



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

SECRETARY OF LABOR,

Complainant,

v.

URBAN ERECTORS, LLC,

Respondent.

OSHRC Docket No. 17-0140

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

This matter is before the Occupational Safety and Health Review Commission (“the Commission”) under section 10(a) of the Occupational Safety and Health Act of 1970, codified at 29 U.S.C. § 651 (“the Act”). The Secretary of Labor (“Secretary”) has filed a Motion to Dismiss Urban Erectors, LLC’s (“Respondent”) notice of contest (“NOC”) on the grounds that it was untimely filed. On April 27, 2017, Respondent filed its Motion in Opposition to the Secretary’s Motion along with a Motion for Dismissal of the Citations. For the reasons that follow, the Secretary’s Motion for an Order Dismissing Respondent’s Late Notice of Contest is GRANTED and Respondent’s Motion for Dismissal of the Citations is DENIED.

## **Background<sup>1</sup>**

The Occupational Safety and Health Administration (“OSHA”) Area Office located in Tarrytown, NY (“the OSHA office”) conducted an inspection of Respondent’s operation, d.b.a. Urban Erectors, LLC, on or about June 6 through June 16, 2016, at its worksite located at 1524 Boone Ave, Bronx, NY 10460. As a result of the inspection, OSHA issued a Citation and Notification of Penalty (“Citation”) to Respondent on or about August 1, 2016, that included: Serious Citation 1, Items 1 and 2 with proposed penalties totaling \$ 9,240.00. The Citation advised Respondent that its NOC was due within 15 working days from receipt which would have been August 25, 2016.

On August 1, 2016, the OSHA office sent a copy of the Citation to Respondent, via United States Postal Service (“USPS”) certified mail (tracking number 7015 1520 0001 4091 4066), to its business address (6 Keiffer Lane, Kingston, NY 12401). On August 4, 2016, the Citation was delivered and signed for by “Jamie Sanchez”. On December 13, 2016, OSHA sent Respondent a delinquency letter indicating that payment of the proposed penalties was past due and interest was accruing under the Debt Collections Act at the same address (6 Keiffer Lane, Kingston, NY 12401) via USPS certified mail (tracking number 7015 3430 0000 7837 1490). On December 19, 2016, the letter was delivered and signed for by the same person, “Jamie Sanchez”. Thereafter, on or about December 21, 2016, the Commission received a letter from Respondent contesting the Citation four months after its NOC was due. Although not specified in its late NOC letter,

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<sup>1</sup> The background information is based on the Secretary’s motion to dismiss, supporting memorandum of law, and the exhibits attached thereto, which include the following: 1) Citation and Notification of Penalty; 2) USPS Certified Mail Receipt; 3) USPS Tracking Information Sheet; 4) Debt Collection Letter dated December 13, 2016, together with USPS Certified Mail Receipt; 5) Late Notice of Contest letter dated December 21, 2016; 6) The Secretary’s Motion to Dismiss Respondent’s Late Notice of Contest dated April 11, 2016; and 7) Respondent’s Motion in Opposition to the Secretary’s Motion to Dismiss dated April 27, 2017.

the undersigned treats Respondent's December 21, 2016, letter as a claim for relief from a final order under Rule 60(b) of the Federal Rules of Civil Procedure ("Rule 60(b)").

### **Discussion**

Section 10(a) of the Act requires an employer to notify OSHA within 15 working days of receiving a citation of its intent to contest the citation and/or proposed penalty. 29 U.S.C. § 659 (a). Failure to do so results in the citation becoming a final order of the Commission "and not subject to review by any court or agency." *Id.* A party adversely affected by a final order may seek relief under Rule 60(b). The Second Circuit Court of Appeals, which has appellate jurisdiction over this case, has held that § 10(a) of the Act precludes the Commission from exercising jurisdiction to apply Rule 60(b) to excuse a late NOC. *Chao v. Russell P. LeFrois Builder, Inc.*, 291 F.3d 219 (2<sup>nd</sup> Cir. 2002). However, the Commission takes the position that it has the authority to grant relief under Rule 60(b). *Jackson Assocs. of Nassau*, 16 BNA OSHC 1261, 1263 (No. 91-0438, 1993) (finding that nothing in the Act precludes the application of Rule 60(b) of the Federal Rules of Civil Procedure to Commission Proceedings). It is Respondent's burden to show a sufficient basis for the relief. *Roy Kay, Inc.*, 13 BNA OSHC 2021 (No. 88-1748, 1989).

*Inter alia*, Rule 60(b) permits such a late filing to be excused if the final order was entered as a result of "mistake, inadvertence, surprise, or excusable neglect" or "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." *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981) (citations omitted). Additionally, a movant seeking relief under Rule 60(b) must also demonstrate the existence of a meritorious defense. *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1951 (No. 97-851, 1999). That element can be "satisfied

with minimal allegations that the employer could prove a defense if given the opportunity.” *Jackson Assoc.*, 16 BNA OSHC at 1267. Respondent did not assert a “meritorious defense” in its late NOC, nor did it assert such a defense in its opposition to the Secretary’s motion.

In this case, Respondent filed a late NOC letter with the Commission, four months after it received the Citation package. In its December 21, 2016, late NOC letter, Respondent merely contested the Citation without offering a reason for the delay in filing its NOC. However, in its April 27, 2017, opposition to the Secretary’s motion, Respondent concedes receipt of the Citation on August 4, 2016, but states “apparently, the secretary who signed for the citation package didn’t open the envelope to discover the citation was enclosed and misplaced or discarded the envelope in the office.”

### ***Proper Service***

By its response in opposition to the Secretary’s motion, Respondent seems to take the position that it didn’t receive proper notice/service of the Citation because it was received and mishandled by its own secretary and therefore its NOC is not late. The Commission has held that the test to be applied in determining whether service is proper is whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of penalty and an opportunity to determine whether to abate or contest. *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474 (No. 76-2165, 1979). Further, the Commission has held that service upon an employee who will know to whom in the corporate hierarchy to forward the documents will satisfy this test. *Id.* In this case, Respondent states that the Citation was received by its secretary. While Respondent asserts that its secretary failed to open the envelope to discover the Citation package, it does not assert that the secretary did not know the proper person to forward the document(s) to within the company’s hierarchy. Service of the Citation upon Respondent was perfected and

proper when its secretary received it on August 4, 2016, notwithstanding what she did, or did not do, with the Citation thereafter.

### ***Excusable Neglect***

Although Respondent's reason for failing to file a timely NOC does not appear to be the result of "excusable neglect", the undersigned is compelled to analyze its justification on those grounds.

The Commission follows the test outlined by the Supreme Court in *Pioneer Inv. Serv. v. Brunswick Assoc.*, 507 U.S. 380 (1993) ("*Pioneer*"), to evaluate a claim of excusable neglect. Using the *Pioneer* test, the Commission considers all relevant circumstances, including: 1) the danger of prejudice to the opposing party, 2) the length of the delay and its potential impact on judicial proceedings, 3) the reason for the delay, including whether it was in the reasonable control of the movant, and 4) whether the movant acted in good faith. *Id.* The Commission has held that the "reason for the delay, and 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.*, BNA OSHC 1147, 1148 (No. 9-0945, 2000); *CalHar Constr. Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-0367, 2000). Here, Respondent asserts that the delay in filing its NOC was caused by a secretary who failed to open the envelope to discover the Citation. The Commission expects employers to maintain orderly procedures for handling important documents. *NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999) (quoting *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989)). The delay in filing its NOC was definitely within the "reasonable control" of Respondent in that the Citation was received at its office by one of its own employees. The Commission has denied Rule 60(b) relief in cases where the late filing was due to mishandling the citation, changes in management, or absence of the individual responsible

for OSHA matters. *See, e.g., Louisiana-Pacific Corp.*, 13 BNA OSHC at 2021; *J.F. Shea Co.*, 15 BNA OSHC 1092, 1094 (No. 89-976, 1991); *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991). Finally, Commission precedent is well-settled that the OSHA citation plainly states the requirement to file an NOC within the prescribed period and that an employer “must bear the burden of its own lack of diligence in failing to carefully read and act upon the information contained in the citations.” *Roy Kay, Inc.*, 13 BNA OSHC at 2022; *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991).

I find that the record clearly establishes that Respondent was served with the Citation, via USPS, which set forth the requirement to file an NOC within the 15-day timeframe required by the Act. Further, I find that Respondent’s NOC was due on or before August 25, 2016; however, the Commission did not receive an NOC in this case until December 21<sup>st</sup>. Respondent’s NOC was untimely and relief under Rule 60(b) is not warranted in this case.

### **ORDER**

For all of the foregoing reasons, the Secretary’s Motion to Dismiss Respondent’s Late Notice of Contest is GRANTED, and the Citations and proposed penalties are affirmed in all respects.

SO ORDERED.

/s/Keith E. Bell  
Keith E. Bell  
Judge, OSHRC

Dated: September 18, 2017  
Washington, D.C.