

Some personal identifiers have been redacted for privacy purposes.

**United States of America  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,

Complainant,

v.

595 CONSTRUCTION LLC.  
And Its Successors,

Respondent.

OSHRC DOCKET NO. 25-0120, 25-0121  
and 25-0122 (Consolidated)

For Complainant: Haley L. Harris, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, IL

For Respondent: Edward Rodriguez, Self-Represented, Crystal Lake, IL

JUDGE: Judge Patrick B. Augustine, U.S. Administrative Law Judge

**DECISION AND ORDER GRANTING COMPLAINANT’S MOTION TO DISMISS  
UNTIMELY NOTICE OF CONTEST**

**Jurisdiction**

This proceeding is before the Occupational Safety and Health Review Commission (the “Commission”) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the “Act”) due to the untimely filing of a Notice of Contest by Respondent with the Commission. Jurisdiction over this action is conferred upon the Commission by Respondent filing a NOC. *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

**Procedural Background**

The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of three of Respondent’s worksites commencing in May 2024 pursuant to OSHA’s National Emphasis Program on Falls. The first two inspections occurred on May 10, 2024 at [redacted] in Elburn, Illinois and next door at [redacted]. The third inspection took place on May 31, 2024, at 2

Davidson Dr. Lot 99 in Elburn, IL 60119. Compliance Safety and Health Officer (“CSHO”) Cody Noren conducted all three inspections.

Edgar and Nicasio “Nick” Rodriguez co-own 595 Construction LLC. On July 31, 2024, CSHO Noren called Edgar to schedule a closing conference for all three inspections. No one answered the telephone call. CSHO Noren then sent Edgar and Nick an email explaining that the closing conference for the three inspections was set for August 1, 2024, at 10:30 a.m. Respondent’s co-owners did not respond to CSHO Noren’s email, and they did not show up at the closing conference on August 1, 2024.

The Naperville Area Office issued Respondent three separate Citations and Notifications of Penalty (“the Citations”) for the three inspections that took place in May 2024. On November 5, 2024, CSHO Noren hand delivered the Citations to Respondent’s business address, which is also Edgar and Nick’s personal residence. An individual at the residence named Maria Christina Rodriguez accepted the Citations for Respondent and signed a document confirming receipt. Sec’y Motion, Ex. 4. The Naperville Area Office also certified mailed the Citations to Respondent on November 5, 2024. Sec’y Motion, Ex. 5. The return receipt provided by the U.S. Postal Service shows that Ms. Rodriguez signed for the Citations on November 7, 2024. Sec’y Motion, Ex. 6.

The Citations informed Respondent it had 15 working days to contest the Citations. The Citation informed Respondent of its right to contest the citation<sup>1</sup> 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

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<sup>1</sup> 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. 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).

Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.

*See* Citation and Notification of Penalty, p. 2.

Since Respondent received the Citations on November 5, 2024, pursuant to Section 10 of the Act, the deadline to contest the Citations was November 27, 2024. Respondent did not file a notice of contest until January 24, 2024—two months late. As a result, the Citations “shall be deemed [] final order[s] of the Commission.” 29 U.S.C. § 659(a).

Respondent did not contest the Citations within the 15 working-day period. Secr’y Motion, Scott Decl. ¶ 7. Not having received any communication from Respondent, on January 2, 2025, the Naperville Area Office mailed Respondent demand letters for the unpaid penalties, plus interest and administrative costs because the penalties were overdue. *Id.* ¶ 9; Secr’y Motion, DOL Ex. 10. On January 21, 2025, Respondent called the Naperville Area Office for the first time, asking to schedule an informal conference. Secr’y Motion, Scott Decl. ¶ 10. The Naperville Area Office advised Respondent the deadline to contest the Citations had passed and emailed Respondent instructions for submitting a late notice of contest. *Id.*; Secr’y Motion, DOL Ex. 11.

On January 24, 2024, the Commission notified the Naperville Area Office that it had received a late Notice of Contest for all three inspections from Respondent. DOL Ex. 12. The late Notice of Contest, signed by Nick Rodriguez, states,

I was unable to meet the contest on 11/27/2024 due to an unforeseen family emergency. My family required my immediate attention, and I had to prioritize their well-being. I apologize for any inconvenience this may have caused and hope for your understanding in this matter. I would like the opportunity to have [an] in[-]person meeting to come to an agreement on this matter.

*See* Notice of Contest.

By filing a late Notice of Contest Respondent has, in effect, requested relief from the operation of § 10(c) of the Act. Rule 60(b) states that “[o]n motion and just terms, the

court may relieve a party or its legal representative from a final judgment, order, or proceeding . . . .” Fed. R. Civ. P. 60(b)(“Rule 60(b)”). The Commission has held an employer may move under Rule 60(b) for permission to file a late Notice of Contest. *Branciforte Builders*, 9 BNA OSHC 2113 (No. 80-1920, 1981). The burden is on the employer to show sufficient basis for relief under the rule. *Id.* See also *Craig Mech. Inc.*, 16 BNA OSHC 1763, 1764 (No. 92-0372s, 1994) (Respondent bears burden to establish basis for relief, *aff’d per curiam* 553 F.3d 633 (5th Cir. 1995) (unpublished)).

In its late Notice of Contest, Respondent does not contend that it never received the Citations or that it missed the deadline due to mistake, inadvertence, or surprise. Rather, in the notice of contest, one of Respondent’s co-owners, Nick Rodriguez, asserts that he “was unable to meet the contest [deadline] . . . due to an unforeseen family emergency” that “required [his] immediate attention.” See Notice of Contest.

On February 10, 2025, Complainant filed his *Motion to Vacate Respondent’s Late Notice of Contest* (“Motion”). Complainant seeks affirmance of the three Citations and the proposed penalties because Respondent failed: (i) to file a timely NOC; (ii) to demonstrate “excusable neglect” pursuant to Rule 60(b); and (iii) Respondent received actual notice of the Citation and failed to comply with the instructions—typed in bold-face and underlined print—indicating the deadline for filing a Notice of Contest.

### **Controlling Case Law**

Upon receiving a Citation, an employer has fifteen (15) working days within which it must file a Notice of Contest. See § 10(a) of the Act, 29 U.S.C. § 659(a). If the employer does not file a Notice of Contest 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 (3rd Cir. 2007).

The Commission has recognized three situations where the finality of § 10(a) of the Act, 29 U.S.C. § 659(a), does not preclude the Commission from hearing an employer's challenge to citations even when a timely notice of contest has not been filed. The first is where the Secretary has employed deceptive practices or fails to comply with required procedures. *See Secretary of Labor v. Louisiana-Pacific Corp.*, 13 BNA OSHC 2020 (No. 86-1266, 1989). There is nothing in the record to suggest this situation is present in this case. Rule 60(b)(3).

Second, 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. 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)(6) and the party's neglect must be excusable. *See Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993) (*Pioneer*). In this case, Respondent did not contend or present any evidence in its NOC which would justify relief under Rule 60(b)(6).

Finally, 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.” *See George Harms Constr. Co., Inc. v. Chao*, 371 F.3d 156, 163 (3rd Cir. 2004) (Commission “has jurisdiction to entertain a late notice of contest under” the excusable neglect standard of Rule 60(b)(1));<sup>2</sup> *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981).

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<sup>2</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)).

In determining whether Respondent’s 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). Under *Pioneer*, the Court must consider “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.” *Pioneer*, 507 U.S. at 395. See *Evergreen Envtl Serv*, 26 BNA OSHC 1982, 1984 (No. 16-1295, 2017). 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.<sup>3</sup>

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.<sup>4</sup> 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)(1), 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

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. *NW Conduit Corp.*, 18 BNA OSHC at 1950. See also *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148 (No. 9-0945, 2000); *CalHar Constr., Inc.*,

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<sup>3</sup> This definition has been applied to other federal procedural rules, including proceedings by the Commission. See *NW Conduit Corp.*, 18 BNA OSHC at 1950.

<sup>4</sup> Commission precedent states 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)(1). *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).

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 (1st Cir. 2001) (“excuse given for the late filing must have the greatest import”).

### **Analysis**

The Court issued an Order consolidating the three cases under one proceeding on February 13, 2025<sup>5</sup>. In order for the Court to obtain additional information from Respondent for it to find Respondent was entitled to relief under Rule 60(b)(1) or Rule 60(b)(6), on February 13, 2025, the Court issued an Order to the Parties in which Respondent was directed to further expand on the reasons for the late filing of the Notice of Contest and to answer the Secretary’s Motion, which the Court attached to the Order. Either party was also provided an opportunity to request a hearing on the late Notice of Contest. Since neither party requested a hearing it was deemed waived. Respondent did not answer the February 13, 2025, Order.

Therefore, on February 25, 2025, the Court issued a *Show Cause Order*<sup>6</sup> directing Respondent to; (i) provide further information as to why it did not file a timely Notice of Contest; (ii) answer the Secretary’s Motion to Dismiss; and (iii) provide a good faith reason on why it did not respond to the Court’s February 13, 2025 Order. Respondent failed to respond to the *Show Cause Order*.

Respondent seeks relief from the operation of § 10(a) of the Act. 29 U.S.C. § 659(a). While there is no evidence Respondent’s late contest filing was prejudicial to the Secretary or negatively

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<sup>5</sup> Respondent is registered as a user in the Court’s electronic filing system and all Orders were issued through the electronic filing system.

<sup>6</sup> Pursuant to Commission Rules 100(d) and 7(o), the Show Cause Order was properly served on Respondent through the Court’s electronic filing system. 29 C.F.R. §§ 7(o) and 100(d).

impacted the Commission proceedings, the reason for the delayed filing was within Respondent's reasonable control. *See CalHar Constr.*, 18 BNA OSHC at 2153 n.5. Respondent was provided two opportunities for it to provide further information for the delay due to family issues. Had Respondent provided more detailed information it is possible the Court could have found it sufficient to meet the threshold requirements of Rules 60(b)(1) or 60(b)(6). 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 under Rule 60(b)(1).

There is no justification for granting Rule 60(b) relief under any subsection since the Respondent has failed, after two opportunities, to provide more detailed information to the Court. Because the Respondent failed to respond to the Motion, and in the hope Respondent would provide additional information as to the reasons why its Notice of Contest was late, the Court issued two Orders directing Respondent to show why the Court should not issue judgment against Respondent, affirming the proposed violations in this case for: (1) failure to timely file a *Notice of Contest* pursuant to Commission Rule 33(b); and (2) for failure to respond to Complainant's Motion and the Court's February 13, 2025 Order.

Respondent was provided two opportunities to provide the Court needed information by responding to the February 13, 2025 Order and to the *Order to Show Cause*. Respondent failed to take advantage of this opportunity to provide the Court with any information which could assist the Court in determining whether Respondent's late Notice of Contest could be accepted under Rule 60(b).

The Court finds OSHA, as well as this Court, have conveyed due notice to Respondent of its procedural rights and provided ample warning that its failure to comply with Court orders



may result in the dismissal of its Notice of Contest. Respondent has failed to take advantage of the opportunity to advise the Court that it has not abandoned its case before the Commission. Every indication before the Court is that Respondent has walked away from its contest. Under these circumstances, the Court sees no worthwhile purpose in allowing this case to proceed by finding a basis for relief for its late Notice of Contest under Rule 60(b). There is no basis to believe Respondent will fulfill its pre-trial obligations or appear at the trial should the Court find Respondent is entitled to relief under Rule 60(b). *11 See Twin Pines Constr. Inc./Teles Constr.*, 24 BNA OSHC 1500, 1504 (No. 12-1328, 2012) (No worthwhile purpose in proceeding to a hearing where a party has abandoned the case). The Court finds that Respondent relinquished its case with the intent to abandon. 1 C.J.S. Abandonment § 13 (2013).

### **Order**

Respondent bears the burden of demonstrating that it is entitled to relief. *See Burrows Paper Corp.*, 23 BNA OSHC 1131 (No. 09-1559, 2010); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No., 86-1266, 1989). Here, Respondent has provided no excusable basis for its failure to file a timely Notice of Contest before its due date. The Court finds Respondent failed to file a timely Notice of Contest and no relief under any provision of Rule 60(b) is justified.

Complainant's Motion is GRANTED. Respondent's Notice of Contest is dismissed, with prejudice, as untimely filed. The citations and penalties are AFFIRMED. Accordingly, the Court ORDERS:

#### **OSHRC DOCKET NO. 25-0120 – Inspection 1751974**

1. Citation 1, Item 1 is AFFIRMED as a serious citation and a \$8,873.00 penalty is ASSESSED.

2. Citation 1, Item 2 is AFFIRMED as a serious citation and a \$12,421.00 penalty is ASSESSED.
3. Citation 2, Item 1 is AFFIRMED as a willful-serious and a \$124,219.00 penalty is ASSESSED.
4. Citation 3, Item 1 is AFFIRMED as repeat-other and a \$3,548.00 is ASSESSED.

OSHRC DOCKET NO. 25-0121 – Inspection 1747360

1. Citation 1, Item 1 is AFFIRMED as a repeat-serious citation and a \$62,104.00 penalty is ASSESSED.
2. Citation 2, Item 1 is AFFIRMED as a repeat-other citation and a \$3,548.00 penalty is ASSESSED.

OSHRC DOCKET NO. 25-0122 – Inspection 1747361

1. Citation 1, Item 1 is AFFIRMED as a serious citation and a \$10,648.00 penalty is ASSESSED.
2. Citation 2, Item 1 is AFFIRMED as a repeat-serious citation and a \$62,104.00 penalty is ASSESSED.

SO ORDERED.

/s/ Patrick B. Augustine

Patrick B. Augustine  
Judge - OSHRC

Date: March 31, 2025  
Denver, CO