

**United States of America**  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
**1120 20th Street, N.W., Ninth Floor**  
**Washington, D.C. 20036-3457**

**SECRETARY OF LABOR,**

**Complainant,**

**v.**

**CONSOLIDATED BARRICADES, INC.,**

**Respondent.**

OSHRC DOCKET NO. 15-1968

**DECISION AND ORDER GRANTING SECRETARY'S MOTION TO DISMISS  
RESPONDENT'S LATE NOTICE OF CONTEST**

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). On February 11, 2016, the Secretary filed his Motion to Dismiss Respondent's Late Notice of Contest (Motion to Dismiss). Complainant seeks the dismissal of Consolidated Barricades, Inc.'s (Respondent) Notice of Contest (NOC) as untimely filed, and an order affirming the citation and proposed penalties in their entirety. For the reasons that follow, the Secretary's Motion to Dismiss is GRANTED.

**I. Background**

The Occupational Health and Safety Administration (OSHA) conducted an inspection of Respondent's worksite located at 179 Dillenbeck Road, Fultonville, New York 12072 from July 13, 2012 through July 18, 2012. On November 16, 2012, OSHA issued a two item serious citation to Respondent.<sup>1</sup> The citation proposed Respondent pay a penalty in the amount of

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<sup>1</sup> Citation 1, Item 1a alleges a violation of 29 CFR § 1910.132(d)(1) for failing on or before July 13, 2012 to perform a personal protective equipment hazard assessment for employees exposed to hand laceration hazards when working

\$3,200. OSHA mailed the citations to the Respondent's worksite via United States Postal Service (USPS) certified mail, return receipt requested, on about November 19, 2012. Based on the tracking service provided by USPS, the citation was received by Respondent on December 5, 2012.<sup>2</sup>

The citations informed Respondent of its right to contest the citations and stated, in part:

**Right to Contest: ...**

**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.**

(Motion to Dismiss, Memorandum of Law, p. 3).

Because Respondent received the citation on December 5, 2012, Respondent's NOC was due by December 28, 2012.<sup>3</sup> Respondent failed to file its NOC by that date. The penalty was accordingly due to be paid by Respondent by January 28, 2013. (Exh. B).

By letter dated October 30, 2014, Respondent was advised by OSHA that it was delinquent and interest was being assessed on the penalty.<sup>4</sup> (Exh. D).

By "Letter of Contest" dated November 10, 2015 addressed to the Commission, Respondent stated that one of the citation items concerned the use of a fork lift "that has never been used by anyone but me" and another citation item "was not truthful." (Exh. E, p. 2). In its NOC, Respondent did not offer any basis why it had not timely filed a NOC by December 28, 2012.

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with metal products. Citation 1, Item 1b alleges a violation of 29 CFR § 1910.138(a) for employees not wearing hand protection when handling sharp metal and wooden panels on or before July 13, 2012. Citation 1, Item 2 alleges a violation of 29 C.F.R. § 1910.178(1)(i) where the employer failed to train and evaluate employees in the safe operation of powered industrial trucks on or before July 13, 2012.

<sup>2</sup> See Motion to Dismiss, at Exh. C.

<sup>3</sup> The Court notes that both December 24 and December 25, 2012 were federal holidays that year. Respondent has not disputed its receipt of the citation on December 5, 2012.

<sup>4</sup> Respondent was advised the total amount due was \$3,604.67. (Exh. D).

On November 18, 2015, OSHRC docketed the matter as Docket No. 15-1968.

On December 2, 2015, Respondent timely submitted its request for simplified proceedings to the Chief Judge.<sup>5</sup> A judge may grant a request for simplified proceedings at his or her discretion. 29 C.F.R. § 2200.203(c). Here, no judge granted Respondent's request for simplified proceedings.<sup>6</sup> Cases selected for Simplified Proceedings are those that do not involve complex issues of law or fact. 29 C.F.R. § 2200.202(a). Cases involving a late notice of contest are not typically selected for Simplified Proceedings.

On December 4, 2015, the Secretary filed his Motion for an Extension of Time to Plead or Otherwise Move. The Secretary sought a 45 day extension to file his pleading or otherwise move through January 14, 2016.<sup>7</sup>

On January 5, 2016, the Chief Judge granted the Secretary's Motion for an Extension of Time to Plead or Otherwise Move through January 14, 2016.

On January 25, 2016, the Secretary filed his [Second] Motion for an Extension of Time to Plead or Otherwise Move seeking an extension to file his pleading or otherwise move through February 16, 2016.

On February 1, 2016, Respondent filed its Motion of Opposition and For Dismissal.<sup>8</sup> Respondent reiterated its position that "no one but myself, Joe Melideo, drives that fork truck and no one else ever has with my knowledge or approval." As to the "other citation" relating to

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<sup>5</sup> Within 20 days of the notice of docketing, a party may request the case be assigned for Simplified Proceedings; such requests to be acted upon within 15 days of its receipt by the judge. 29 C.F.R. § 2200.203(b)(c).

<sup>6</sup> To any extent necessary, Respondent's Request for Simplified Proceedings is DENIED, *nunc pro tunc*.

<sup>7</sup> The Secretary's pleading was normally due 20 days after receipt of the NOC. 29 C.F.R. § 2200.34(a)(1). However, here the Secretary's time to file his pleading did not run from his receipt of the NOC since Respondent timely requested Simplified Proceedings. 29 C.F.R. § 2200.203(d). The period for filing his pleading runs from the issuance of a Court notice denying Simplified Proceedings. (*Id.*)

<sup>8</sup> Respondent's attempt to combine its Opposition to the Secretary's Second Motion for an Extension of Time to Plead or Otherwise Move with its own Motion to Dismiss the citation violated Commission Rule 40 that states "[a] motion shall not be included in another document, such as a brief or a petition for discretionary review, but shall be made in a separate document." 29 C.F.R. § 2200.40(a).

“PPE’s”, Respondent stated it has “always supplied gloves and made them available to the people who work for me[.]” Respondent asked the citations [sic] be “dismissed in the interest of fundamental fairness and proper conduct.”

On February 11, 2016, the Secretary filed his Motion to Dismiss Respondent’s Late Notice of Contest. The Secretary’s seeks affirmance of both the citation and its proposed penalties because Respondent failed to file a timely NOC and has demonstrated neither “excusable neglect” pursuant to Fed. R. Civ. P. 60(b) nor a meritorious defense.

On March 18, 2016, the case was assigned to the undersigned with no indication that it was to proceed as a simplified case.

Respondent has not filed any response to the Secretary’s Motion to Dismiss Respondent’s Late Notice of Contest.

## **II. Discussion**

Upon receiving a citation and notification of penalty, an employer has 15 working days within which it must file a NOC. *See* section 10(a) of the Act, 29 U.S.C. § 659(a). If the employer does not file a NOC within the specified time 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.” *Id.* An uncontested citation is generally unreviewable. *See Culver v. U.S. Dept. of Labor Occupational Safety & Health Administration*, 248 Fed. Appx. 403 (3<sup>rd</sup> Cir. 2007).

Respondent may overcome the Commission’s final order under Federal Rule of Civil Procedure 60(b)(1) (Rule 60(b)), if it was entered as a result of “mistake, inadvertence, surprise or excusable neglect.” *See George Harms Constr. Co., Inc. v. Chao*, 371 F.3d 156, 163 (3<sup>rd</sup> Cir. 2004) (Commission “has jurisdiction to entertain a late notice of contest under” the excusable

neglect standard of Rule 60(b)(1));<sup>9</sup> *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981). In determining whether a late-filed NOC was due to “excusable neglect,” the Commission follows the Supreme Court’s test in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 381 (1993). In *Pioneer*, “excusable neglect” is defined as an equitable determination of all relevant circumstances surrounding the party’s omission, and the prejudice these circumstances presented to the opposing party. This definition has been applied to other federal procedural rules, including proceedings by the Commission. See *NW Conduit Corp.*, 18 BNA OSHC 1948, 1950 (No. 97-851, 1999). In *NW Conduit*, the Commission quoted *Pioneer*, noting that the “reason for the delay, including whether it was within the reasonable control of the movant,” is a “key factor” and, in appropriate circumstances, the dispositive factor. *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148 (No. 9-0945, 2000); *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-0367, 2000); *NYNEX*, 18 OSHC 1944, 1947 (No. 95-1671, 1999) (finding because employer failed to present evidence on the reason for delay, it did not establish excusable neglect). See also *Hospital Del Maestro v. NLRB*, 263 F.3d 173, 174-75 (1<sup>st</sup> Cir. 2001) (“excuse given for the late filing must have the greatest import”).

Here, Respondent has provided no excusable basis for its failure to file a timely NOC before November 10, 2015.<sup>10</sup> Respondent does not dispute its receipt of the citation on December 5, 2012; more than three years ago.

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<sup>9</sup> But see *Chao v. Russell P. Le Frois Builder Inc.*, 291 F.3d 219 (2d Cir. 2002) (concluding Commission may not exercise jurisdiction based on Rule 60(b)(1)).

<sup>10</sup> The Court also finds that Respondent has not presented adequate evidence to support the proffering of any meritorious defense(s) to the citation. Respondent provided no credible defense to its alleged violation of 29 CFR § 1910.132(d)(1) for failing on or before July 13, 2012 to perform a personal protective equipment hazard assessment for employees exposed to hand laceration hazards when working with metal products. Similarly, Respondent provided no credible evidence of a meritorious defense to Citation 1, Item 1b that alleged a violation of 29 CFR § 1910.138(a) for employees not wearing hand protection when handling sharp metal and wooden panels on or before July 13, 2012. Respondent alleged only that gloves were available and that he, Mr. Melideo, wore them. Lastly, Respondent failed to present adequate evidence to support the proffering of any meritorious defense to Citation 1, Item 2 that alleged a violation of 29 C.F.R. § 1910.178(1)(i) where the employer failed to train and evaluate

Respondent has remained silent on the late NOC issues put forth by the Secretary in his Motion to Dismiss. Respondent has not presented sufficient evidence for the Court to conclude that Respondent timely filed a NOC, or that its failure to timely file a NOC was due to excusable neglect. Respondent has not demonstrated any sort of mistake, inadvertence, surprise or excusable neglect that justifies grounds for relief from the Commission's final order under Rule 60(b). *See Burrow Paper Corp*, No. 09-1559, 2010 WL 1715389, at \*2 (O.S.H.R.C.A.L.J. Jan. 19, 2010) (Employer has burden of its own lack of diligence in acting upon information contained in the citation.). Nor has Respondent demonstrated any basis for relief under Rule 60(b)(2)(newly discovered evidence), 60(b)(3)(fraud, misrepresentation, or misconduct by the Secretary), or 60(b)(6)(any other reason justifying relief). Respondent has the burden of proving that it is entitled to Rule 60(b) relief; something it has failed to do here. *NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999).

Respondent also has the burden of proving any motion to dismiss the citation has merit. This burden it has failed to carry. The Court finds Respondent's general denial of the allegations set forth in the Secretary's citation in its February 1, 2016 filing inadequate to support a motion to dismiss the citation.

### **III. Conclusion**

The Court finds that Respondent failed to file a timely NOC and no relief under Rule 60(b) is justified.

The Court also finds Respondent's motion to dismiss to have been filed in violation of the Commission rules and to be without adequate basis. The Court finds Respondent's motion to dismiss the citation to be without merit.

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employees in the safe operation of powered industrial trucks on or before July 13, 2012. Respondent alleged it only had knowledge Mr. Melideo drove a forklift truck.

**IV. Order**

WHEREFORE, IT IS ORDERED Respondent's Motion of Opposition and For Dismissal, to the extent it includes a motion to dismiss, is DENIED,

IT IS FURTHER ORDERED that the Secretary's Motion to Dismiss is GRANTED, Respondent's November 10, 2015 NOC is dismissed in its entirety with prejudice as untimely filed, and the citation and penalties are AFFIRMED in all respects.

SO ORDERED.

/s/  
The Honorable Dennis L. Phillips  
U.S. OSHRC JUDGE

Date: May 5, 2016  
Washington, D.C.