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. FRAME Q, LLC, Respondent.	OSHRC Docket No. 16-2010

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 (the Act), codified at 29 U.S.C. § 651. On February 27, 2017, the Secretary of Labor (Secretary) filed a Motion to Dismiss Respondent's Late Notices of Contest (Motion to Dismiss).[1] On March 20, 2017, Respondent filed its opposition to the Secretary's Motion to Dismiss. On September 18, 2017, the undersigned held a hearing to supplement the record. Thereafter, on October 18, 2017, the Secretary filed a Motion to Reopen the Record Based on Newly Discovered Evidence and to Admit Evidence into the Record (Motion to Reopen). On October 23, 2017, Respondent filed its opposition to the Secretary's Motion to Reopen. As a preliminary matter, the Secretary's Motion

[1] Although this decision only addresses case docket no. 16-2010, the Secretary's Motion to Dismiss covers this case along with related case docket nos. 16-2011, 16-2012, 16-2013, 16-2014 and 16-2015. None have been consolidated. On September 11, 2017, the undersigned issued a Decision and Order Granting the Secretary's Motion to Dismiss Respondent's Late Notice of Contest for case docket no. 16-2015. That decision became a final Order on October 25, 2017.

to Reopen is DENIED. It would be fundamentally unfair and highly prejudicial to admit this newly discovered evidence into the record without another supplemental hearing to give Respondent the opportunity to cross examine such evidence. Additionally, the undersigned finds that the evidence of record provides a sufficient basis for a decision on the Secretary's Motion to Dismiss. For the reasons that follow, the Secretary's Motion to Dismiss case docket no. 16-2010 is hereby GRANTED.

Background[2]

Respondent, Frame Q, LLC (Respondent or Frame Q), is a construction company with worksites all over the Northern New Jersey Area. Tr. 34. Frame Q uses a residence as its business address. *Id*. The Occupational Safety and Health Administration (OSHA) Area Office located in Hasbrouck Heights, NJ conducted five inspections of Frame Q's various worksites across Northern New Jersey from February 24, 2015, to December 22, 2015.

As a result of an inspection of Respondent's worksite at 27 Maple Ave. in Mahwah, New Jersey 07430 on February 24, 2015, OSHA issued a Citation that included: Serious Citation 1, Item 1; Willful Citation 2, Item 1; and Repeat Citation 3, Item 1 with total proposed penalties in the amount of $20,680.00. Ex. A to Motion to Dismiss. On June 22, 2015, the OSHA office sent a copy of the Citation to Respondent, via United States Postal Service (USPS) certified mail (tracking number 7014 3490 0001 1526 3859), to Respondent's residence and business address located at 200 B Commercial Ave., Palisades, NJ 07650 (known business address). Ex. A to Motion to Dismiss. The Citation advised Respondent that its Notice of Contest (NOC) was due within 15 working days from receipt. However, it is unclear when the Citation was received by

[2] The background information is based on the Secretary's Motion to Dismiss, supporting memorandum of law, and the exhibits attached thereto along with the evidence of record from the September 18, 2017, supplemental hearing. During the supplemental hearing, one document was moved and admitted into evidence without objection. It was a copy of the OSHA Area Director's affidavit (the same affidavit submitted in support of the Secretary's Motion to Dismiss). The affidavit was marked and is herein referenced as GX-1.

Respondent because the USPS tracking sheet appended to the Secretary's Motion to Dismiss lists the package as "in transit to destination" on June 26, 2015, with no further updates. Ex. A to Motion to Dismiss. Neither the package or its green card were returned. GX-1. OSHA then mailed the Citation package, via, USPS first-class mail. *Id*. That package was not returned either. *Id*. On September 15, 2015, 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. Ex. A to Motion to Dismiss.

On or about November 29, 2016, the Commission received a letter from Respondent's Attorney (dated November 23, 2016) contesting the Citation package at issue long after the NOC was due.[3] Notably, the reason given, in this letter, for the delay in filing the NOC was that Respondent, Juan Quevedo, "did not fully understand OSHA rule and regulations".

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.* The Commission derives its authority to grant relief from a final order from Rule 60(b) of the Federal Rules of Civil Procedure (Rule 60(b)). *Jackson Assocs. of Nassau,* 16 BNA OSHC 1261, 1263 (No. 91-0438, 1993).[4]

Rule 60(b)(6) justifies relief from operation of judgment for "any other reason" other than Rules 60(b)(1)-(5). *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1144 (2d Cir. 1994).

[3] Respondent's NOC purported to contest case docket numbers: 16-2010; 16-2011; 16-2012; 16-2013; and 16-2014 along with docket no. 16-2015 which has already been adjudicated.

[4] The Second Circuit, which has appellate jurisdiction over this case, has held that section 10(a) of the Act precludes the Commission from applying Rule 60(b) to excuse a late NOC. *Chao v. Russell P. LeFrois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002). However, the Commission has followed the holding of the Third Circuit that section 10(a) is not a bar to Commission review and that it "has jurisdiction to entertain a late notice of contest under" the excusable neglect standard of Rule 60(b). *See George Harms Constr. Co. v. Chao*, 371 F.3d 156, 161 (3d Cir. 2004). Applying either interpretation of section 10(a) to this case doesn't change the outcome.

This rule is a "catch all" provision, which requires a showing of "extraordinary circumstances." *Klapprott v. United States*, 335 U.S. 601, 604-609 (1949). Rule 60(b)(6) is a "catch-all" provision that is narrowly interpreted. *See, e.g., Dowell v. State Farm Fire & Cas. Co.,* 993F.2d 46, 48 (4th Cir. 1993). "Rule 60(b)(6) . . . grants federal courts broad authority to relieve a party from a final judgment . . . provided that the motion . . . is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988). The rule has been described as a "grand reservoir of equitable power to do justice in a particular case." *See Compton v. Alton Steamship Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (quoting 12 James Moore *et. al.*, *Moore's Federal Practice* ¶ 60.48[1](3d ed. 2017)); *see also Wesco Prods. Co. v. Alloy Auto. Co.*, 880 F.2d 981, 983 (7th Cir. 1989). The Commission has applied Rule 60(b)(6) in setting aside final judgments under circumstances such as "absence, illness, or similar disabilit[ies] [that] prevent[s] a party from acting to protect its interests." *Branciforte Builders, Inc.,* 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981). The movant has the burden of demonstrating that it is entitled to relief. Additionally, a movant seeking relief under Rule 60(b) must also demonstrate the existence of a meritorious defense.[5] *Nw. Conduit Corp.*, 18 BNA OSHC 1948, 1951 (No. 97-851, 1999). The meritorious element can be "satisfied with minimal allegations that the employer could prove a defense if given the opportunity." *Jackson Assocs.*, 16 BNA OSHC at 1267.

Rule 60(b)(6) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *See e.g., Klapprott*, 335 U.S. at 615 (upholding Rule 60(b)(6) motion for inmate party who was poor, ill, and, therefore, unable to

[5]The Second Circuit has held that "[i]n order to make a sufficient showing of a meritorious defense in connection with a motion to vacate a default judgment, the defendant need not establish his defense conclusively, but he must present evidence of facts that, if proven at trial, would constitute a complete defense." *SEC v. Robert J.* McNulty, 137 F.3d 732, 740 (2d Cir. 1998).

oppose denaturalization proceeding in a timely manner); *accord Liljeberg*, 486 U.S. at 864 (finding judge's conflict of interest undiscoverable by parties).

This "catch-all" provision, however, does not grant courts with unfettered discretion to set aside a judgment in all cases. *Klapprott*, 335 U.S. at 615. Before a court grants a Rule 60(b)(6) motion, the moving party must prove the following two elements: (1) that there are reasons for relief *other* than those set out in more specific clauses of Rule 60(b); and (2) that there is a valid reason or an *extraordinary circumstance* justifying relief. *Id*. As a matter of policy, courts are seeking to preserve a balance between serving the ends of justice and ensuring that litigation reaches an end within a finite period of time. *See, e.g., Paddington Partners* 34 F.3d at 1144; *see also Bankers Mortg. Co. v. United States*, 423 F.2d 73, 77 (5th Cir. 1970) (promoting the "sanctity of final judgments"); *Toscano v. C.I.R.*, 441 F.2d 930-34 (9th Cir. 1971) (stating that "finality of judgments . . . is an important social interest"). Here, Respondent, Juan Quevedo, claims that he didn't receive the Citation package because it was delivered to the wrong address. Tr. 52. If true, his failure to timely contest the Citation cannot be analyzed under of Rule 60(b)(1)-(5). Rather, Respondent's stated basis for relief is properly analyzed under Rule 60(b)(6).

Extraordinary Circumstances

The "other reason that justifies relief" provision requires a showing of "extraordinary circumstances" for a court to grant relief. *Liljeberg*, 486 U.S. at 863-64. This provision exists to balance the broad power vested in the court pursuant to Rule 60(b)(6) and the interest in the finality of judgments. *Blinds, Inc. v. White,* 536 F.3d 244, 255 (3d Cir. 2008). The term "extraordinary circumstances" derives from two cases, one in which relief was granted, *Klapprott*, 335 U.S. 601, 604-09 (1949), and the other in which relief was denied, *Ackermann v.*

United States, 340 U.S. 193, 195-97 (1950). In *Klapprott*, the Supreme Court granted a party 60(b)(6) relief, by ordering that a denaturalization proceeding be set aside nearly four (4) years after it was entered. *Klapprott*, 335 U.S. at 604-609. The denaturalization judgment was rendered by default because the movant never appeared. *Id.* During the denaturalization proceeding, the movant was ill, penniless, and had been imprisoned prior to his receipt of the denaturalization complaint. *Id.* As a result, the movant was unable to appear and defend himself in the civil denaturalization proceeding. *Id.* The Court reasoned that the movant's allegations constituted an extraordinary circumstance and could not "logically be classified as mere 'neglect' on his part." *Id.* The Court stated that the movant—jailed, weakened with illness, and without a lawyer in the denaturalization proceedings or the funds to secure one—was unable to defend himself in court. *Id.* at 613-14. One year later, the Supreme Court denied 60(b)(6) relief to a movant who failed to appeal judgment from denaturalization proceedings in which he was represented by counsel. *Ackerman,* 340 U.S. at 195-197. In so doing, the Court distinguished its decision in *Ackerman* from that in *Klapprott* noting the difference was "choice and no choice, imprisonment and freedom of action; no trial and trial; no counsel and counsel; [and] no chance for negligence and inexcusable negligence." *Ackerman,* 340 U.S. at 202. More recently, the Supreme Court held that a district court's denial of petitioner's motion under Rule 60(b)(6) was an abuse of discretion after finding that petitioner clearly established ineffective assistance of counsel in a capital murder case. *Buck v. Davis*, 580 U.S. __, 137 S.Ct. 759 (2017).

The Commission has also decided cases dealing with Rule 60(b)(6) jurisdiction. Consistent with the Supreme Court's analysis, the Commission has held that a party seeking relief under Rule 60(b)(6) has the burden of persuasion that there are "extraordinary

circumstances showing that the employer is faultless in the delay." *Treeman Landscaping*, 25 BNA OSHC 2048, 2048 (No. 10-2333, 2016).

Although Respondent, Juan Quevedo, cannot prove that he did not receive the Citation package, in order to show "extraordinary circumstances" warranting relief under Rule 60(b)(6), he must, at a minimum, show that he played no role in causing his NOC to be filed late.

Sufficiency of Service

The Commission has consistently held § 10(a) of the Act governs service of citations. *B.J. Hughes, Inc*., 7 BNA OSHC 1471, 1474 n. 6 (No. 76-2165, 1979). It requires the Secretary to "notify the employer by certified mail of the penalty…". It provides no more specificity. In *B.J. Hughes*, the Commission addressed the Secretary's obligation under § 10(a), holding 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 proposed penalty and an opportunity to determine whether to abate or contest. *B.J. Hughes,* 7 BNA OSHC at 1474. In the case at bar, the evidence reflects that the Citation package was mailed through USPS certified mail return receipt requested. GX-1. The Citation package was mailed to Respondent's known business address. Ex. A to Motion to Dismiss. However, neither the package nor receipt were returned. As a follow-up, OSHA mailed the Citation package a second time using regular mail. Tr. 23-24.

In *Powell v. Commissioner*, 958 F.2d 53, 54 (4th Cir. 1992) the court held that, in the absence of evidence to the contrary, it is reasonable to presume that the United States Postal Service officials have properly discharged their duties. Normally, the fact that OSHA mailed the Citation packages using the Postal Service would entitle it to a presumption of delivery

regardless of Respondent's assertion of non-receipt. *See Rosenthal v. Walker*, 111 U.S. 185, 193 (1884), that notes

> If a letter properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed, from the known course of business in the post-office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.

However, the common law mailbox rule presumption is rebuttable with evidence that the letter was never received. *Rios v. Nicholson*, 490 F.3d 928, 931 (Fed. Cir. 2007). "If there is opposing evidence that the letter was not received, the trier of fact must weigh the evidence 'with all the other circumstances of the case' to determine whether the letter was actually received." *Tatum v. MSPB*, 482 F. App'x. 554, 556 (Fed. Cir. 2012) (unpublished) (citing *Rios v. Nicholson*, 490 F.3d at 931 (2007)). Juan Quevedo testified that he only received one Citation Package (16-2015). Tr. 51. The reason Mr. Quevedo gave for receiving only one Citation is that he moved from his known business address and residence to which the Citations at issue were sent to 315 7th Street in Fairview, NJ on or about July 4, 2015. Tr. 51-52. Although Mr. Quevedo conceded that he did not forward his mail to the new address through the Postal Service, he claimed that he informed OSHA of his new address. Tr. 52. However, Mr. Quevedo's claim of notification to OSHA is controverted by two OSHA Compliance Officers (CO). CO Howard Dixon testified that he conducted an inspection of a Frame Q worksite on December 22, 2015, months after Mr. Quevedo said he moved. Tr. 38. During that inspection, CO Dixon had a conversation with Mr. Quevedo, by phone, in which he was given the known business address in Palisades Park. Tr. 38-39. CO Sydenstricker testified that he too conducted an inspection of a Frame Q worksite in 2015. Tr. 44. At that time, he spoke to Mr. Quevedo, in person, and was also given the known

business address.[6] Tr. 45-46. OSHA Area Director, Lisa Levy testified that she had no information regarding an address for Frame Q other than the one in Palisades Park. Tr. 25. The weight of the evidence does not support Mr. Quevedo's claim that he informed OSHA of his new address in Fairview, NJ, neither does it rebut the presumption that USPS delivered or attempted to deliver the Citation package.

Mr. Quevedo admitted, under oath, that he did not forward his mail to the new address by filing a change of address form with the USPS. Tr. 52. He went on to claim that he almost doesn't receive mail which, if true, is likely a result of his failure to forward his mail. *Id.* Mr. Quevedo's decision not to forward his mail is inconsistent with the Commission's expectations of how responsible employers should handle such matters. *See La.-Pac. Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (holding that the Commission expects employers to maintain orderly procedures for handling important documents). Clearly, failing to forward mail to a new address falls short of an "orderly procedure" for receiving or handling important documents such as Citation packages. Also, Mr. Quevedo testified that he had relatives still living at the old address (200 B Commercial Ave., Palisades Park, NJ) after he moved to Fairview, NJ. Tr. 53. His mom lived in the old address after he moved as did his sister. Tr. 55-56. According to Mr. Quevedo, his sister forwards mail to him although she never told him that she received any mail from OSHA. Tr. 56.

Although the facts of the case before the court are not on point with those in the *Ackerman* case, the rationale used by the Court in *Ackerman* sheds light on whether "extraordinary circumstances" exists here. As in *Ackerman*, Mr. Quevedo's fate rests on his own

[6] When Mr. Quevedo spoke to CO Sydenstricker, the two conversed in Spanish. Tr. 57. This is important because Mr. Quevedo used the assistance of a Spanish interpreter at the hearing. However, it was clear to the undersigned that Mr. Quevedo understands some English based on the number of times, during the hearing, he attempted to answer questions without the aid of the interpreter.

choices. Mr. Quevedo could have chosen to forward his mail by filing a change of address form with the USPS. However, he chose not to do so. In the absence of such a formal and orderly process to ensure receipt of work-related mail, Mr. Quevedo could have informed OSHA of his new address when he moved. He chose not to do so. Mr. Quevedo could have set up a separate post office box for receipt of his work-related mail. The evidence does not reflect that he took that route either. At the very least, receipt of the first Citation package (16-2015) should have put Mr. Quevedo on notice that he might receive future communications from OSHA regarding those violations. However, Mr. Quevedo chose not to act. Respondent has failed to establish extraordinary circumstances to warrant relief under Rule 60(b)(6). The intervening factors make such a grant of relief to one who chose to forego his right to receive notice inequitable. Finally, Respondent has not asserted that it has a "meritorious defense". Accordingly, the undersigned finds that the Secretary properly served the Citation to Respondent at his known business address. However, Respondent failed to act and the Citation at issue became a final Order by operation of law.

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

Dated: February 5, 2018
Washington, D.C.