



OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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

Washington, DC 20036-3457

**SECRETARY OF LABOR,
Complainant,**

v.

**JMD ROOFING & SIDING, LLC,
Respondent.**

OSHRC DOCKET NO. 15-0516

**ORDER DISMISSING RESPONDENT'S
LATE NOTICE OF CONTEST**

This matter is before the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et sec.* (the Act). On October 21, 2015, Complainant, the Secretary of Labor (Secretary), filed a Motion to dismiss Respondent's late notice of contest, together with a supporting memorandum of law, and attachments (Motion). On January 4, 2016, the Secretary filed a Supplemental Memorandum to the Motion to dismiss (Supplemental Memo). On January 15, 2016, the Secretary filed a Supplemental Motion to dismiss Respondent's late notice of contest, together with a revised supporting memorandum of law, and additional attachments (Supplemental Motion). The Secretary's Motion and Supplemental Motion request that Respondent's late notice of contest be dismissed and that the citation and penalty issued to Respondent in this case be affirmed by operation of law as a final order of the Commission. Respondent did not respond to the Secretary's Motion, Supplemental Memo, or Supplemental Motion.

A Notice of Hearing issued in this case on November 23, 2015. An Order issued on January 12, 2016. Respondent did not respond to the Hearing Notice or Order.

Respondent's late notice of contest letter was received by and docketed with the Commission on March 30 and 31, 2015, respectively.

For the reasons set forth below, Respondent's notice of contest is dismissed.

Background¹

The Albany, New York, Area Office of the Occupational Safety and Health Administration (OSHA) inspected Respondent's job site, located at 9 Delta Place, Kingston, NY 12401, on September 24, 2014. The inspection number is 996663. On November 3, 2014, OSHA issued to Respondent a five item serious citation, with subparts, and a one item other-than-serious citation and notification of penalty (citation). The citation alleged violations of OSHA's construction standards, including standards regarding job site inspections, personal protective equipment, fall protection, fall protection training, portable ladders, ladder training, and first aid supplies, among others. The total penalty proposed was \$8,400.00. The citation stated that unless Respondent informed the OSHA Area Director in writing of Respondent's intention to contest the citation and / or proposed penalties, within 15 working days after receipt, the citation and the proposed penalties would become a final order of the Commission. The citation was written in English.

On November 4, 2014, OSHA served the citation by USPS certified mail, return receipt requested, to Respondent's address listed on the citation: JMD Roofing & Siding, LLC, 36 Oakland Avenue, Danbury, CT 06810. The USPS Tracking form reveals that notice of the

¹ The background is based on the citations and on the other exhibits attached to the Secretary's Supplemental Motion. These include the November 2014 USPS Tracking form, the returned envelope containing the citations marked "unclaimed," the December 2014 UPS shipment receipt and delivery notification, the January 2015 UPS delivery notification, the Declaration of Rita Young, Assistant Area Director OSHA Albany Area Office, Respondent's handwritten late notice of contest dated March 17, 2015, postmarked March 19, 2015, marked received March 23, 2015, and the late notice of contest hand addressed envelope.

The Secretary's October 2015 Motion and January 2016 Supplemental Memo did not include a complete description of the Secretary's communications and attempted communications with Respondent nor did they include the complete set of supporting exhibits attached to the January 2016 Supplemental Motion. The Secretary's October 2015 Motion and January 2016 Supplemental Memo read alone are incomplete. Therefore, greater weight has been given to the Secretary's January 2016 Supplemental Motion.

As Respondent has not responded to the many attempts by the Secretary and by the undersigned Judge to communicate with Respondent, in writing and by telephone, the representations made in the Secretary's January 2016 Supplemental Motion, for the purpose of this Order, are regarded as uncontested.

correspondence from OSHA was left for Respondent on November 7, 2014, but there was “no authorized recipient available.” USPS Tracking further reveals that on November 25, 2014, the OSHA correspondence was noted as “undeliverable as addressed,” and “unclaimed / max hold time expired.” The envelope for the unclaimed citation that was returned to the OSHA Area Office was marked “Returned to sender. Unclaimed. Unable to Forward.” The handwritten note “ext.” was added to the street address to read: “36 Oakland Ave. ext.” (Supplemental Motion Exs. B, C, D).

On December 11, 2014, OSHA again sent the citation to Respondent by United Parcel Service (UPS) 2nd day air delivery to Respondent’s address listed on the citation, including the name of Respondent’s owner: JMD Roofing & Siding, LLC, Jorge Tacuri, 36 Oakland Avenue, Danbury, CT 06810. UPS delivery notification indicates that the citation was delivered on December 17, 2014, signed by “Tacuri.” (Supplemental Motion Exs. E, F).

The memorandum of law supporting the Secretary’s January 2016 Supplemental Motion states, at page 3, that OSHA called Mr. Tacuri, on January 13, 2015. Mr. Tacuri stated that he did not receive the citation. Mr. Tacuri informed OSHA that his address was 36 Oakland Ave., Ext., Danbury, CT 06810.

On January 13, 2015, OSHA once again sent the citation to Respondent by UPS 2nd day air delivery to Respondent’s address, adding “ext.” to the street address, and modifying the zip code, as follows: JMD Roofing & Siding, LLC, 36 Oakland Ave. Ext., Danbury, CT 06811. UPS delivery notification indicates that the citation was delivered on January 14, 2015, noting “met customer man.” (Supplemental Motion Ex. G).

Shortly thereafter, Respondent participated in an OSHA informal conference. On January 29, 2015, Respondent’s owner Jorge Tacuri attended an informal conference regarding the citation, held at the OSHA Albany Area Office, with Assistant Area Director Rita Young. Ms. Young is a native Spanish speaker and all of her communications with Jorge Tacuri and with his wife, Maria Tacuri, have been in Spanish. During the informal conference, Assistant Area Director Young explained to Mr. Tacuri, in Spanish, that Respondent could contest the citation

by sending a notice of contest letter to the OSHA Albany Area Office by February 5, 2015². Mr. Tacuri nodded after the notice of contest method and deadline were explained to him. (Supplemental Motion Ex. H).

On March 23, 2015, the OSHA Albany Area Office received a handwritten late notice of contest letter, dated March 17, 2015, regarding the citation issued in case number 996663, from Respondent's owner Jorge Tacuri. The notice of contest envelope is postmarked March 19, 2015. The notice of contest envelope, handwritten return address, reads: JMD Roofing Siding, 36 Oakland Av. Ext., Danbury, CT 06810. As translated by Ms. Young, the late notice of contest states:

Hello, I am Jorge Tacori. I want to contest the case number 996663 toward company JMD Roofing and Siding. I'm the owner of the company. (Supplemental Motion Ex. I).

Thereafter, on April 10, 2015, Assistant Area Director Young and Respondent's owner Mr. Tacuri reached agreement in principal to settle the citation. That day, April 10th, Respondent advised Ms. Young that Respondent was moving to a new address. At that time, Ms. Young did not learn Respondent's new address. (Supplemental Motion Ex. H).

The stipulated settlement agreement was drafted. On April 30, 2015, Assistant Area Director Young called Mr. Tacuri at the phone number she had previously used to reach him. Ms. Young left a voice mail message for Mr. Tacuri advising him that the stipulated settlement agreement had been prepared and requesting Respondent's new address so that the settlement agreement could be mailed to Respondent. Mr. Tacuri did not respond to Ms. Young's voice mail message. (Supplemental Motion Ex. H).

Since that time, Assistant Area Director Young attempted to contact Respondent regarding the citation numerous times. The last time Ms. Young spoke to Mr. Tacuri was on April 10, 2015. Ms. Young was unsuccessful in her attempts to learn Respondent's new address. (Supplemental Motion Ex. H).

² February 5, 2015 is fifteen working days following Respondent's receipt of the citation on January 14, 2015, as reflected on the UPS delivery notification. (Supplemental Motion Ex. G).

Assistant Area Director Young attempted to call Mr. Tacuri on May 27, 2015. On June 2, 2015, Ms. Young called Mr. Tacuri, but at that time Mr. Tacuri's phone was no longer accepting voice mail messages. That date, June 2, 2015, Ms. Young also called Mrs. Maria Tacuri, at her phone number, and left a voice mail message. On June 4, 2015, Mrs. Tacuri returned Ms. Young's voice mail message. Ms. Young emphasized to Mrs. Tacuri the importance of Mr. Tacuri returning Ms. Young's phone calls. On June 9, 2015, Assistant Area Director Young called both Mr. Tacuri and Mrs. Tacuri, but she was unable to reach either person. Ms. Young attempted to call Mr. Tacuri on July 15 and July 16, 2015, but was unable to reach him. At that time, Mr. Tacuri's phone was no longer accepting voice mail messages. (Supplemental Motion Ex. H).

Procedural Status Before the Commission

Respondent's late notice of contest letter was received by and docketed with the Commission on March 30 and 31, 2015, respectively.

The Secretary filed a Motion for an extension of time to plead or otherwise move, on April 2, 2015, noting that this case involved an apparent late notice of contest. By Order, dated April 17, 2015, an extension of time to June 4, 2015 was granted. Both the Motion and Order were served on Respondent, by first class mail, to the address set forth on the citation. The Order was returned, unopened, to the Commission, with the postal marking: "Return to Sender. Not Deliverable as Addressed. Unable to Forward."

The settlement was reported to the Commission, via email notification from the Secretary, on June 1, 2015.

The Secretary filed a second Motion for an extension of time to plead or otherwise move, on July 29, 2015. The Motion noted that the Secretary reported this case as settled on June 1, 2015. Motion further advised, in part:

The OSHA Area Office has left several telephone messages for Respondent in an effort to get him to execute the Stipulated Settlement Agreement, which the parties agreed to. As of today, the Respondent has not returned any of their telephone calls or the executed Settlement. As a result, the Secretary requests that this matter be returned to

the Court's trial calendar and that he be granted additional time to analyze this matter in order to determine its suitability for litigation.

A representative of the Secretary contacted Mr. Jorge Tacori (sic) in order to determine if he would consent to the Motion or sign the Stipulated Settlement and return it to our office and he advised us he only speaks "Spanish." As a result, a representative of the Secretary, who speaks Spanish, attempted to contact Mr. Tacori (sic) twice but he did not answer his telephone so voice mail messages were left. As of the filing of this Motion, we have not yet heard back from Mr. Tacori (sic).

By Order, dated August 14, 2015, an extension of time to August 21, 2015 was granted. Both the Motion and Order were served on Respondent, by first class mail, to Respondent's address set forth on the citation.

The Secretary filed a third Motion for an extension of time to plead or otherwise move, on October 5, 2015, to determine if this matter is suitable for litigation. By Order, dated October 19, 2015, an extension of time to October 23, 2015 was granted. Both the Motion and Order were served on Respondent, by first class mail, to Respondent's address set forth on the citation.

On October 21, 2015, the Secretary filed a Motion to dismiss Respondent's late notice of contest, together with a supporting memorandum of law, and attachments, requesting that Respondent's late notice of contest be dismissed and that the citation and penalty be affirmed by operation of law as a final order of the Commission. The Secretary's October 2015 Motion was incomplete and did not present a full description of the communications between the Secretary and Respondent.³ A Certificate of Service accompanied the Secretary's Motion, indicating service on Respondent by first class mail, as follows: Jorge Tacori, 36 Oakland Avenue Ext., Danbury, CT 06811. Respondent 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 November 23, 2015, a Notice of Hearing issued scheduling a hearing in this matter for January 26, 2016, concerning the relevant circumstances surrounding Respondent's failure to file a timely notice of contest and whether or not Respondent's late filing may be accepted.

³ See note 1 above.

The Hearing Notice also scheduled a prehearing conference call for January 5, 2016 at 9:30 a.m. The Hearing Notice advised all parties that failure to comply with the Order may result in appropriate sanctions, including dismissal of claims or defenses. See Commission Rule 101; 29 C.F.R. § 2200.101. The Hearing Notice advised Respondent where the Commission Rules, written in Spanish, were located on the Occupational Safety and Health Review Commission website: www.oshrc.gov/→Publicaciones En Espanol. See Hearing Notice p. 3, n.2. The Hearing Notice was translated into Spanish and served in Spanish and English. The Hearing Notice was served on Respondent by first class mail and by certified mail return receipt requested to Respondent's address set forth on the citation. Both the first class mail and certified mail envelopes were returned to the Commission, undelivered, with the postal marking "Return to Sender. No Such Number. Unable to Forward."⁴

As the prehearing conference call was scheduled for January 5, 2016, the day before, on January 4, 2016, the undersigned Judge's legal assistant attempted to call Respondent's owner Mr. Tacuri regarding the scheduled conference call. Mr. Tacuri's home and cell phone numbers were received by the Judge's legal assistant from the Secretary. When the home number was first called, a woman answered the phone and stated no one by the name of Mr. Jorge Tacuri was there. When the home number was called a second time, the call went straight to voice mail and the legal assistant left a message for Mr. Tacuri. When Mr. Tacuri's cell phone was called a recorded message announced that the voice mail box was full. The undersigned's office never received a phone call from Mr. Tacuri in response to the voice mail message left on his home phone.

On January 4, 2016, the Secretary filed a Supplemental Memorandum to the Motion to dismiss Respondent's late notice of contest. The Supplemental Memo in summary fashion advised that an OSHA investigator, who is fluent in Spanish, had made numerous attempts to contact Respondent; however, Respondent had been entirely unresponsive to OSHA. The Secretary's January Supplemental Memo was incomplete and did not present a full description

⁴ An internet query disclosed the address for Respondent's registered agent as Jorge Daniel M. Tacuri, 36 Oakland Ave, Danbury, CT 06810. The address set forth on the citation. See <https://www.statelog.com/jmd-roofing-and-siding-llc-danbury-ct>. (Visited on December 3, 2015).

of the communications between the Secretary and Respondent.⁵ A Certificate of Service accompanied the Secretary's Supplemental Memo indicating service on Respondent by first class regular mail at: Jorge Tacuri, JMD Roofing & Siding LLC, 36 Oakland Avenue Ext., Danbury, CT 06810.

On January 5, 2016 a brief prehearing conference call was held. Counsel for the Secretary participated. No one from Respondent joined the call. Counsel for the Secretary advised that the Secretary recently had been unable to contact Respondent by telephone. The Secretary understood that Respondent had changed its address, but Respondent's new address was unknown to the Secretary.

On January 12, 2016, an Order issued cancelling the scheduled January 26, 2016 hearing. The Secretary was asked to carefully review the October 2015 Motion, the January 2016 Supporting Memorandum, and attachments, filed in this case, for accuracy and completeness. The Secretary was given an opportunity to file a Supplemental Motion, including any relevant affidavits, in this case. A copy of the November 23, 2015, Notice of Hearing was attached to the Order. The Order was translated into Spanish and served in Spanish and English. The Order was served on Respondent by first class mail and by certified mail return receipt requested to Respondent's address: Jorge Tacori, JMD Roofing & Siding, LLC, 36 Oakland Avenue Extension, Danbury, CT 06810. The certified mail envelope was returned to the Commission, undelivered, with the postal marking "Return to Sender. Unclaimed. Unable to Forward." USPS Tracking further notes "Undeliverable as Addressed." The first class mail envelope was not returned.

On January 15, 2016, the Secretary filed a Supplemental Motion to dismiss Respondent's late notice of contest, together with a supporting memorandum of law, and attachments, requesting that Respondent's late notice of contest be dismissed and that the citation and penalty be affirmed by operation of law as a final order of the Commission. A Certificate of Service accompanied the Secretary's Motion, indicating service on Respondent by first class mail, as follows: Jorge Tacuri, 36 Oakland Avenue Ext., Danbury, CT 06811.

⁵ See note 1 above.

Respondent did not respond to the Secretary's Supplemental Motion within the time specified by Commission Rule 40(c), 29 C.F.R. § 2200.40(c).

Discussion

Abandonment of Notice of Contest

On January 14, 2015 the citation in this case was delivered to Respondent by UPS 2nd day air delivery to: JMD Roofing & Siding, LLC, 36 Oakland Ave. Ext., Danbury, CT 06811. The record discloses and I find that Respondent received the citation on January 14, 2015. Shortly thereafter, Respondent's owner Mr. Tacuri participated in an informal conference with OSHA Assistant Area Director Young on January 29, 2015. The informal conference was conducted in Spanish. Mr. Tacuri was advised of the notice of contest method and the February 5, 2015 notice of contest deadline.

Respondent's handwritten late notice of contest regarding the citation is dated March 17, 2015. It was received by the OSHA Albany Area Office on March 23, 2015. The envelope containing the late notice of contest was postmarked March 19, 2015. The notice of contest envelope, handwritten return address, reads: JMD Roofing Siding, 36 Oakland Av. Ext., Danbury, CT 06810. Respondent's late notice of contest was docketed with the Commission on March 31, 2015.

Thereafter, on April 10, 2015, during a telephone conversation, Respondent's owner, Mr. Tacuri advised OSHA Assistant Area Director Young that Respondent was moving to a new address. Despite numerous attempts by the OSHA Albany Area Office to communicate with Respondent, in writing to Respondent's known address, and by telephone to Respondent's owner Jorge Tacuri and to his wife Maria Tacuri, Respondent has been completely unresponsive. Assistant Area Director Young's telephone communications with Mr. Tacuri and his wife were in Spanish. Likewise, efforts by the undersigned Judge to communicate with Respondent, in writing and by telephone, have been unsuccessful.

Commission Rule 6 requires that every party, including self-represented employers, advise the Commission Judge and all other parties to the proceeding of their current contact

information and promptly advise the Judge and all other parties of any change to their contact information. Commission Rule 6 "Record address" states:

Every pleading or document filed by any party or intervenor shall contain the name, current address and telephone number of his representative or, if he has no representative, his own name, current address and telephone number. Any change in such information shall be communicated promptly in writing to the Judge, or the Executive Secretary if no Judge has been assigned, and to all other parties and intervenors. A party or intervenor who fails to furnish such information shall be deemed to have waived his right to notice and service under these rules.

29 C.F.R. § 2200.6.

Respondent's owner, Jorge Tacuri, has not returned voice mail messages regarding this case left by the OSHA Assistant Area Director and by the undersigned Judge's legal assistant. Respondent has not provided the undersigned Judge or the Secretary, OSHA's representative, a party to this proceeding, with Respondent's current mailing address. Therefore, pursuant to Commission Rule 6, Respondent is deemed to have waived his right to notice and service under the rules. Respondent's actions reveal that Respondent has abandoned its notice of contest in this case.

A Commission Judge has broad discretion to impose sanctions for noncompliance with the Commission's Rules or Orders issued by the Judge. See Commission Rule 101(a); 29 C.F.R. § 2200.101(a). *Sealtite Corp.*, 15 BNA OSHC 1130, 1136 (No. 88-1431, 1991).

The record in this case reveals that Respondent is aware of these proceedings. Respondent met with the OSHA Assistant Area Director for an informal conference to discuss the citation on January 29, 2015. Respondent wrote and filed the late notice of contest letter with the OSHA Albany Area Office. The late notice of contest envelope is postmarked March 19, 2015. Thereafter, the record reveals that Respondent abandoned its notice of contest.

After April 10, 2015, Respondent failed to participate in this proceeding, despite numerous efforts on the part of the Secretary and the undersigned Judge to promote his participation and elicit his response. These efforts include telephone calls and voice mail messages. Notably, Assistant Area Director Young's informal conference and later telephone

communications with Respondent were in Spanish. These efforts also include several written Motions filed by the Secretary and a Hearing Notice and Order issued by the undersigned Judge. The Hearing Notice and Order were translated into Spanish and served on Respondent in English and Spanish. Notably the January 12, 2016 Order, which included a copy of the November 2015 Hearing Notice, was served to Respondent's return address, as handwritten on the envelope containing Respondent's late notice of contest.

The facts of this case present a question whether Respondent received any of the written communications mailed to Respondent after April 10, 2015, when Mr. Tacuri told Assistant Area Director Young that Respondent was moving to a new address. Importantly, the facts *also disclose* that Respondent failed to respond to OSHA's numerous telephone inquiries, in Spanish, to obtain Respondent's new address.

Respondent's consistent failure to participate or respond in this case indicates Respondent's lack of interest in pursuing its notice of contest and reveals a pattern of disregard for Commission proceedings. *See Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001).

I find that Respondent has been given proper notice of this proceeding and the opportunity to participate. I find that Respondent has failed to participate in this proceeding and abandoned Respondent's notice of contest. I find Respondent in default.

Untimely Filed Notice of Contest

Positions of the Parties

The Secretary's Supplemental Motion 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, on January 14, 2015, by UPS 2nd day air delivery to the address Respondent provided to OSHA on Respondent's late notice of contest envelope, was proper, (3) Respondent did not contest the method of service or Respondent's actual receipt of the citation, (4) the late notice of contest does not establish "excusable neglect" for the

untimely filing under Federal Rule of Civil Procedure 60(b), and (5) Respondent did not raise a meritorious defense to the citation in the late notice of contest.

In its late notice of contest, Respondent's owner Jorge Tacuri simply states that he wants to contest this case. Respondent does not state the reason for the late filing. Respondent does not state its defenses to the violations alleged in the citation.

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."

In this case, the record discloses and I find that Respondent received the citation on January 14, 2015, by UPS 2nd day air delivery. Respondent's owner Jorge Tacuri and his wife, Maria Tacuri, met with OSHA Assistant Area Director Young on January 29, 2015, for an informal conference. The informal conference was conducted in Spanish. Respondent was advised, in Spanish, that Respondent could contest the citation by sending a notice of contest letter to the OSHA Albany Area Office by February 5, 2015. It is undisputed that Respondent did not file a notice of contest on or before February 5, 2015. Therefore, Respondent's late notice of contest, postmarked on March 19, 2015 and received by the OSHA Area Office on March 23, 2015 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.⁶ *George Harms Constr. Co. v. Chao*, 371 F.3d 156 (3d Cir.

⁶ In *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002), the court concluded that the Commission did not have jurisdiction to reopen a citation under Rule 60(b), due to a party's inadvertence or excusable neglect, once the citation was deemed a final order of the Commission pursuant to section 10(a) of the Act. In this case, the Secretary does not contend that the Commission may not exercise jurisdiction based on Rule 60(b). Further, under

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.”⁷ 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. 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).

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*). In this case, the citation was received by Respondent on January 14, 2015. Respondent met with the OSHA Assistant Area Director regarding this citation on January 29, 2015, during which the contest method and contest deadline were explained to Respondent, in Spanish. Thereafter, Respondent delayed for seven weeks to write and mail the late notice of contest, dated March 17, 2015, postmarked March 19, 2015. Respondent has provided no explanation for the delay in filing its notice of contest. Therefore, Respondent is not entitled to relief under Rule 60(b)(6). The undersigned thus regards Respondent’s late notice of contest to be a request for relief under Rule 60(b)(1), due to “excusable neglect.”

In regard to Respondent’s request for relief because the late filing was due to “excusable neglect,” the Commission applies the equitable analysis stated by the Supreme

either the Commission precedent set out below or the Second Circuit’s *Russell P. Le Frois Builder* decision, the result is the same.

⁷ 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. In this case, there is no allegation that the Secretary or his representatives misled Respondent as to the notice of contest filing deadline.

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 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). The Commission has held 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, Rule 60(b) relief is not warranted. *A.W. Ross, Inc.*, 19 BNA OSHC at 1149; *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989).

In this case, Respondent prepared and filed a very brief late notice of contest, without explanation for the filing delay, without discussion of Respondent’s defenses to the violations alleged in the citation. Respondent’s late notice of contest does not dispute that Respondent received the citation on January 14, 2015. Respondent’s late notice of contest does not dispute that Assistant Area Director Young explained to Respondent’s owner, Mr. Tacuri, in Spanish, the notice of contest method and deadline, at the January 29, 2015 informal conference. Thereafter, since April 10, 2015, Respondent has failed to participate in this proceeding in any manner. Respondent has not returned voice mail messages left by the Assistant Area Director, in Spanish, or by the undersigned Judge’s legal assistant. Respondent has not provided the Commission or the Secretary with its current address and contact information.

Ensuring the timely management and processing of important business documents, such as the citation received in this case, is within the employer’s reasonable control. See *CalHar Constr., Inc.*, 18 BNA OSHC at 2153; *J.F. Shea Co.*, 15 BNA OSHC 1092, 1093 (No. 89-

0976, 1991)(relief denied where the error in timely handling the citation occurred in the employer's own office). Maintenance of orderly procedures for handling important documents is 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 this case.

Finally, the Commission has held that the moving party must allege a meritorious defense to be eligible for Rule 60(b) relief. *See Northwest Conduit Corp.*, 18 BNA OSHC at 1952. In the late notice of contest, Respondent does not allege a meritorious defense to the citation.

Decision

Respondent has failed to provide its current address and contact information to the Commission or to the Secretary, a party to this proceeding. Therefore, pursuant to Commission Rule 6, Respondent is deemed to have waived his right to notice and service under the rules.

I find that Respondent has been given proper notice of this proceeding and the opportunity to participate. I find that Respondent has failed to participate in this proceeding and abandoned Respondent's notice of contest. I find Respondent in default.

Further, 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 Supplemental Motion is Granted, Respondent's late notice of contest is Dismissed, and the citation issued on November 3, 2004 is Affirmed in all respects.

SO ORDERED.

Dated: March 24, 2016
Washington, D.C.

/s/
Honorable Carol A. Baumerich
Judge, OSHRC