

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

SECRETARY OF LABOR,

Complainant,

v.

ROBINSON MASONRY,

Respondent,

OSHRC DOCKET
NOS. 13-1956 &
13-1957 (Consolidated)

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("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") inspected two of Respondent's worksites in Little Rock, Arkansas, on January 23, 2013 and February 6, 2013. On April 2, 2013, as a result of the inspections, OSHA issued two *Citations and Notifications of Penalty* ("Citations") to Respondent alleging a total of seventeen serious, and one other-than-serious, violations of the Act, with total proposed penalties of \$22,400.00.

Respondent was served a copy of the *Citations*, by confirmed UPS delivery, on April 2, 2013. (*Complainant's Opposition to Relief*, Ex. C; *Respondent's Response to Show Cause*). On April 11, 2013, Respondent's representative, Ron Robinson, met with OSHA officials in the Little Rock, Arkansas area office to discuss potential settlement during an informal settlement conference. (*Complainant's Opposition to Relief*; *Respondent's Response to Show Cause*).

Settlement options were apparently discussed and exchanged, but the parties failed to successfully negotiate any type of settlement agreement. (*Complainant's Opposition to Relief; Respondent's Response to Show Cause*). The fifteen-working-day limitations period, prescribed by Congress to contest OSHA citations, subsequently expired on April 23, 2013. Section 10(a) of the Act, 29 U.S.C. §659(a).

On April 29, 2013, Respondent's attorney notified OSHA that he would be representing Respondent from that date forward in these matters. (*Complainant's Opposition to Relief, Ex. D; Respondent's Response to Show Cause*). There was no language in counsel's letter which could be reasonably interpreted as an attempt to dispute, challenge, or otherwise contest the *Citations*. Respondent's counsel's letter to OSHA was titled "Letter of Representation" and included two sentences: "Please note my representation of the referenced company regarding the referenced OSHA inspections. Please direct all future communications to this office."

On May 29, 2013 (fifty-five days after service of the *Citations*), OSHA sent Respondent a letter attempting to collect the penalties due as a result of the uncontested violations. (*Complainant's Opposition to Relief, Ex. E*). More than four months later, on October 7, 2013 (two-hundred-forty-seven days after service of the *Citations*), Respondent's counsel sent OSHA a second letter, this time to an address in Washington, D.C., asking that the matters be referred to the "office of the general counsel." (*Complainant's Opposition to Relief, Ex. F*). The October 7th letter contained, for the first time, language which could be reasonably construed as challenging the citations and penalties. The letter stated: "[t]he fines are so out of proportion to the offense, even if proved, as to shock the conscience."

On November 7, 2013 (two-hundred-seventy-eight days after service of the *Citations*), Respondent's counsel sent the Commission's Executive Secretary a letter which stated: "[p]lease

accept this late Notice of Contest, as that is defined by OSHA, though Mr. Robinson misunderstood the proceedings and that the adversarial process had ever been terminated.” (*Complainant’s Opposition to Relief*, Ex. F).

The cases were subsequently docketed by the Commission and assigned to this Judge for disposition. On January 29, 2014, Complainant filed *Complainant’s Opposition to Relief Under Rule 60(b)* in each case, seeking to vacate Respondent’s *Notices of Contest* as impermissibly late. On February 6, 2014, the Court issued an *Order of Consolidation* which combined OSHRC Docket Nos. 13-1956 and 13-1957 into a single proceeding. Also on February 6, 2014, the Court issued an *Order to Respondent to Show Cause*, which afforded Respondent an opportunity to explain its six month delay¹ in filing the *Notices of Contest*, considering the fifteen-working-day limitation contained in Section 10(a) of the Act, as well as its retention of counsel the same month the *Citations* were originally served. The *Order to Respondent to Show Cause* warned that “[i]f Respondent does not respond to this *Order to Respondent 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 *Notices of Contest* and affirming the citations proposed in these cases pursuant to Commission Rules 67 and 101.”

On February 18, 2014, Respondent’s counsel responded to the *Order to Respondent to Show Cause*. Respondent did not dispute the facts and timeline set out above, but rather argued that: (1) OSHA’s settlement offer at the area office informal conference was still pending at the end of the fifteen-day contest period, and by not specifically withdrawing that offer, OSHA waived its right to assert the fifteen-day statute of limitations; and (2) the fifteen-day contest period set out in the Act is arbitrary and capricious, inadequate as a matter of law, and deprives

1. Based upon the fifteen-working-day contest period ending April 23, 2013, and interpreting Respondent’s October 7, 2013 letter as an attempt to challenge the *Citations*.

regulated parties of due process.

The *Citations* served on Respondent on February 2, 2013, clearly stated 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.**²

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 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.

2. Boldface and underlined typeface are as in the original *Citations*.

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 acknowledged service of the *Citations* on April 2, 2013, and sufficiently understood the language on the face of the *Citations* to request and attend an informal settlement conference at the local OSHA area office within the fifteen-working-day limitations period, but then failed to contest the *Citations* before the limitations period expired on April 23, 2013. Even after counsel was retained on April 29, 2013, six days after the limitations period expired, no communication from Respondent was ever submitted to OSHA or the Commission which could be reasonably interpreted as protesting, disputing, or otherwise challenging the *Citations* until October 7, 2013 (eight months after service of the *Citations*).

Respondent has failed to meet its burden of establishing good cause to excuse such a late attempt to contest these *Citations*. See also *Garabar, Inc.*, 2013 CCH OSHD ¶33,256 (No. 11-3105); *J.P. Gallagher Electric*, 2012 WL 7198438 (OSHRC). Similarly, Respondent's alternative argument challenging the enforceability of the 15-day limitations period is rejected, as such limitation has been repeatedly upheld for more than forty years and does not need to be re-evaluated under these facts.

ORDER

Accordingly, Respondent's *Notices of Contest* are hereby VACATED and the violations

and penalties alleged in the *Citations and Notifications of Penalty* in OSHRC Docket Nos. 13-1956 and 13-1957 are AFFIRMED.

SO ORDERED.

/s/ *Brian A. Duncan*

Judge Brian A. Duncan

U.S. Occupational Safety and Health Review Commission

Date: March 10, 2014
Denver, Colorado