



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

SECRETARY OF LABOR,

Complainant,

v.

GTA CO., INC.,

Respondent.

OSHRC DOCKET NO. 19-0469

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

This matter 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 Andover, Massachusetts Area Office of the Occupational Safety and Health Administration (OSHA) conducted an inspection of a Respondent GTA Co., Inc. (GTA) job site located at West Wyoming Street, Melrose, Massachusetts, on December 7, 2018. The designated OSHA inspection number is 1365141. Following this inspection, on January 11, 2019, OSHA issued to Respondent GTA a two-item serious citation, a one-item willful citation, and a notification of penalty (citation). Respondent GTA received the citation on January 15, 2019. Therefore, the 15-working day notice of contest filing period ended on February 6, 2019.

Respondent mailed and faxed a late notice of contest letter, dated March 19, 2019, addressed to the Commission, in Washington, D.C. Respondent's late notice of contest letters, sent by facsimile and mail, were received by the Commission on March 21 and 25, 2019, respectively. The Commission issued a notice of docketing in this case on March 29, 2019.

Complainant, the Secretary of Labor (Secretary), filed a Motion to dismiss Respondent's late notice of contest, together with a supporting memorandum, declaration of OSHA Assistant Area Director (AAD) Sweeney with exhibits, and proposed order (Motion). In the Motion, the Secretary contends that Respondent failed to file a timely notice of contest, has not demonstrated grounds for relief pursuant to Federal Rule of Civil Procedure 60(b), and has not demonstrated a meritorious defense to the citation. The Motion requests that Respondent's late notice of contest be dismissed, and that the willful citation, issued on January 11, 2019, and the \$56,908.00 penalty proposed for the willful citation, be affirmed by operation of law as a final order of the Commission.

An Order to show cause issued directing Respondent to file a written response to the Secretary's Motion. In response, Respondent filed an Objection to the Secretary's Motion, together with a supporting memorandum and declaration of Respondent GTA President Antonelli. Thereafter, the Secretary filed a Reply.¹

For the reasons set forth below, the Secretary's Motion is Granted.

ISSUES

Was Respondent's March 19, 2019 notice of contest untimely filed?

If Respondent's notice of contest was untimely filed, may Respondent receive relief for the untimely filing under Federal Rule of Civil Procedure 60(b)?

*FINDINGS OF FACT*²

¹ During a conference call on October 28, 2019, Counsel for the Secretary and Counsel for Respondent were advised that the Secretary's assented to Motion for leave to file a Reply was granted and that the Secretary's Reply, attached to the Motion, was received. Respondent was offered an opportunity to respond to the Secretary's Reply. Respondent Counsel stated that further response was not necessary. The relevant case facts are not disputed.

² The factual findings are based on Respondent's March 19, 2019 late notice of contest, the Secretary's Motion, Respondent's Objection, and the Secretary's Reply. Exhibits filed with the Secretary's Motion and Declaration of AAD Sweeney include the January 11, 2019 citation in OSHA inspection # 1365141, excerpts from the OSHA 3000 Booklet, the signed certified mail return receipt and the USPS Tracking Report confirming Respondent's receipt of the January 11, 2019 citation on January 15, 2019, and the May 20, 2019 partial Informal Settlement Agreement

The OSHA Andover Area Office conducted an inspection of Respondent GTA's job site located at West Wyoming Street, Melrose, Massachusetts, on December 7, 2018. The designated OSHA inspection number is 1365141.

Shortly after the December 7, 2018 inspection, Respondent President Antonelli called OSHA AAD Sweeney to inquire about OSHA inspection # 1365141 and two other OSHA inspections. At the time of this conversation, no citation regarding OSHA inspection # 1365141 had issued. AAD Sweeney told Respondent President Antonelli that once he received the citation, Mr. Antonelli could contact the OSHA Andover Area Office if he wanted to schedule an informal conference. *See* Sweeney Declaration ¶ 5; Motion p. 2; Objection p. 2.

On January 11, 2019, OSHA issued to Respondent GTA a two-item serious citation, a one-item willful citation, and a notification of penalty (citation). The citation alleged violations of OSHA construction standards regarding excavations. The total penalty proposed was \$ 68,290.00. The total proposed penalty included a proposed penalty of \$56,908.00 for the willful citation. *See* Sweeney Declaration ¶ 6, Exhibit A; Objection p. 2.

Section 10(a) of the Act requires the employer to notify OSHA within fifteen working days of receiving the citation of its intent to contest the citation or proposed penalty. 29 U.S.C. § 659(a). *See* 29 C.F.R. § 1903.17(a). The citation advised Respondent of this requirement. The citation emphasized that unless Respondent informed OSHA in writing of its intention to contest the citation, within fifteen working days after receipt, the citation would become a final order of the Commission.

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**

in OSHA Inspection # 1365141. Filed with Respondent's Objection is the Declaration of GTA President Antonelli.

In the show cause Order, Respondent was instructed to state whether it disagreed with any of the factual representations set forth in the Secretary's Motion or in the show cause Order. Unless a factual disagreement is stated in Respondent's Objection or in GTA President Antonelli's Declaration, the representations of fact set forth in the Secretary's Motion and in the show cause Order are regarded as uncontested.

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.

See Sweeney Declaration ¶ 9, Exhibit A, page 2 (emphasis in original).

On January 11, 2019, the citation was sent to Respondent by certified mail return receipt requested. The OSHA Andover Area Office mailed the citation to Respondent, together with a copy of the *OSHA 3000 Employer Rights and Responsibilities Following a Federal OSHA Inspection Booklet* (OHSA 3000 Booklet). *See* Sweeney Declaration ¶ 7, Exhibit B. The OSHA 3000 Booklet provided information regarding the actions an Employer must take to timely submit a notice of contest after OSHA citations are received, including the following guidance.

How to Contest Citations

If you wish to contest any portion of your citation, you must submit a Notice of Intent to Contest **in writing** to the **OSHA area office within 15 working days after receipt of the Citation and Notification of Penalty**. This applies even if you have stated your disagreement with a citation, penalty, or abatement date during a telephone conversation or an informal conference.

See Sweeney Declaration Exhibit B, page no. 8 (emphasis supplied).

The OSHA 3000 Booklet also provided information regarding an informal conference and settlement, including the following guidance.

OSHA encourages you to take advantage of the opportunity to have an informal conference if you foresee any difficulties in complying with any part of the citation **Please note, however, that an informal conference must be held within the 15-working-day Notice of Intent to Contest period and will neither extend the 15-working-day contest period nor take the place of the filing of a written notice if you desire to contest.**

See Sweeney Declaration Exhibit B, page no. 4 (emphasis in original).

It is undisputed that Respondent GTA received the citation on January 15, 2019. *See* Sweeney Declaration ¶ 10, Exhibits C, D. Therefore, the 15-working day notice of contest filing period ended on February 6, 2019. *See* Sweeney Declaration ¶ 11.

It is undisputed that between January 15, 2019 when Respondent received the citation and February 6, 2019 when the notice of contest period ended, Respondent had no communication with AAD Sweeney or the OSHA Andover Area Office. *See* Sweeney Declaration ¶ 13; Motion

p. 4; Reply ¶ 4. Respondent GTA did not file a timely notice of contest on or before February 6, 2019. *See* Sweeney Declaration ¶ 12. After receiving the citation, Respondent GTA did not request an informal conference on or before February 6, 2019. *See* Sweeney Declaration ¶ 12; Motion p. 4.

It is undisputed that Respondent GTA did not make a timely penalty payment. On March 11, 2019, the OSHA Andover Area Office mailed a debt collection letter to Respondent regarding inspection # 1365141. *See* Sweeney Declaration ¶ 14; Motion p. 4.

It is undisputed that after receiving the citation on January 15, 2019, Respondent did not contact the OSHA Andover Area Office until March 18 or 19, 2019,³ when Respondent President Antonelli called AAD Sweeney. AAD Sweeney advised Mr. Antonelli that the OSHA citations issued regarding inspection # 1365141 and inspection # 1362185 had become final orders of the Commission as of February 6, 2019. AAD Sweeney further advised Mr. Antonelli that he would need to contact the Commission to provide a reason why Respondent did not respond to the citations during the 15-working day notice of contest period. AAD Sweeney also sent an email to Mr. Antonelli with the Commission's address. *See* Sweeney Declaration ¶ 15; Motion pp. 4-5; Reply ¶ 5; Objection p. 3; Antonelli Declaration ¶¶ 3, 4; March 19, 2019 late notice of contest.

Respondent mailed and faxed a late notice of contest letter, dated March 19, 2019, addressed to the Commission, in Washington, D.C. The late notice of contest letter was signed by Respondent President Antonelli. Respondent's late notice of contest, sent by facsimile, was received by the Commission on March 21, 2019.

The body of Respondent's March 19, 2019 late notice of contest letter states:

Re: Inspection Number(s): 1365141 and 1362185⁴

³ AAD Sweeney recalls that Respondent President Antonelli contacted her regarding inspection #1365141, on March 19, 2019. *See* Sweeney Declaration ¶ 15; Motion p. 4; Reply ¶ 4. In the March 19, 2019 late notice of contest letter, Mr. Antonelli recalls contacting ADD Sweeney on March 18, 2019.

⁴ Respondent's late notice of contest references two OSHA inspection numbers 1365141 and 1362185.

Respondent's late notice of contest regarding OSHA inspection # 1365141 was docketed with the Commission as OSHRC Docket no. 19-0469. This is the Respondent late notice of contest

Inspection Site: Melrose, MA

To whomever it may concern:

I received the following two (2) citations listed above in Melrose, MA. I have been and was in contact with Gail Sweeney from the Andover, MA OSHA office. I didn't realize that the last day to contest the citations and penalties was on February 6, 2019. I contacted Gail on Monday, March 18, 2019 to try and set up a time with the Andover OSHA office to discuss and go over the citations that were issued. In speaking with Gail this past Monday, she informed me that the time period to contest the violations had expired. She told me that I would need to request an extension from the Washington Office. Please accept this letter as a request for a time extension on a hearing to contest the citations and penalties. I appreciate your anticipated cooperation to this matter.

On March 20, 2019, Respondent provided a copy of the March 19, 2019 late notice of contest to AAD Sweeney. *See* Sweeney Declaration ¶ 16; Motion p. 5.

On April 1, 2019, AAD Sweeney sent an email message to Respondent President Antonelli to schedule an informal conference in response to Respondent's late notice of contest. On April 3, 2019, AAD Sweeney left a voice mail message for Mr. Antonelli to schedule an informal conference. In April 2019, there were several additional communications between AAD Sweeney and Mr. Antonelli to schedule an informal conference. The parties agreed to a meeting scheduled for May 14, 2019. *See* Sweeney Declaration ¶¶ 17, 18; Reply ¶ 6; Antonelli Declaration ¶ 2.

On May 14, 2019, Respondent President Antonelli attended a meeting with OSHA Andover Office Area Director (AD) Covello and AAD Sweeney. At the meeting, the participants discussed the citations issued to Respondent in OSHA inspection # 1365141. They also discussed the citations issued in two other OSHA inspections.⁵ Regarding the citations issued to Respondent in OSHA inspection # 1365141, Respondent President Antonelli agreed to accept serious citation

before the undersigned Judge in this case. The Secretary's Motion to dismiss in this case only concerns OSHA inspection # 1365141.

Respondent's late notice of contest regarding OSHA inspection # 1362185 was docketed with the Commission as OSHRC docket no. 19-0467. In that case, the parties submitted a full Informal Settlement Agreement, dated May 20, 2019. The Notice of Order and Report in OSHRC docket no. 19-0467 has become a final order of the Commission.

⁵ At the May 14, 2019 meeting the participants also discussed two other OSHA inspections regarding GTA, OSHA inspection numbers 1362185 and 1246054.

1, items 1 and 2, with a reduced penalty. OSHA AD Covello advised Mr. Antonelli that OSHA would not reclassify willful citation 2, item 1. Mr. Antonelli would not accept the willful citation. The willful citation remained unresolved when the meeting ended. *See* Sweeney Declaration ¶ 18, Exhibit E; Motion p. 5; Reply ¶ 6; Antonelli Declaration ¶ 2; Objection p. 2.

After the meeting AAD Sweeney prepared and sent to Respondent a partial Informal Settlement Agreement, regarding the citations issued in OSHA inspection # 1365141, reflecting the agreements reached by the parties during the May 14, 2019 meeting. The partial Informal Settlement Agreement resolved serious citation 1, items 1 and 2, with an agreed amended penalty. This partial Informal Settlement Agreement resolved Respondent's late notice of contest regarding serious citation 1, items 1 and 2. Respondent agreed to waive its right to contest the citations and penalties regarding serious citation 1, items 1 and 2. The partial Informal Settlement Agreement did not resolve willful citation 2, item 1, or Respondent's late notice of contest regarding willful citation 2.⁶ *See* Sweeney Declaration ¶ 19; Exhibit E; Motion pp. 5-6, n.5; Objection p. 3.

Respondent's March 19, 2019 late notice of contest, as it concerns willful citation 2, item 1, issued in OSHA inspection # 1365141, is the only outstanding citation and contest that remain before the undersigned Judge for decision in this case OSHRC docket no. 19-0469.

ANALYSIS

⁶ A Joint Notification of Partial Settlement regarding OSHA inspection # 1365141 was filed, on November 4, 2019, reflecting the parties' amicable resolution of serious citation 1, items 1 and 2, as set forth in the May 20, 2019 partial Informal Settlement Agreement. *See* Sweeney Declaration ¶ 19; Exhibit E. The Joint Notification of Partial Settlement also reflects Respondent's withdrawal of its late notice of contest regarding serious citation 1, items 1 and 2, in OSHA inspection #1365141. *See* Commission Rule 100(b).

On November 5, 2019, an Order of Severance issued severing the resolved serious citation 1, items 1 and 2, from the unresolved willful citation 2, item 1, in OSHA inspection # 1365141. The serious citations items will be resolved independently in a new case assigned OSHRC docket no. 19-1694.

On June 10, 2019, revised Commission Rules became effective, including revised Commission Rule 100 - Settlement. OSHRC Rules of Procedure, 84 Fed. Reg. 14554 (April 10, 2019) (<https://www.govinfo.gov/content/pkg/FR-2019-04-10/pdf/2019-06581.pdf>) corrected at 84 Fed. Reg. 45654 (Aug. 30, 2019) (<https://www.govinfo.gov/content/pkg/FR-2019-08-30/pdf/2019-18736.pdf>)) and 84 Fed. Reg. 53052 (<https://www.govinfo.gov/content/pkg/FR-2019-10-04/pdf/2019-21414.pdf>) (to be codified at 29 C.F.R. Part 2200).

Respondent's March 19, 2019 notice of contest was not timely filed.

Pursuant to section 10(a) of the Act, 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 working 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.” 29 U.S.C. § 659(a).

The Secretary of Labor has prescribed requirements for an employer to timely make a notice of contest. The employer contest must be made in writing.⁷ 29 C.F.R. § 1903.17(a). *See Sec’y of Labor v. Barretto Granite Corp.*, 830 F.2d 396, 398 (1st Cir. 1987) (per curiam).

The citation Respondent received on January 15, 2019, regarding OSHA inspection #1365141, advised Respondent of the contest filing deadline. The citation emphasized that unless Respondent informed the OSHA Area Director, in writing, of its intention to contest the citation, within 15-working days after receipt, the citation would become a final order of the Commission. *See Sweeney Declaration* ¶ 9, Exhibit A, page 2. The OSHA 3000 Booklet, sent to Respondent with the citation, also provided information regarding the actions an employer must take to timely submit a notice of contest after OSHA citations are received. *See Sweeney Declaration Exhibit B*, page nos. 4 and 8.

It is undisputed that the January 11, 2019 citation was received by Respondent on January 15, 2019. Respondent’s notice of contest was due on February 6, 2019. It is undisputed that Respondent did not file a notice of contest, on or before the contest due date.

It is undisputed that between January 15, 2019 when Respondent received the citation and February 6, 2019 when the notice of contest period ended, Respondent had no communication with the OSHA Andover Area Office or with AAD Sweeney.

⁷ Section 1903.17(a), in pertinent part, states:

Any employer to whom a citation or notice of proposed penalty has been issued may, under section 10(a) of the Act, notify the Area Director in writing that he intends to contest such citation or proposed penalty before the Review Commission. Such notice of intention to contest shall be postmarked within 15 working days of the receipt by the employer of the notice of proposed penalty.

It is undisputed that Respondent's March 19, 2019 notice of contest letter was late filed. 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. *Id.* at 398-400.

The Secretary's initial burden to establish grounds to dismiss Respondent's late notice of contest are established. There is no dispute that Respondent's March 19, 2019 contest letter was late filed. The burden shifts to Respondent to establish a basis for relief from the final order under Federal Rule of Civil Procedure 60(b). Respondent has not met its burden. *See Taj Mahal Contracting*, 20 BNA OSHC 2020, 2022 (No. 03-1088, 2004); *Kerr-McGee Chem. Corp.*, 4 BNA OSHC 1739, 1740 (No. 9890, 1976).

Respondent may not receive relief under Federal Rule of Civil Procedure 60(b) for its late filed notice of contest.

An employer who has filed an untimely notice of contest may be granted relief under Federal Rule of Civil Procedure 60(b) in certain circumstances. *George Harms Constr. Co. v. Chao*, 371 F.3d 156 (3d Cir. 2004). A late filing may be excused under Rule 60(b)(1) if the final order was entered because of "mistake, inadvertence, surprise or excusable neglect." A late filing also may be excused under Rule 60(b)(3)⁸ if the late filing was caused by the Secretary's "deception or failure to follow proper procedures." *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981); *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1476-77 (No. 76-2165, 1979). *See also Atlantic Marine, Inc. v. OSHRC*, 524 F.2d 476, 478 (5th Cir. 1975) (per curiam). 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 at 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, 1132 (No. 09-1559, 2010); *NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999).

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

⁸ 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

be excusable. See *Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993) (*Pioneer*). In this case, Respondent does not contend that it is entitled to relief under Rule 60(b)(6). The undisputed facts would not support granting relief under Rule 60(b)(6).

Respondent asserts that it is entitled to relief from the Commission final order under Federal Rule of Civil Procedure 60(b)(1). Respondent asserts that filing its written contest was delayed due to Respondent's ongoing good faith participation in negotiations with OSHA AAD Sweeney. Respondent asserts that Respondent President Antonelli held a "good faith belief" that the contest deadline has not lapsed. Further, Respondent contends that the late filed notice of contest did not prejudice the Secretary or negatively impact the Commission proceedings. Therefore, Respondent contends it is entitled to relief from the Commission final order due to "excusable neglect." Objection pp. 1-2, 4-6.

Regarding a request for relief due to "excusable neglect," the Commission applies the equitable analysis stated by the Supreme Court in the *Pioneer* decision. This analysis considers "all relevant circumstances surrounding the party's omission," including (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. 97-0851, 1999) (quoting *Pioneer*, 507 U.S. at 395). See *Evergreen Env'tl Serv.*, 26 BNA OSHC 1982, 1984 (No. 16-1295, 2017).

The Supreme Court stated that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer*, 507 U.S. at 392. The Court found "excusable neglect" to be, in part, an "elastic concept" not restricted to "omissions caused by circumstances beyond the control of the movant." *Id.* Regarding relief sought pursuant to Rule 60(b), the Court stated that "'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 394.

When evaluating claims of excusable neglect, many circuit courts focus on the third factor in the *Pioneer* equitable analysis, "the reason for the delay, including whether it was within the reasonable control of the movant." *Id.* at 395.

The four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry . . . [A]t the end of the day, the focus must be upon the nature of the neglect.

Hospital del Maestro v. NLRB, 263 F.3d 173, 175 (1st Cir. 2001) (per curiam) (quoting *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000)). See *Cohen v. Bd. of Trs. of Univ. of D. C.*, 819 F.3d 476, 479-80 (D.C. Cir. 2016) (same); *Dimmitt v. Ockenfels*, 407 F.3d 21, 24-25 (1st Cir. 2005) (same); *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366, 366 n.7 (2d Cir. 2003) (same); *Graphic Communications Int'l Union v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5-6 (1st Cir. 2001) (same); *David E. Harvey Builders, Inc. v. Sec'y of Labor*, 724 Fed. Appx. 7, 9 (D.C. Cir. 2018) (same).⁹

Other circuit courts emphasize that the *Pioneer* equitable analysis requires consideration of “all relevant circumstances” surrounding a party’s request for relief due to excusable neglect. Therefore, the “control” factor must not be weighted too heavily at the expense of the other relevant *Pioneer* factors. *Avon Contractors, Inc. v. Sec'y of Labor*, 372 F.3d 171, 174 (3d Cir. 2004). See *Coleman Hammons Constr. Co. v. OSHRC*, 2019 WL 5782425, at *3 (5th Cir. 2019) (same); *George Harms Constr.*, 371 F.3d at 164 (same).

Long-settled Commission precedent focuses on the third factor in the *Pioneer* equitable analysis. Evaluating a request for relief for a late filed notice of contest due to excusable neglect, Commission precedent states that a “key factor” is “the reason for the delay, including whether it was within the reasonable control of the movant.” *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153-54 (No. 98-0367, 2000). In appropriate circumstances, the Commission finds this to be the dispositive factor. Commission decisions state that “[e]mployers must maintain orderly procedures for handling important documents,” and 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 1147, 1148-49 (No. 99-0945, 2000) (relief under Rule 60(b)(1) denied where the employer’s president failed to carefully read and act upon information contained in the citation); *CalHar*

⁹ This matter could be appealed to either the D.C. Circuit or the First Circuit. The Commission generally applies the law of the circuit where a case will likely be appealed. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

Constr., 18 BNA OSHC at 2153-54 (relief denied where administrative employees assigned to process the citation did not exercise diligence in timely filing a written contest).

Commission decisions state that ignorance of procedural rules does not constitute “excusable neglect” and that mere carelessness or negligence, even by a lay person, in failing to timely file a notice of contest does not justify relief under Rule 60(b). *Acrom Constr. Serv. Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991).

In this case, the citation Respondent received on January 15, 2019 advised Respondent of the contest filing deadline. The citation emphasized that unless Respondent informed the OSHA Area Director, in writing, of its intention to contest the citation, within 15-working days after receipt, the citation would become a final order of the Commission. The OSHA 3000 Booklet, sent to Respondent with the citation, also provided information regarding the actions an employer must take to timely submit a notice of contest after OSHA citations are received.

It is undisputed that Respondent did not contact the OSHA Area Office between January 15, 2019, the date Respondent received the citation, and February 6, 2019, the end of the contest filing period. No explanation is provided by Respondent for its silence and inaction during the contest filing period.

It is undisputed that after receiving the citation on January 15, 2019, Respondent did not contact the OSHA Andover Area Office until March 18 or 19, 2019, more than one month after the contest filing period ended. No explanation is provided by Respondent for its silence and inaction during the period between Respondent’s receipt of the citation and mid-March 2019. On or about March 19, 2019, Respondent President Antonelli contacted AAD Sweeney to discuss the citation and request that the penalties be reduced.

Respondent President Antonelli’s inaction during the contest filing period discloses his failure to carefully read and follow the requirements for filing a contest stated on the citation. 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.” *Acrom Constr.*, 15 BNA OSHC at 1126. *See Craig Mechanical Inc.*, 16 BNA OSHC 1763, 1765-66 (No. 92-0372-S, 1994). In this case, there is no evidence that Respondent acted in bad faith. That said, the claim that Respondent President

Antonelli held a “good faith belief” that the contest period had not lapsed is undermined by Respondent’s failure to carefully read the citation.

While there is no evidence that Respondent’s late contest filing was prejudicial to the Secretary or negatively impacted the Commission proceedings, the undisputed facts disclose that the reason for the delayed filing was within Respondent’s reasonable control. *See CalHar Constr.*, 18 BNA OSHC at 2153 n.5. Respondent’s delay in filing the notice of contest was a result of Respondent’s lack of diligence in failing to carefully read and act upon the information contained in the citation regarding filing a timely contest. This factor is dispositive. There is no justification for granting Rule 60(b)(1) relief in this case.

Respondent also asserts that it is entitled to relief from the Commission final order under Federal Rule of Civil Procedure 60(b)(3). To support this assertion, Respondent again states that Respondent President Antonelli’s “ongoing negotiations” with AAD Sweeney led him to believe that the notice of contest deadline had not lapsed. Respondent asserts that AAD Sweeney’s “actions and representations confused and misled Respondent as to when or whether written notice was required.” Objection p. 10; *See also* Objection pp. 2-3, 6, 8, 9-10. The undisputed case facts do not support this contention.

The undisputed facts reveal no misleading or confusing actions taken by AAD Sweeney, or by anyone in the OSHA Andover Area Office, regarding the requirement that a citation contest be filed with the OSHA Area Director, in writing, within the 15-working day period following Respondent’s receipt of the citation on January 15, 2019. *See Barretto*, 830 F.2d at 400 (an employer’s “subjective belief” that it is compliant with the contest requirements, does not qualify as an exception to the Section 1903.17(a) requirements that the contest be timely filed, in writing.).

Prior to March 18 or 19, 2019, the only communication Respondent had with AAD Sweeney, or with anyone in the OSHA Andover Area Office, was one conversation shortly after the December 7, 2018 inspection, before the citation issued. AAD Sweeney told Respondent President Antonelli that once he received the citation, Mr. Antonelli could contact the OSHA Andover Area Office if he wanted to schedule an informal conference. During this call, there is no claim that AAD Sweeney communicated to Respondent a miscalculated contest filing deadline. It would have been impossible to state the contest filing deadline, as the citation had not issued. *See*

B.J. Hughes, 7 BNA OSHC at 1476-77 (fifteen day filing requirement tolled where the employer relied upon OSHA's inadvertent erroneous calculation of the filing deadline). During this call, there is no claim that AAD Sweeney communicated to Respondent that a written contest was not required.

Importantly, any questions Respondent President Antonelli had regarding how or when to file a timely notice of contest were answered on the face of the citation. Mr. Antonelli simply had to read the citation. Any confusion regarding the difference between an informal conference and a notice of contest was clarified by the specific instructions set forth in the citation.

More than one month after the contest filing period ended, on or about March 19, 2019, Respondent President Antonelli contacted AAD Sweeney to discuss the citation issued and to request that the penalties be reduced. At this delayed date, March 19, 2019, Respondent filed its late notice of contest with the Commission. Thereafter, Respondent President Antonelli and AAD Sweeney communicated to schedule a meeting regarding the citation. Respondent President Antonelli, AAD Sweeney, and AD Covello met on May 14, 2019 and negotiated a partial settlement of the citation issued in OSHA inspection # 1365141, regarding the serious citation items, and a partial withdrawal of Respondent's late notice of contest regarding the serious citation items.

These later communications and negotiations, beginning in mid-March 2019, more than one month after the contest filing period ended, neither explain nor excuse Respondent's failure to timely file a notice of contest during the 15-working day contest period that ended on February 6, 2019. Certainly, these later communications and negotiations, could not have confused or mislead Respondent before the February 6, 2019 contest filing deadline.

Respondent's late filed contest was not caused by the Secretary's "deception or failure to follow proper procedures." See *Branciforte Builders*, 9 BNA OSHC at 2117. The undisputed facts do not justify granting Rule 60(b)(3) relief in this case.

Finally, a party moving for relief pursuant to Rule 60(b)(1) must allege a meritorious defense. See *Evergreen Envtl Serv*, 26 BNA OSHC at 1985; *Northwest Conduit Corp.*, 18 BNA OSHC at 1951. The Commission has found this requirement "satisfied with minimal allegations that the employer could prove a defense if given the opportunity." *Jackson Assocs. of Nassau*, 16

BNA OSHC 1261, 1267 (No. 91-0438, 1993). Respondent's Objection sets forth defenses Respondent would rely upon regarding the willful citation, at issue in this case, if a hearing on the merits was held. *See* Objection pp. 6-9. Respondent contends that the willful citation item is duplicative of the serious citation items. Respondent also contends that Respondent was making good faith efforts to protect employee safety and health at the time of the inspection, therefore, the Secretary will be unable to prove the willful classification. *See* Objection p. 8. Before reaching the issue of whether Respondent has a meritorious defense to the citation, the record first must establish that Respondent has a basis for relief from the Commission final order under Federal Rule of Civil Procedure 60(b). *Id.* Because the record does not establish as basis for relief from the Commission final order for Respondent's untimely filing, the issue of a meritorious defense need not be addressed further.

CONCLUSIONS OF LAW

Respondent's March 19, 2019 notice of contest letter was untimely filed.

Respondent may not receive relief for the untimely filing under Federal Rule of Civil Procedure 60(b).

ORDER

Based on the foregoing, the Secretary's Motion is Granted. Respondent's late notice of contest is Dismissed. The willful citation issued on January 11, 2019, in OSHA Inspection # 1365141, is Affirmed in all respects, including the \$56,908.00 penalty proposed for the willful citation.

Dated: November 25, 2019
Washington, D.C.

/s/ Carol A. Baumerich
Carol A. Baumerich
Judge, OSHRC