

THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING
COMMISSION REVIEW



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant

v.

Bluewater Yachting Solutions, Inc.,
Respondent.

OSHRC Docket No.: **24-0451**

Appearances:

Rachel L. Graeber, Esq.
Office of the Solicitor, U.S. Department of Labor, Atlanta, GA
For Complainant

Steve Zuidema, *Pro Se*
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission (Commission) on a Late Notice of Contest dated March 23, 2024, filed by Bluewater Yachting Solutions, Inc. (Bluewater), which was received by the Commission and docketed by the Executive Secretary of the Commission on March 28, 2024. The Secretary of Labor, United States Department of Labor (Secretary) filed a Motion to Dismiss on May 13, 2024¹.

For the reasons set forth herein, Bluewater's Late Notice of Contest, construed as a Request for Rule 60(b) Relief is hereby **DENIED**.

BACKGROUND

This matter arises out of an Occupational Safety and Health Administration (OSHA) inspection conducted on September 26, 2023, at a jobsite located at 2209 Industrial Boulevard,

¹ The Secretary filed an Amended Motion to Dismiss, also on May 13, 2024, correcting an error in the email address on the Certificate of Service for Bluewater's Representatives

Sarasota, FL 34234. (Citation.) On October 18, 2023, OSHA issued a Citation and Notification of Penalty (Citation) citing in Citation 1, one Serious violation of §5(a)(1) of the Occupational Safety and Health Act of 1970 (“Act”); citing in Citation 2, one Serious violation of 29 C.F.R. § 1910.134(f)(1), and in Citation 3 serious violations of 29 C.F.R. §§ 1910.178(l)(1)(i) and, 1910.178(q)(7). The Citation proposed penalties in the total amount of \$32,814. The Secretary mailed the Citation by certified mail through the United States Postal Service (USPS) to Bluewater’s mailing address at 2209 Industrial Boulevard, Sarasota, FL (Picciano Aff., Exh. 2, par. 9) It was signed as received on October 23, 2023. (Picciano Aff., Exh. 2, par.9; Exh. A.)

Pursuant to the requirements of the Act, an employer is required to notify the Secretary of its intent to contest (Notice of Contest or NOC) a Citation within 15 working days of receipt. Failure to timely file a NOC results in the Citation becoming a final order of the Commission by operation of law. The Citation provided Bluewater had 15 working days from the date of receipt to contest. (Citation.) As set forth above, the return receipt shows Bluewater received the Citation on October 23, 2023. (Picciano Aff., Exh. 2, par.9; Exh. A.) Therefore, any contest by Bluewater was to be filed within the contest period, no later than November 14, 2023. However, Bluewater did not file a contest within the 15-day contest period. Instead, it filed an undated late notice of contest directed to the Area Director, however, addressed to the Commission and received by the Commission’s Executive Secretary on March 27, 2024, approximately 4 1/2 months after the 15-day contest period prescribed by the Act. The late notice of contest reflects that Peter Picciano, Assistant Area Director for the OSHA Tampa Area Office was cc’d on the late notice of contest and reflects the address for the Tampa Area Office. Due to Bluewater’s failure to timely contest, the Citation became a final order of the Commission under § 10(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act) on November 14, 2023.

DISCUSSION

Bluewater asserts it timely filed the Citation, having originally sent it on November 9, 2023. For the reasons set forth herein, the Court finds Bluewater’s contest, received by the Commission on March 27, 2024, is a late NOC, and the Commission has jurisdiction to address the late NOC issue.

Sufficiency of Service

It is the Secretary’s burden to establish service of the Citation. Bluewater contends it mailed the late notice of contest on November 9, 2024, and apparently it never made it to the correct address. (NOC.) Although the Act refers only to the penalty, 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...” In *B.J. Hughes*, the Commission addressed the Secretary’s obligation under § 10(a), holding,

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.

7 BNA OSHC at 1474. Further, the Commission’s holding in *B. J. Hughes* that “[t]he 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” satisfies the due process requirements set forth by the United States Supreme Court that notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mulane v. Cent. Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950).

The Secretary’s service of the Citation on Bluewater meets the test set out in *B.J. Hughes*. The test is one of reasonableness. The Citation was mailed certified mail through the United States Postal Service to Bluewater’s business address, and OSHA received confirmation from USPS that Bluewater received the Citation on October 23, 2024. (Picciano Aff., Exh. 2, par. 9.) By mailing the Citation certified mail addressed to Bluewater to its business address and having received confirmation the Citation was received at that address, the service was reasonably calculated to provide the employer with the required notification and opportunity to determine whether to abate or contest.

Rule 60(b) Relief

An employer who has filed an untimely NOC may be granted relief under Rule 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) 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, 2116-17 (No. 80-1920, 1981); *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1476 (No. 76-2165, 1979); *Keppel’s Inc.*, 7 BNA OSHC 1442, 1443-44 (No. 77-3020, 1979). In addition, 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 2117. The moving party has the burden of proving it is entitled to relief under Rule 60(b).

In determining whether the late filing of a NOC may be found to be due to “excusable neglect” under Rule 60(b)(1), the equitable analysis enunciated by the Supreme Court in *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership* 507 U.S. 380 (1993) is applicable. *George Harms Constr. Co., supra*. In *Pioneer* the Court held that “excusable neglect” is determined based upon equitable considerations that take into account all relevant circumstances, and includes consideration of the following factors: (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. *Id.* at 395; *see also Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1951 (No. 97-851, 1999). “[N]either a lack of prejudice to the Secretary nor good faith on the part of Respondent in attempting to comply with the statutory filing requirement alone will excuse a late filing.” *Prime Roofing Corp.*, 23 BNA OSHC 1329 (No. 07-1409, 2010).

The Commission has held that whether the reason for the delay was within the control of the respondent is a “key factor” in determining the presence of “excusable neglect.” *A. S. Ross, Inc.*, 19 BNA OSHC 1147 (No. 99-0945, 2000); *See also Calhar Constr., Inc.*, 18 BNA OSHC 2151 (No. 98-0367, 2000). 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 be excusable. *See Pioneer Investment Serv.*, 507 U.S. at 393. The Commission requires an employer to exercise due diligence before it will find excusable neglect. *Keefe Earth Boring Company, Inc.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991); *Craig Mechanical*, 16 BNA OSHC 1763 (No. 92-0372, 1994).

Bluewater provides insufficient evidence to support Rule 60(b) relief. Although it asserts the notice of contest was timely filed on November 9, 2023, the record fails to support this claim. The undated contest letter was not addressed to and mailed to the OSHA Area Office, instead was addressed to the Commission and was received by the Commission on March 27, 2024. (LNOC.) And although the contest letter reflects Assistant Area Director Picciano at the OSHA Area Office address was copied on the LNOC, the record fails to show that it was received by OSHA before

the expiration of the contest period. The Court finds Bluewater failed to exercise due diligence and was simply negligent in failing to file the contest before the expiration of the contest period.

The Commission has long held an employer's mere carelessness or negligence, even by a layperson, in failing to timely file a Notice of Contest does not amount to "excusable neglect" that would justify relief under Rule 60(b). *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). The record evidence fails to substantiate deception or a failure to follow proper procedures on behalf of the Secretary. The delay was within Bluewater's control.

Where timely response was within the employer's reasonable control, the Commission has denied relief even to petitions filed only one or two days late, *see Sec'y of Labor v. Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185, 2186-87 (2003) (one day late); *see also Sec'y of Labor v. A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148-49 (2000) (11 days late).

David E. Harvey Builders, Inc. v. Sec'y of Labor, 724 F. App'x 7, 9 (D.C. Cir. 2018) (unpublished)(citations omitted).

By letter dated March 23, 2024, to the OSHA Area Director, addressed to the Commission, Bluewater asserts the contest was "sent originally on November 9, 2023. . .there were no indications that anything wrong..." (LNOC.)

By Order issued May 15, 2024, the Court provided Bluewater an opportunity to provide to the Court the reason for its late filing of the notice of contest and a meritorious defense that it could prove if given the opportunity. In response filed May 21, 2024, Bluewater asserts it announced during the informal conference on November 9, 2023, that it would bring this matter before the Commission and filed its NOC that day. Bluewater contends that after having received a bill from the Treasury Department it realized there was a problem, and that it believed this case was under review by the Commission. (May 21, 2024, Response.) The Citation issued to Bluewater specifically provides the address of the Area Office for where a NOC is to be filed should an employer decide to do so. (Exh. 1, p.1.) The Citation does not set forth the address for the Commission for filing of a NOC. The failure to file the contest with OSHA before the expiration of the contest period was within the reasonable control of Bluewater.

In addition to control, the Court must also consider the danger of prejudice to the opposing party; the length of the delay and its potential impact on the proceedings; and whether the party seeking relief acted in good faith.

Danger of Prejudice

The Secretary does not assert it would be prejudiced because of the delay. Therefore, the

Court finds the Secretary is not prejudiced by the late filing. However, a lack of prejudice to the Secretary, alone, will not excuse a late filing. *Prime Roofing Corp.*, 23 BNA OSHC 1329 (No. 07-1409, 2010).

Length of Delay and Impact on Proceedings

The 4 ½ month delay will not adversely impact the Commission’s proceedings.

Good Faith

The record is absent of evidence to show Bluewater acted in good faith. Even if the Court were to find Bluewater acted in good faith, as noted above, good faith in attempting to comply with the statutory filing requirement alone will not excuse a late filing. *Prime Roofing Corp.*, 23 BNA OSHC 1329 (No. 07-1409, 2010).

The Court has considered the factors required by *Pioneer*. Despite the lack of prejudice to the Secretary and that the delay would not adversely affect the Commission proceedings, Bluewater’s control of the delay in timely filing the NOC is determinative.

Meritorious Defense

In addition to the factors set forth in *Pioneer*, an employer also must establish the presence of a meritorious defense for Rule 60(b)(1) relief. *Northwest Conduit Corp.*, 18 BNA OSHC 1948 (No. 97-851, 1999). A meritorious defense is one that is valid at law with respect to the underlying action. *Park Nursing Center, Inc., v. Samuels*, 766 F.2d 261, 264 (6th Cir. 1985). The presence of a meritorious defense is “satisfied with minimal allegations that the employer could prove a defense if given the opportunity.” *Jackson Assoc. of Nassau*, 16 BNA OSHC 1261, 1267 (No. 91-0438, 1993). Although the Court provided Bluewater an opportunity to set forth a meritorious defense in this matter as required for Rule 60(b) relief, it failed to do so. Because Bluewater has not established its neglect is excusable, relief pursuant to Rule 60(b)(1) is not warranted. Accordingly, the Court finds Bluewater is not entitled to relief pursuant to Rules 60(b)(1), 60(b)(4) and 60(b)(6) of the Federal Rules of Civil Procedure.

Having considered all factors enunciated in *Pioneer*, relief from the Final Order in this matter is not warranted. Bluewater’s control over the delay is determinative.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the Findings of Fact and Conclusion of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Therefore, for the reasons set forth herein, Bluewater's request for relief is **HEREBY DENIED**. The Secretary's Motion to Dismiss is **GRANTED**. The final order for the Citation remains in effect and is **AFFIRMED**.

SO ORDERED.

/s/

Sharon D. Calhoun
Administrative Law Judge, OSHRC

Dated: **June 14, 2024**
Atlanta, GA