



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.

POLYLITE ROOF DECKS INC.,

Respondent.

OSHRC Docket No. 13-1473

ORDER

On December 5, 2014, the parties filed a Stipulated Settlement in this matter, which the Commission construes as a joint motion for approval of their settlement agreement. After consideration by the Commission, the Commission remands this matter to the judge for her consideration of the parties' settlement agreement pursuant to Commission Rule 100, 29 C.F.R. § 2200.100.

SO ORDERED.

BY DIRECTION OF THE COMMISSION

Dated: December 10, 2014

/s/ _____
John X. Cerveny
Executive Secretary



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POLYLITE ROOF DECKS INC.,

Respondent.

OSHRC DOCKET NO. 13-1473

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

This matter is before the Occupational Safety and Health Review Commission (the Commission) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act). On March 13, 2014, Complainant, the Secretary of Labor (Secretary), filed a Motion to dismiss Respondent's late notice of contest (Secretary's Motion), with a supporting memorandum of law, and attachments, requesting that Respondent's late notice of contest be dismissed as untimely filed and that the citation and proposed penalty be affirmed, as issued, by operation of law as a final order of the Commission. A Certificate of Service accompanied the Secretary's Motion, indicating service on Respondent by first class mail.¹

Respondent Vice President George Lynardakis responded to the Secretary's Motion, by letter, dated April 7, 2014, with enclosures. In this letter, Respondent asserts that the OSHA inspector wrote citations regarding Tamco Construction, LLC's worksite scaffolding practices. Respondent further states that "Polylite Roof Decks, Inc. did not man this project and therefore did not subject any PRD [Polylite Roof Deck] employees to any workplace hazards."

¹ First class mail service was to Respondent's address of record: 215 Wilson Avenue, Newark, New Jersey 07105.

On April 14, 2014, an Order issued advising Respondent of its right to file a further written response to the Secretary's Motion, on or before May 9, 2014. Respondent was advised that failure to respond to the Order, by filing a further written response to the Secretary's Motion, may result in a decision being made regarding the Secretary's Motion based solely on the information already received by the Court. Respondent was further advised that failure to comply with the Order, by filing a further written response to the Secretary's Motion, may result in its notice of contest being dismissed and the citation and proposed penalty being affirmed. *See* Commission Rule 101; 29 C.F.R. § 2200.101. This Order was sent by certified mail, return receipt requested, to George Lynardakis, Vice President, Polylite Roof Decks, Inc., 215 Wilson Avenue, Newark, NJ 07105. The certified mail receipt was signed and returned, indicating delivery on April 19, 2014. Respondent did not file a response to the Order.

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

Background²

The Avenel, New Jersey Area Office of the Occupational Safety and Health Administration (OSHA) conducted an inspection of Respondent's job site, located at 1311 Morris Avenue, Union, New Jersey 07083, on August 2, 2012. The designated OSHA inspection number is 551798. On October 17, 2012, OSHA issued to Respondent one three item serious citation and a notification of penalty (citation). The total penalty proposed was \$8,400.00. The citation advised Respondent that unless it informed OSHA 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 Area Office sent the citation to Respondent's address, Polylite Roof Decks, Inc., 215 Wilson Avenue, Newark, NJ 07105, the same address noted on Respondent's late notice of contest and on the citation. The OSHA Area Office mailed the citation to Respondent by USPS certified mail, return receipt requested, on October 19, 2012. Gloria Santiago signed

² The background is based on the Secretary's Motion, with attachments, and Respondent's April 7, 2014 letter response to the Secretary's Motion. The attachments to the Secretary's Motion include the citation, signed certified mail receipt, USPS Tracking form, and the late-filed notice of contest dated August 20, 2013. In the April 14, 2014 Order, Respondent was instructed to state whether it disagreed with any of the factual representations set forth in the Secretary's Motion. As stated above, Respondent filed a letter response to the Secretary's Motion, but did not further respond to the Secretary's Motion as set forth in the April 14, 2014 Order. Where Respondent has indicated disagreement with the Secretary's representations, that disagreement is noted in the background discussion. Where Respondent has indicated no disagreement, the representations are regarded as uncontested.

the certified mail receipt, on October 22, 2012, acknowledging receipt of the citation at Respondent's address. USPS Tracking confirms delivery of the citation sent by certified mail on October 22, 2012.

Respondent's Vice President Lynardakis filed with the Commission a late notice of contest letter, dated August 20, 2013, regarding OSHA inspection # 551798.³ Mr. Lynardakis stated that Respondent never received the original letter containing the citation, stating the employer's violation. He noted that Respondent's office is located in a central building with three other businesses. Further, Respondent stated that Gloria Santiago is not an employee of PolyLite Roof Decks. Respondent was informed that Gloria Santiago "signed for the letter" containing the citation when Respondent called the OSHA Avenel New Jersey Area Office. Respondent's late notice of contest does not state when Respondent's call was placed to the OSHA Area office. The late notice of contest does not state when Respondent first learned that the citation had been issued and signed for, as received, at Respondent's business address.

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 and/or proposed penalty. Based on certified mail return receipt, signed on October 22, 2012, at Respondent's address of record, Respondent's notice of contest was due on or before November 13, 2012. Respondent did not file a notice of contest on or before that date. Respondent's August 20, 2013 late notice of contest letter, addressed to the Commission, is dated more than nine months after the November 13, 2012 notice of contest due date. Respondent's August 20, 2013 late notice of contest was docketed with the Commission on September 6, 2013.

Positions of the Parties

The Secretary's Motion contends that the citation should be affirmed as a final order of the Commission because: (1) Respondent did not timely file its notice of contest, (2) OSHA's service of the citation, by USPS certified mail to the address Respondent provided to OSHA, was proper, (3) the late-filed notice of contest does not establish "excusable neglect" for the untimely

³ Respondent's August 20, 2013, late notice of contest letter also concerned OSHA inspection # 551698. That case, OSHA inspection # 551698, was docketed with the Commission, as case # 13-1472, on September 6, 2013. A stipulated settlement was executed in case # 13-1472, by the parties, on January 10, 2014. The Administrative Law Judge's Report regarding that settlement was docketed with the Commission, on March 27, 2014, and became a final order of the Commission, on April 28, 2014. Accordingly, the instant case # 13-1473 does not involve case # 13-1472, OSHA inspection # 551698, which case was settled by the parties.

filing under Federal Rule of Civil Procedure 60(b), and (4) Respondent did not raise a meritorious defense to the citation in the late-filed notice of contest.

In the August 20, 2013 late notice of contest, as summarized above, Respondent's Vice President Lynardakis states that Polylite Roof Decks never received the original letter containing the citation, stating the employer's violation. Respondent's office is located in a central building with three other businesses. Respondent states that Gloria Santiago, who signed the certified mail receipt for the citation, is not an employee of Polylite Roof Decks. Respondent was informed that Gloria Santiago "signed for the letter" containing the citation when Respondent called the OSHA Avenel New Jersey Area Office.

Further, in Respondent's April 7, 2014 letter response to the Secretary's Motion, Mr. Lynardakis contends that the day the OSHA inspector wrote the citations they concerned Tamco Construction, LLC's work site scaffolding practices that were in violation of OSHA standards, not Respondent Polylite Roof Decks' practices. Respondent contends that it did not "manage this project" and, therefore, Respondent "did not subject any PRD [Polylite Roof Decks] employees to any workplace hazards." Respondent submitted copies of two checks from Wells Fargo Business Online, dated October 3, 2012 and February 25, 2013, from Polylite Roof Decks, Inc.⁴ to Tamco Construction, LLC. Respondent also submitted documents, dated February 10, 2012, October 3, 2012, and February 25, 2013, purporting to show Northfield Bank bookkeeping entries for Tamco Construction, LLC, "the contractor performing the work at Northfield Bank in Union, New Jersey."

Discussion

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

In this case, it is undisputed that the October 17, 2012 citation issued in this case was delivered and received at Respondent's address of record – the address provided by Respondent to OSHA, appearing on Respondent's late notice of contest, and on Respondent's printed

⁴ Respondent's printed checks set forth Respondent's address as 215 Wilson Avenue, Newark, NJ 07105, Respondent's address of record provided to OSHA.

business checks: 215 Wilson Avenue, Newark, New Jersey 07105. Delivery on October 22, 2012 is documented by the USPS Tracking form. Receipt at Respondent's address of record is documented by the certified mail receipt signed on October 22, 2012. It is undisputed that Respondent did not file a notice of contest on or before November 13, 2012. Respondent's August 20, 2013 notice of contest was untimely. 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.

An employer who has filed an untimely notice of contest may be granted relief under Rule 60(b) in certain circumstances. *George Harms Constr. Co. v. Chao*, 371 F3d 156 (3d Cir. 2004). A late filing may be excused under Rule 60(b)(1) if the final order was entered as a result 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."⁵ 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). 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 2113, 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 (No. 09-1559, 2010); *Elan Lawn and Landscape Serv., Inc.*, 22 BNA OSHC 1337, 1338 (No. 08-0700, 2008).

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 Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 393 (1993) (*Pioneer*). In this case, the citation was received at Respondent's address of record on October 22, 2012. Respondent's Vice President Lynardakis states that Respondent was not aware that the citation had been signed for as received, at Respondent's business address, until sometime thereafter, when Respondent called the OSHA Area Office. Mr. Lynardakis' delayed knowledge that the citation had been issued and signed for as received, at

⁵ 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. In this case, there is no allegation that the Secretary or his representatives misled Respondent as to the notice of contest filing deadline.

Respondent's address of record, resulted from the handling - or mishandling - of the document, following its receipt at Respondent's business address. Therefore, Respondent is not entitled to relief under Rule 60(b)(6). The undersigned thus regards Respondent's late notice of contest and letter response as a request for relief under Rule 60(b)(1), due to "excusable neglect."

In regard to Respondent's request for relief because the late filing was due to "excusable neglect," the Commission applies the equitable analysis stated by the Supreme Court in its *Pioneer* decision. This analysis takes into account "all relevant circumstances" and includes consideration of (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. 97-851, 1999), quoting *Pioneer*, 507 U.S. at 395.

In evaluating whether the late filing of a notice of contest was due to excusable neglect, the Commission has found a "key factor" to be "the reason for the delay, including whether it was within the reasonable control of the movant." *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-367, 2000). In appropriate circumstances, the Commission has held this to be the dispositive factor. *Id.*; *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1149 (No. 99-945, 2000). The Commission has held that "[e]mployers must maintain orderly procedures for handling important documents," and that 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 at 1149 (employer's president failed to carefully read and act upon information contained in citation); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989). Here, Respondent does not dispute that the certified mail receipt - acknowledging receipt of the citation at Respondent's address of record - was signed on October 22, 2012. Respondent states that the individual who signed the certified mail receipt at Respondent's business address, Gloria Santiago, is not a Respondent employee. Respondent states that Respondent's office is located in a central building with three other businesses. Respondent contends that it did not receive the citation delivered on October 22, 2012 and did not learn of the citation until Respondent called the OSHA Area Office at an unspecified later date. Therefore, Respondent requests the opportunity to file a late notice of contest.

Ensuring the timely management and processing of important business documents, such as the citation received in this case, is within the employer's reasonable control. It is within Respondent's reasonable control to establish and implement reliable procedures for important documents delivered to Respondent's business address, even when Respondent's office is located in a building shared with other businesses. *See CalHar Constr., Inc.*, 18 BNA OSHC at 2153; *J.F. Shea Co.*, 15 BNA OSHC 1092, 1093 (No. 89-0976, 1991) (relief denied where the error in timely handling the citation occurred in the employer's own office); *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830, 1989) (relief denied where company employee who received citation failed to bring it to the attention of the proper company officer); *Louisiana-Pacific Corp.*, 13 BNA OSHC at 2021 (relief denied where, during period of management transition, company's new manager was unaware of the citation until the contest period had expired). Maintenance of orderly procedures for handling important documents is clearly within the reasonable control of Respondent. I conclude that this factor is dispositive and that there is no justification for granting Rule 60(b) relief in this case.

The inspection in this case was conducted on August 2, 2012, and the citation was issued on October 17, 2012. Respondent does not state when Respondent called the OSHA Area Office and learned that the citation has been signed for as received at Respondent's address of record in October 2012. Respondent's late notice of contest is dated August 20, 2013, more than one year following the OSHA worksite inspection and more than ten months after the citation issued. No reason is given for Respondent's apparent delayed inquiry into the status of the OSHA inspection and citations, if any.

In reaching the conclusion in this case, I have also considered the statements in Respondent's letter response that Respondent would rely upon to show a meritorious defense to the citation. However, before reaching the issue of whether Respondent has a meritorious defense to the citation, the record first must establish that the untimely filing was the result of "excusable neglect," entitling Respondent to relief under Rule 60(b). *See Northwest Conduit*, 18 BNA OSHC at 1952. Because the record does not show that the late filing was due to "excusable neglect," the issue of a meritorious defense need not be addressed.

Decision

I find that Respondent's notice of contest was untimely filed and that Respondent has not demonstrated that it is entitled to relief under Rule 60(b). I conclude that the reason for the untimely filing was within Respondent's reasonable control and that this factor is dispositive.

Based on the foregoing, the Secretary's Motion is Granted, Respondent's late notice of contest is Dismissed, and the citation issued on October 17, 2012, is Affirmed in all respects.

SO ORDERED.

Dated: November 4, 2014
Washington, D.C.

/s/
Honorable Carol A. Baumerich
Judge, OSHRC