

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,

Complainant,

v.

MILLER CONSTRUCTION CO.,

Respondent,

OSHRC DOCKET NO. 13-0323

Before: Administrative Law Judge Brian A. Duncan

**DECISION AND ORDER**

**Procedural History**

This proceeding is before the Occupational Safety and Health Review Commission<sup>1</sup> ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's worksite in Lubbock, Texas on April 19, 2012. On October 9, 2012, as a result of the inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging two serious violations of the Act with an associated penalty of \$4,000.00.

Respondent was served a copy of the *Citation*, by confirmed UPS delivery, on October 11, 2012. (Complainant's Opposition to Relief, Ex. C & D). On November 6, 2012,

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<sup>1</sup> Based on its June 15, 2013 letter, it appears that Respondent does not understand that the U.S. Occupational Safety and Health Review Commission and the U.S. Occupational Safety and Health Administration are separate Federal agencies. For clarification, the former is an adjudicative agency charged with impartially deciding disputes between employers and OSHA. The latter investigates and prosecutes OSHA violations alleged to be committed by employers.

Complainant sent Respondent a letter attempting to collect the penalties due as a result of the uncontested *Citation*. (Complainant's Opposition to Relief, Ex. E). On December 13, 2012, thirty-seven days after the collection letter (and sixty-three days after original service of the *Citation*), Respondent sent Complainant a letter claiming "it was not aware of any payments that were approved by me...nor did I have a chance to dispute the fines or infractions," and further asking for "appropriate information...so that we may move forward in resolving this matter." (Complainant's Opposition to Relief, Ex. F). On February 8, 2013 (one-hundred-twenty days after service of the *Citation*), Respondent finally sent OSHA a *Notice of Contest* disputing the *Citation*. (Complainant's Opposition to Relief, Ex. H). On February 14, 2013, Respondent sent the Commission a *Notice of Contest*, modifying its contest to only dispute Citation 1, Item 1. (Complainant's Opposition to Relief, Ex. I).

The case was then docketed by the Commission and ultimately assigned to this Judge for disposition. On April 1, 2013, Complainant filed *Complainant's Opposition to Relief Under Rule 60(b)* seeking to vacate Respondent's *Notice of Contest* as impermissibly late. On May 30, 2013, the Court issued an *Order to Respondent to Show Cause*, which afforded Respondent an opportunity to explain its four month delay in filing a *Notice of Contest*, considering the fifteen working day limitation contained in Section 10(a) of the Act, 29 U.S.C. §659(a). The *Order to Respondent to Show Cause* warned that "[i]f Respondent does not respond to this *Order to Show Cause*, and/or fails to establish good cause, it may result in the issuance of sanctions, including the issuance of default judgment against Respondent dismissing its *Notice of Contest* and affirming the citations proposed in this case pursuant to Commission Rules 67 and 101."

On June 15, 2013, Respondent sent the Court a responsive letter asserting that it never saw the original *Citation* and that it "did not know how much they were or what my recourse

was.” Respondent’s assertion is rejected, as Complainant submitted clear proof of delivery to Miller Construction Company in Lubbock, Texas, with delivery confirmation signed for by “Miller”<sup>2</sup> on October 11, 2012. (Complainant’s Opposition to Relief, Ex. C and D). Furthermore, Respondent acknowledged receipt of the collection letter dated November 6, 2012, yet still waited another thirty-seven days to request information from OSHA in an effort to “resolve this matter,” and even then, waited an additional fifty-seven days before submitting its first *Notice of Contest*. (Complainant’s Opposition to Relief, Ex. F and H).

The Citation served on Respondent on October 11, 2012, clearly states on page 2 that:

**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.**<sup>3</sup>

Respondent acknowledged awareness of, albeit disagreement with, the fifteen day contest period prescribed by Congress for OSHA citations in its June 15, 2013 letter: “I feel your [OSHA’s] 15 day deadline was unreasonable for a small business...[and]...other than missing your 15 day deadline...”

A late contest may be excused pursuant to Rule 60(b)(1) if there is evidence of “mistake, inadvertence, surprise, or excusable neglect,” or pursuant to Rule 60(b)(6) for “any other reason that justifies relief.” The party seeking relief under Rule 60(b) bears the burden of demonstrating that it is entitled to relief. *Burrows Paper Corp.*, 23 BNA OSHC 1131 (No. 09-1559, 2010); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989). To determine whether the late filing

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<sup>2</sup> Guin Miller is Respondent’s owner and its representative in this proceeding.

<sup>3</sup> Boldface and underlined typeface are as in the original *Citation*.

of a notice of contest was due to “excusable neglect” under Rule 60(b)(1), courts consider 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 Inv. Svcs. v. Brunswick Associates*, 507 U.S. 380, 395 (1993); *Northwest Conduit Corp.*, 18 BNA OSHC 1948 (No. 97-851, 1999). The third enumerated factor -- the reason for the delay, including whether it was within the reasonable control of the movant -- is the key factor. *A.W. Ross, Inc.*, 19 BNA OSHC 1147 (No. 99-0945, 2000).

The Court notes that a lack of prejudice to the Secretary, or good faith on the part of Respondent, alone will not excuse a late filing.” *Fitchburg Foundary, Inc.*, 7 BNA OSHC 1516 (No. 77-520 & 1073, 1979). Furthermore, an employer’s mere carelessness or negligence, even if 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). *Keefe Earth Boring Co.*, 14 BNA OSHC 2187 (No. 88-2521, 1991). 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, supra*. In this instance, Respondent has failed to meet its burden of establishing facts or circumstances which justify its untimely contest of the *Citation* four months after it was delivered. For the reasons stated above, the Court finds that Respondent is not entitled to relief excusing its late *Notice of Contest*.

### **ORDER**

Accordingly, Respondent’s *Notice of Contest* is hereby VACATED and the violations

alleged in the *Citation and Notification of Penalty* are AFFIRMED.

SO ORDERED.

/s/ *Brian A. Duncan*

Judge Brian A. Duncan  
U.S. Occupational Safety and Health Review Commission

Date: July 9, 2013  
Denver, Colorado