



OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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

Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

BELLCO GLASS, INC.,

Respondent.

OSHRC DOCKET Nos. 12-1594 & 12-1595

ORDER OF DISMISSAL

These matters are before the Occupational Safety and Health Review Commission (Commission) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (Act), having been consolidated pursuant to Commission Rule 9, 29 C.F.R. § 2200.9. The Secretary of Labor (Secretary) has filed separate motions to dismiss each matter on the ground that the Respondent, Bellco Glass, Inc. (Respondent) did not timely notify the Secretary of its intent to contest the underlying citations. The Respondent has failed to file a response to the motions to dismiss, despite being allowed multiple opportunities to do so. For the reasons described below, the motions to dismiss are granted.

Background

During the period January 17-20, 2012, two Compliance Safety and Health Officers (CSHO's) from the Occupational Safety and Health Administration (OSHA) inspected the Respondent's facility in Vineland, New Jersey. One CSHO conducted Health Inspection Number 316194935 (Health Inspection) and the other conducted Safety Inspection Number 316263441 (Safety Inspection). Two company officials, the general

manager (Sean Harker) and the chief financial officer (Aaron Sackstein), attended the closing conference on January 20, 2012, during which the CSHO's informed them that OSHA was likely to issue citations. (Declaration of Assistant Area Director Logue, submitted in support of motions to dismiss). On April 4, 2012, one of the CSHO's had a follow-up telephone conference with the general manager to further discuss the Health Inspection. (Logue Declaration).

On April 27, 2012, the Secretary mailed to the Respondent, by certified mail, return receipt requested, a Citation and Notification of Penalty (Citation) for the alleged health violations and a separate Citation for the alleged safety violations. The certified letter containing both of the Citations was addressed to "Bellco Glass, Inc.," and not to the attention of any specific company official. The certified letter was delivered to the Respondent on May 1, 2012. (Logue Declaration).

Each Citation included the following provision regarding the fifteen-day time period for contesting a citation:

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).

The Respondent did not notify the Secretary that it intended to contest either of the Citations on or before the expiration of the 15-day period, which was May 22, 2012.

(Logue Declaration).

On June 11, 2012, Aaron Sackstein, Respondent's chief financial officer, contacted the OSHA Area Office and requested a settlement conference with OSHA. (Logue Declaration). An OSHA official informed Mr. Sackstein that the Citations had become final orders because the Respondent had not timely filed a notice of intent to contest them. (Logue Declaration). The OSHA official told Mr. Sackstein that a late notice of contest would have to be filed directly with the Commission. (Logue Declaration).

The Respondent did not pay the penalties assessed in the Citations by the due date, so by letter dated June 28, 2012, OSHA informed the Respondent of the delinquency. On August 7, 2012, eleven weeks after the final day for contesting the Citations, the Respondent filed a letter with the Commission that stated in part that "all the corrections have been made and we would like to request a hearing." The Commission's Executive Secretary treated the letter as a notice of intent to contest both Citations (Notice of Contest) and docketed the cases. The Citations were assigned the docket numbers set out above.

The Notice of Contest, signed by Mr. Sackstein, stated in its entirety as follows:

My name is Aaron Sackstein and I am the Chief Financial Officer of Bellco Glass Incorporated. I am writing this letter to you due to the unfortunate citations we have received from the Occupational Safety and Health Administration. Bellco Glass Incorporated has been in business since 1936 as a leading manufacturer in lab glass and equipment. In the past 5 years, Bellco Glass has been going through hard times due to the economy. Due to the economy, we have been forced to rebuild our company that was at one point had 150 employees. Currently, we have a total of 37 employees within our company. Since being with the company

as of 2011, being hired as the Chief Financial Officer, I currently hold positions of Human Resource Manager, Purchase Manager of all material, Accounts Receivable, Accounts Payable, and Payroll Department. We are all wearing many hats to better the company and to strive in making our products to save lives and work towards cures in many diseases.

When the inspection was done in January of 2012, we immediately started making the corrections that were noted immediately. The issuance date on 4/27/2012 had made us aware of a lot more that needed to be done to our buildings and machines which required quite a bit of funds. In addition to the fact that funds were needed, [redacted] who was handling the OSHA citations [redacted].

With that said, as of today, all corrections have been made and we would like to request a hearing. In addition to the inspection that was done, we have made many changes and precautions that I think the inspectors will be very happy with as well.

Bellco Glass Incorporated would really appreciate the understanding if you can honor a hearing for the abatements of the citations. I can only assure you as an officer of the company that we will avoid any such citations from ever occurring again considering we never had any before and have been in business for over 75 years. We look forward to hearing from you at your earliest convenience.

On November 1, 2012, the Secretary filed the above-noted motions to dismiss.

On November 5, 2012, the matters were assigned to the undersigned for disposition. On November 8, 2012, the undersigned issued an order consolidating the cases. The order of consolidation reminded the Respondent that its response to the motions to dismiss was due no later than November 19, 2012.

The Respondent did not file a response to the motions to dismiss, so on November 26, 2012, the undersigned issued an order directing the Respondent to show cause why it had not done so.

The Respondent responded to the order with a letter from Mr. Sackstein dated December 12, 2012. Mr. Sackstein stated that he had been engaged in unsuccessful attempts to communicate with various persons in the Department of Labor regarding the

matter. He requested “a 60 day extension to resolve the matter” with the attorney for the Secretary. Counsel for the Secretary did not oppose the Respondent’s request for an extension. On January 10, 2013, the undersigned issued an order extending the time for the Respondent to file its response to the motions to dismiss to February 12, 2013. The Respondent failed to file a response to the motions to dismiss by that date.

On April 18, 2013, the undersigned issued a notice of telephone conference for April 26, 2013, for the stated purpose of discussing the pending motions to dismiss and the Respondent’s failure to file a response. No representative for the Respondent called in for this telephone conference. The undersigned then issued a Report of Telephone Conference that same day that stated in part that the undersigned intended to rule on the merits of the motions to dismiss without the benefit of a response from the Respondent.

On April 30, 2013, Mr. Sackstein contacted the undersigned’s office and advised that the Respondent had not received the notice of telephone conference for April 26, 2013, and thus was not aware that the telephone conference had been scheduled. Accordingly, that same day, the undersigned issued a notice of another telephone conference for May 13, 2013.

Mr. Sackstein participated in the telephone conference on May 13, 2013, and requested additional time to file a response to the motions to dismiss. The request was granted, and the undersigned informed Mr. Sackstein that the response was due no later than May 20, 2013. The undersigned issued an order to this effect on May 13, 2013, which also instructed the Respondent to address the following matters in its response:

- Whether the Respondent disputes the Secretary’s assertion that the Respondent did not file a notice of contest within the fifteen-day period specified by 29 U.S.C. § 659(a).
- Whether the Respondent disagrees with any other statements of fact that are set forth in the motion to dismiss (and supporting materials), and to identify the statements of fact which it believes to be in error.
- If the Respondent agrees that it did not file a notice of contest within the fifteen-day period specified by 29 U.S.C. § 659(a), the response should state why the Respondent believes it should be excused from the requirement to file a notice of contest within that fifteen-day period.
- Provide a brief description of why the Respondent believes that it could achieve at least a partially favorable outcome following a hearing on the merits of the citation and penalties.
- The Respondent should also include any other matter that it believes is appropriate to respond fully to the motion to dismiss.

The Respondent did not file a response to the motion to dismiss by May 20, 2013, and to date has not filed any response. Because of this failure to respond, the assertions contained in the Notice of Contest shall be treated as the Respondent’s response to the motion to dismiss.

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). Such notification must be in writing and is timely when postmarked within the fifteen working day period. 29 C.F.R. § 1903.17(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.” 29 U.S.C. § 659(a).

The Respondent does not deny either (1) receiving the Citations by certified mail on May 1, 2012, or (2) filing the Notice of Contest after the expiration of the fifteen-day statutory period. Thus, by operation of § 659(a), the Citations are deemed to be final orders of the Commission.

An employer may be relieved from such a final order through Fed. R. Civ. P. Rule 60(b)(1) and (6). *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 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); *La. Pac. Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989).

“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.” *Pioneer*, 507 U.S. at 393. 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 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, including 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. “[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, 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.¹ See *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 n.5 (No. 98-367, 2000).

The Notice of Contest suggests, but does not explicitly assert, that the late filing was due at least in part [redacted] and to the expanded corporate duties of Mr. Sackstein. Neither of these circumstances, either individually or in combination, has been demonstrated to amount to “excusable neglect” under Rule 60(b)(1). See *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1990) (where company official

¹ Regarding the other three specified *Pioneer* factors, the late notification does not appear to have resulted in substantial prejudice to the Secretary. The eleven-week delay in filing the Notice of Contest, while significant, does not appear to have had a substantial impact on the initiation of proceedings in this matter. Finally, the Respondent does not appear to have acted in bad faith in connection with filing the late notice.

responsible for communicating with OSHA had prolonged illness that resulted in late-filed notice of contest, the “employer’s failure to have a procedure in place to address such occurrences” amounts to simple negligence and not excusable neglect). 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 La. Pac. Corp.* (filing of timely notice of contest was overlooked due to personnel change in operations manager position).

Similarly, with respect to relief under Rule 60(b)(6), [redacted] does not amount to “extraordinary circumstances” that would allow relief. Even assuming that [redacted] was the direct cause of the Respondent’s failure to timely contest the Citations (which the Respondent has neither directly asserted nor demonstrated), the late filing could have been averted if the Respondent had maintained appropriate internal procedures to assure the timely handling of important documents. *See E.K. Constr. Co., supra.*

For the foregoing reasons, the Respondent has not met its burden of showing that it is entitled to relief from the final orders of the Commission pursuant to Rule 60(b). Accordingly, the Secretary’s motions to dismiss are granted, and it is ORDERED as follows:

1. The notice of contest filed in OSHRC Docket No. 12-1594 is DISMISSED, and the Citation and Notification of Penalty is affirmed in all respects; and

2. The notice of contest filed in OSHRC Docket No. 12-1595 is DISMISSED, and the Citation and Notification of Penalty is affirmed in all respects.

SO ORDERED.

/s/

WILLIAM S. COLEMAN
Judge, OSHRC

DATED: July 9, 2013
Washington, D.C.