel's*, 7 BNA OSHC at 1444. *Compare B.J. Hughes*, 7 BNA OSHC at 1476-77 (fifteen day filing requirement tolled where the employer relied upon OSHA's inadvertently erroneous calculation of the filing deadline). Importantly, as stated above, the citation sets forth Respondent's right to contest the citation by filing a written notice of contest with the Area Director within fifteen working days of receipt of the citation. *See Garabar, Inc.*, 2012 WL 3550137 *3 (OSHR CJ, No. 11-3105, 2012) (any confusion regarding the difference between an informal conference and a notice of contest was clarified by the specific instructions set forth in the citation). 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." *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991), *Roy Kay*, 13 BNA OSHC 2021, 2011 (No. 88-1748, 1989).

In regard to Respondent's request for relief for the reason that the late filing was due to "excusable neglect," the Commission applies the equitable analysis enunciated by the Supreme Court in its *Pioneer* decision. This analysis takes into account "all relevant circumstances" and includes consideration of (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. *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1950 (No. 97-851, 1999), quoting *Pioneer*, 507 U.S. at 395.

In this case, Respondent's response of October 4, 2012, sets out Mr. Gallagher's explanation for the late filing of the notice of contest.¹⁰ According to the response, Mr. Gallagher arrived late for the informal conference he was to have with the OSHA Area Director on October 26, 2011. At the time of his arrival, the Area Director was unable to meet with Mr. Gallagher. Rather than waiting to see if they could "fit [him] in" to meet with the Area Director later that day, Mr. Gallagher chose to reschedule. The OSHA receptionist told Mr. Gallagher the

¹⁰ The relevant portion of Respondent's response appears on page 3 of this decision.

conference could be held over the phone, and Mr. Gallagher opted to have a phone interview. The OSHA receptionist then indicated he would let the Area Director know that Mr. Gallagher wanted to have a phone interview. Mr. Gallagher claims in his response that he never received a phone call from OSHA.¹¹ He acknowledges receiving two letters from OSHA, but he states that he “just thought they were busy and would get to me when they could.” In essence, despite the November 9, 2011 letter, which requested abatement verification, and the December 6, 2011 letter, which was a delinquent payment notice, Mr. Gallagher simply decided to wait for a phone call from OSHA. As found above, Mr. Gallagher’s failure to contact OSHA after receiving these letters was not reasonable.

Even after the December 6, 2011 letter, Respondent did not contact OSHA until February 6, 2012. The record shows that on that day, Ms. Jackson called the OSHA Office and indicated that she wanted to dispute the citation. The Area Director explained the contest period and gave her information for filing a late notice of contest with the Commission. In spite of this information, Respondent did not mail its notice of contest to the Commission for two more months. Respondent’s response sets out no reason as to why it delayed until on or after April 13, 2012, to file its notice of contest with the Commission. As found above, this delay was unreasonable.

In evaluating whether the late filing of a notice of contest was due to excusable neglect, the Commission has found a “key factor” to be “the reason for the delay, including whether it was within the reasonable control of the movant.” *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-367, 2000). In appropriate circumstances, the Commission has held this to be the dispositive factor. *Id.*; *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1149 (No. 99-945, 2000). Here, Respondent has given no satisfactory explanation as to why it waited until February 6, 2012, to contact OSHA. Further, it has given no explanation at all as to why, after Ms. Jackson’s phone conversation with the OSHA Area Director, it waited for two more months before filing its notice of contest. Given the lack of any plausible reasons for its delays in this matter, and given that the delays were clearly within the reasonable control of Respondent, I conclude that this factor is dispositive and that there is no justification for granting Rule 60(b) relief.

In reaching this conclusion, I have considered Mr. Gallagher’s statement in his response that he is a small businessman who cannot afford problems like this one. As indicated above, the

¹¹ See footnote 9, above.

citation Mr. Gallagher received set out all the information he needed in order to file a timely notice of contest. If Mr. Gallagher had any questions in this regard, he could have called OSHA upon receiving the citation. He also could have waited for the Area Director, when he went to the OSHA Office on October 26, 2011, and discussed it with him at that time. Finally, and most importantly, Mr. Gallagher could have exercised more diligence and checked back with the OSHA Office about the pending phone interview, rather than simply waiting for months before taking any action. The Commission has held that “Rule 60(b) cannot be invoked ‘to give relief to a party who has chosen a course of action which in retrospect appears unfortunate or where error or miscalculation is traceable really to a lack of care.’” *Louisiana-Pacific Corp.*, 13 BNA OSHC at 2021 quoting *Sadowski v. Bombardier Ltd.*, 539 F.2d 615, 618 (7th Cir. 1976). The Commission has also held that ignorance of procedural rules does not constitute “excusable neglect” and that mere carelessness or negligence, even by a lay person, in failing to timely file a notice of contest does not justify relief under Rule 60(b). *Acrom*, 15 BNA OSHC at 1126; *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991).

In reaching my conclusion in this case, I have also considered the statements in Respondent’s response that Mr. Gallagher would rely upon to show a meritorious defense to the citation. However, 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 Northwest Conduit*, 18 BNA OSHC at 1952. Because the record does not show that the late filing was due to “excusable neglect,” the issue of a meritorious defense need not be addressed.

Decision

I find that Respondent’s notice of contest was untimely filed and that Respondent has not demonstrated that it is entitled to relief under Rule 60(b). I conclude that the reason for the untimely filing was within Respondent’s reasonable control and that this factor is dispositive.

Based on the foregoing, the Secretary’s Motion is Granted, Respondent’s late notice of contest is Dismissed, and the citation issued on October 6, 2011 is Affirmed in all respects.

SO ORDERED.

Dated: December 6, 2012
Washington, D.C.

/s/ Carol A. Baumerich
Honorable Carol A. Baumerich
Judge, OSHRC