



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.

Liberty View Construction, Inc.

Respondent.

OSHRC DOCKET NO. 09-1168

Before: Chief Judge Irving Sommer

**DECISION AND ORDER**

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”), to determine whether the Secretary’s motion to dismiss Respondent’s late-filed notice of contest (“NOC”) should be granted.

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

The Occupational Safety and Health Administration (“OSHA”) inspected a work site of Respondent, located in Jersey City, New Jersey, on December 4, 2008. OSHA reinspected the site on April 20, 2009. As a result, OSHA issued to Respondent a Citation and Notification of Penalty (“Citation”) on May 22, 2009.<sup>2</sup> OSHA mailed the Citation to Respondent’s business address in Jersey City, New Jersey, by certified mail, return receipt requested. The Citation was delivered and signed for on May 29. The Act requires an employer to notify the Secretary of its intent to contest a citation within 15 working days of receipt, and the failure to file a timely NOC results in the

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<sup>1</sup>The background information is contained in a declaration of an employee of OSHA’s Parsippany, New Jersey office and exhibits to the Secretary’s motion to dismiss.

<sup>2</sup>All dates hereafter will refer to the year 2009, unless otherwise indicated.

citation becoming a final order of the Commission by operation of law. Based upon the date it received the Citation, Respondent was required to file an NOC on or before June 19. Respondent did not file an NOC by that date, but it did file one on June 24. The NOC letter contained one sentence stating the company contested “all Citations and Notifications of Penalties.” On June 26, a secretary with OSHA’s Parsippany, New Jersey office telephoned Respondent and left a voice mail message advising the company that the 15-day contest period had already elapsed. The secretary’s message also offered to provide the company with the Commission’s contact information.

On July 22, Brian Murray, Respondent’s construction manager, telephoned the OSHA office, and the secretary gave him the Commission’s contact information. That same day, Mr. Murray sent a letter to the Commission. In his letter, Mr. Murray stated that after both inspections, all items were “immediately corrected.” He also stated that the company filed an NOC but was told it was late. He noted the company’s attempts to maintain a safe workplace and stated that, except for this Citation, its efforts had been successful. Mr. Murray concluded his letter with a request that the Commission review the documents to arrive at a “fair resolution.”<sup>3</sup> On October 13, 2009, the Secretary filed her motion to dismiss Respondent’s late-filed NOC.

#### **Discussion**

The record in this case plainly shows that Respondent did not file its NOC within the requisite 15-day period set out in the Act. An otherwise untimely NOC may be accepted, however, where the delay in filing was caused by deception on the part of the Secretary or her failure to follow proper procedures. A late filing may also be excused, under Federal Rule of Civil Procedure 60(b) (“Rule 60(b)”), if the final order was entered as a result of “mistake, inadvertence, surprise or excusable neglect.” See *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981) (citations omitted). The moving party has the burden of proving it is entitled to Rule 60(b) relief.

Mr. Murray’s July 22 letter to the Commission will be considered a request for Rule 60(b) relief for the reason that the late filing was caused by “excusable neglect.” In this regard, the Commission follows the Supreme Court’s test in *Pioneer Inv. Serv. v. Brunswick Assoc.*, 507 U.S. 380 (1993). See *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1950 (No. 97-851, 1999). Under

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<sup>3</sup>Mr. Murray also signed the June 24 NOC letter.

that test, the Commission takes into account all relevant circumstances, including the danger of prejudice to the opposing party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Id.* at 1950, quoting 507 U.S. at 395. The Third Circuit Court of Appeals, to which this case could be appealed, has held that all factors must be considered and that the “control” factor does not necessarily trump all the other factors. *George Harms Constr. Co. v. Chao*, 371 F.3d 156, 164 (3d Cir. 2004); *Avon Contractors, Inc., v. Secretary of Labor*, 372 F.3d 171, 174 (3d Cir. 2004).

I find the length of delay in filing the actual NOC here, which was five days, to be of little significance. That delay would be unlikely to prejudice the Secretary and would have little impact on judicial proceedings. The delay in filing the letter with the Commission, which was 26 days, is more significant and tends to support a conclusion that Respondent’s seeking of relief was not filed “within a reasonable time” following entry of the final order. *Monroe & Sons*, 4 BNA OSHC 2016, 2018 (No. 6031, 1977), *aff’d*, 615 F.2d 1156 (6<sup>th</sup> Cir. 1980). As to good faith, I note the statement in the July 22 letter indicating that this was the first time the company had been cited is not accurate. One of the items in the Citation alleges a “repeat” violation, and that item states that Respondent was previously cited on February 16, 2007, for violating the same or an equivalent standard.

As to the reason for the delay, and whether it was within the reasonable control of the movant, the Citation Respondent received stated, on the first page, as follows:

You must abate the violations referred to in this Citation by the dates listed and pay the penalties proposed, unless within 15 working days (excluding weekends and Federal holidays) from your receipt of this Citation ... you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above.

The Citation further stated, on the second page, that:

**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 proposed penalty(ies) will become a final order of the [Commission] and may not be reviewed by any court or agency.**

The Commission has held that the OSHA citation clearly 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*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). The Commission has also held that ignorance of procedural rules does not constitute “excusable neglect” and that mere carelessness or negligence does not justify relief. *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). Finally, the Commission has held that a business must have orderly procedures in place for handling important documents and that if the lack of such procedures caused the late filing, Rule 60(b) relief will not be granted. *NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999); *E.K. Constr.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991); *Stroudsburg Dyeing & Finishing*, 13 BNA OSHC 2058 (No. 88-1830, 1989); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989).

Besides the above, Respondent’s July 22 letter provides no explanation at all for the late filing of the NOC. And, Respondent was cited before, in 2007, and should have been aware of the contest procedure. For these reasons, and based on the other facts of this case and the Commission precedent set out *supra*, I find the delay in filing was within the reasonable control of Respondent. I also find, upon considering this factor together with the other *Pioneer* factors set out *supra*, that Respondent has not met its burden of proving that it is entitled to Rule 60(b) relief.

There is another reason for denying relief in this matter. Besides showing that the late filing was due to “excusable neglect,” the party seeking relief must also allege that it has a meritorious defense to the citation. *See, e.g., Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1951 (No. 97-851, 1999). The July 22 letter contains nothing to indicate a meritorious defense to the Citation.

Based on the foregoing, Respondent's request for relief is DENIED, the Secretary's motion is GRANTED, and the Citation is AFFIRMED in all respects.

SO ORDERED.

/s/  
Irving Sommer  
Chief Judge

Dated: November 13, 2009  
Washington, D.C.