



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

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SECRETARY OF LABOR, :  
: :  
Complainant, :  
: :  
v. :  
: :  
BLACKSTONE GROUP, LLC, :  
: :  
Respondent. :

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OSHRC DOCKET NO. 04-0707

Appearances:

Jennifer Marciano, Esquire  
U.S. Department of Labor  
New York, New York  
For the Complainant.

Mark E. Tabakman, Esquire  
Grotta, Glassman & Hoffman, P.C.  
Roseland, New Jersey  
For the Respondent.

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”), for the purpose of determining whether the Secretary’s motion to dismiss Respondent’s notice of contest (“NOC”) as untimely should be granted.

On July 30, 2003, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a work site of Respondent, Blackstone Group, LLC (“Blackstone”), located in Roselle, New Jersey. As a result of the inspection, on October 3, 2003, OSHA issued to Blackstone a Citation and Notification of Penalty (“Citation”) alleging eight serious violations and proposing penalties totaling \$7,350.00. OSHA mailed the Citation to Blackstone by certified mail, return receipt requested, and on October 14, 2003, an employee of Blackstone signed for the Citation. Section 10(a) of 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 citation becoming a final order of the Commission by operation of law. In view of the date it received the Citation, Blackstone was required to file its NOC by November 4, 2003. Blackstone, however, did not file an NOC by that date, but it did file a late NOC, through counsel, on December 18, 2003. On July 7, 2004, the Secretary filed her motion to dismiss Blackstone's NOC. Blackstone filed an opposition to the motion, and a hearing in this matter was held in New York, New York, on November 9, 2004. Both parties have submitted post-hearing filings.

### *Discussion*

The record plainly shows, and Blackstone concedes, that it did not file an NOC within the requisite 15 working-day period. (Tr. 10). However, an otherwise untimely NOC may be accepted 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, pursuant to 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" or "any other reason justifying relief, including mitigating circumstances such as absence, illness or a disability that would prevent a party from protecting its interests." *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no contention, and likewise no evidence, that the untimely filing in this case was caused by deception on the part of the Secretary or her failure to follow proper procedures. Rather, Blackstone contends that the late filing should be found to be "excusable neglect" pursuant to Rule 60(b) and to the Third Circuit's decision in *George Harms Constr. Co. v. Chao*, 371 F.3d 156 (3d Cir. 2004) ("*George Harms*").<sup>1</sup>

In *George Harms*, the court reaffirmed its holding in *J.J. Hass Co. v. OSHRC*, 648 F.2d 190, 195 (3d Cir. 1981), that the Commission had jurisdiction to consider late-filed NOC's.<sup>2</sup> 371 F.3d at 163. The court then discussed the Supreme Court's decision in *Pioneer Invest. Serv. v. Brunswick*

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<sup>1</sup>"Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the law of that circuit in deciding the case, even though it may clearly differ from the Commission's law." *D.M. Sabia Co*, 17 BNA OSHC 1413, 1414 (No. 93-3274, 1995). This case arose in the Third Circuit, and an appeal in this matter would very likely be to the Third Circuit. The undersigned is thus constrained to follow Third Circuit precedent.

<sup>2</sup>In so doing, the Third Circuit noted the Second Circuit's contrary holding in *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002).

*Assoc.*, 507 U.S. 380 (1993) (“*Pioneer*”), which addressed the “excusable neglect” standard. The court concluded that *Pioneer*’s broad construction of the excusable neglect standard applied to Commission cases implicating that standard, and it then went on to set out the factors the Supreme Court identified to consider: “the danger of prejudice ..., 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.” 371 F.3d at 163-64 (citing *Pioneer*, 507 U.S. at 395). The court noted that “a court must take into account all relevant circumstances surrounding a party’s failure to file” and that the “control” factor “did not necessarily trump all the other factors.” 371 F.3d at 164. The court also noted that, as the Supreme Court stated in *Pioneer*, “the lack of any prejudice to the [opposing party] or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim.” 371 F.3d at 164 (citing *Pioneer*, 507 U.S. at 398).

As the court points out in *George Harms*, the Commission has recognized that, in almost all Rule 60(b) late filing cases, “it is a given that there is a lack of prejudice to the Secretary or to the interests of efficient judicial administration, combined with a lack of bad faith by the employer.” 371 F.3d at 164 (citing *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 n.5 (No. 98-0367, 2000)). I find, accordingly, that excusing the late filing in this case would not prejudice either the Secretary or the interests of efficient judicial administration, particularly since Blackstone’s NOC was filed only 44 days after it was due, and, apparently, as soon as Blackstone became aware that no NOC had been filed. I also find that Blackstone acted in good faith in this matter, in that seven of the eight cited conditions were corrected immediately during the inspection and the eighth condition was corrected shortly thereafter. (Tr. 4-6, 20-24).

Turning to the reason for the reason for the delay, and whether it was in the reasonable control of Blackstone, the record shows that Blackstone was the general contractor for the job and that it had hired J&S Construction (“J&S”), one of the subcontractors at the site. The record further shows that Ozzie Ibraimovic was Blackstone’s site superintendent on the job and that he was responsible for ensuring that the building was put up according to the plans and specifications, for coordinating the work of the various trades, and for overall safety at the site. When the OSHA inspection took place, both Mr. Ibraimovic and John Suarez, the owner of J&S, accompanied the

OSHA inspectors because many of the violations had to do with J&S's work. During the inspection, the inspectors advised Mr. Ibraimovic and Mr. Suarez that they would have 15 days within which to contest any citations that were issued.<sup>3</sup> After the inspection, OSHA issued citations to both Blackstone and J&S. According to the testimony of Mr. Ibraimovic, Mr. Suarez assured him that he (Mr. Suarez) would take care of contesting the citations. J&S, however, did not contest the citations, and it resolved its own citation by entering into a settlement with OSHA. (Tr. 8, 11-18, 26-28). When Blackstone learned that J&S had not in fact contested the citations, it had its attorney write an NOC letter to OSHA; as noted above, that letter was dated December 18, 2003.

In view of the foregoing, the reason for the delay in filing the NOC was Mr. Ibraimovic's belief that Mr. Suarez would contest not only the J&S citation but also that of Blackstone, because many of the violations pertained to the work of J&S. I observed the demeanor of Mr. Ibraimovic as he testified and found him to be a believable witness. I therefore have no reason to doubt the veracity of his statements at the hearing, and I credit his testimony about Mr. Suarez promising to contest the citations. As to whether the delay was within the reasonable control of Blackstone, I find that it was. Mr. Ibraimovic was aware of the 15-day filing requirement, and, in the exercise of reasonable diligence, he should have followed up with Mr. Suarez before the end of the 15-day period to ensure that an NOC had been submitted. Had he done so, he would have learned that no NOC had been filed, but there would still have been time for Blackstone to file an NOC itself.

Under Commission precedent, the reason for the late filing that Mr. Ibraimovic provided would not justify a finding of excusable neglect, notwithstanding the fact that Blackstone had no previous experience with a citation for OSHA violations. (Tr. 27). *See, e.g., 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); *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989). However, as noted *supra*, the Third Circuit's decision in *George Harms* and the Supreme Court's decision in *Pioneer* are the controlling precedent in this matter. Of the four factors set out above in *Pioneer*, the third factor, that

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<sup>3</sup>Mr. Ibraimovic himself testified that the inspectors had advised him and Mr. Suarez of the 15-day filing requirement. (Tr. 27). Further, the first page of the OSHA citation itself states the 15-day filing period, in the paragraph captioned "Right to Contest." (Tr. 9).

is, the reason for the delay, including whether it was within the reasonable control of the movant, has not been met. Regardless, as the Third Circuit stated in *George Harms*, “a court must take into account all relevant circumstances surrounding a party’s failure to file” and the “control” factor does “not necessarily trump all the other factors.” 371 F.3d at 164. In addition, as the Supreme Court stated in *Pioneer*, “the lack of any prejudice to the [opposing party] or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim.” 507 U.S. at 398.

On the basis of the foregoing precedent and the circumstances of this case, I find that Blackstone’s failure to file a timely NOC was due to excusable neglect and that it is entitled to Rule 60(b) relief. The Secretary’s motion to dismiss Blackstone’s NOC as untimely is DENIED. The Secretary shall file her complaint in this matter within twenty (20) days of the date of this order.

SO ORDERED.

/s/  
Irving Sommer  
Chief Judge

Dated: January 21, 2005  
Washington, D.C.