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. PRIME ROOFING CORPORATION, Respondent,	OSHRC Docket No. 07-1409

APPEARANCES:

Lee Grabel, Attorney; Michael P. Doyle, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; Gregory F. Jacob, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

William A. Seppala; New Ipswich, NH
For the Respondent

DECISION AND REMAND

Before: ROGERS, Chairman; THOMPSON, Commissioner.

BY THE COMMISSION:

STATEMENT OF THE CASE

The Occupational Safety and Health Administration ("OSHA") inspected a worksite located in Hanover, New Hampshire and, on April 3, 2006, issued a citation to Prime Roofing Corporation ("Prime") under the Occupational Safety and Health Act of 1970 ("Act" or "OSH Act"), 29 U.S.C. §§ 651-678, alleging a serious fall protection violation. In an order dated October 25, 2007, Chief Administrative Law Judge Irving Sommer affirmed the citation after determining that Prime had not timely filed a notice of contest ("NOC") and was not entitled to relief from a final order under Federal Rule of Civil Procedure 60(b). Upon review, the Commission remanded the case for the judge to consider whether any of the other letters filed by Prime was a valid NOC and, if so, whether this would affect the judge's Rule 60(b)

determination. *Prime*, 22 BNA OSHC 1092, 1094, 2008 CCH OSHD ¶ 32,930, p. 53,654 (No. 07-1409, 2007).

On remand, the judge issued an order ("NOC order") in which he determined that one of Prime's other letters, filed with OSHA before expiration of the contest period, constituted a valid NOC. The judge therefore vacated his order denying Prime relief under Rule 60(b) and instructed the Secretary to file a complaint within thirty days. The Secretary timely filed her complaint and, the next day, filed a motion for "Voluntary Dismissal with Prejudice," stating explicitly that the purpose of her motion was "to secure a final judgment and to seek immediate review" of the NOC order. In an order dated February 5, 2008, the judge granted the Secretary's motion and dismissed the citation and complaint with prejudice. The Secretary now petitions for review of the judge's dismissal order for the stated purpose of obtaining review of the interlocutory NOC order. For the reasons that follow, we vacate the judge's dismissal order and remand the case to the judge for further proceedings consistent with this opinion.

ISSUES

At issue before the Commission is whether the Secretary properly sought review of the judge's interlocutory NOC order by requesting and receiving a voluntary dismissal with prejudice and, if so, whether the judge properly concluded that the letter filed by Prime within the contest period was a valid NOC.

FINDINGS OF FACT

OSHA issued a citation to Prime on April 3, 2006, and Prime received the citation by certified mail the next day. On April 13, Michael Goen, vice-president of Prime, attended an informal conference with an OSHA Assistant Area Director ("AAD") and the compliance officer who had inspected the worksite. During the conference, Goen contended that a subcontractor was the employer of the exposed employees at the worksite, and the AAD asked Goen to provide OSHA with certain information to substantiate this claim. In a letter dated April 21, 2006, and received by OSHA on April 24, Goen informed the AAD of the alleged subcontractor's address and noted that "[b]illings associated to jobsite" had been enclosed.

Over the next few months, OSHA received a number of additional letters from Prime, including one dated April 28, 2006, which OSHA received on May 1. In this letter, Prime noted that it had provided OSHA with information establishing that the subcontractor was not a Prime

employee and that, pursuant to the agreement it claimed was reached during the informal conference, OSHA should forward a settlement agreement to Prime.[1] Over a year later, in a letter dated September 5, 2007, Prime informed OSHA that it would "take this case up with the . . . Commission" and would not pay the penalty, because the citation was issued to the "wrong company" and Prime "had zero employees on this particular project." In another letter, also dated September 5 and jointly addressed to OSHA and the Commission, Prime requested an "impartial hearing," again arguing that the subcontractor, rather than Prime, was solely responsible for the alleged violation.

DISCUSSION

I. VOLUNTARY DISMISSAL WITH PREJUDICE

Before considering the Secretary's substantive challenge to the judge's NOC order, we first consider whether her method of using a voluntary dismissal with prejudice to seek immediate review of that interlocutory order is permissible in Commission proceedings. For the reasons that follow, we conclude the Secretary's use of this method was appropriate here.

PRINCIPLES OF LAW

In accordance with section 12(j) of the OSH Act, 29 U.S.C. § 661(j), the Commission's procedural rules provide that following the docketing of a judge's decision constituting the "final disposition of the proceedings" in a contested case, "[a] party adversely affected or aggrieved" by the judge's decision may petition the Commission for discretionary review.[2] 29 C.F.R. §§ 2200.90(a)-(b), .91(b). Any single Commissioner "may, as a matter of discretion, direct review on his own motion or on the petition of a party." 29 C.F.R. §§ 2200.90(d), .91(a). Once review has been directed, "[u]nless the Commission orders otherwise," jurisdiction is established in the Commission to review "the entire case." 29 C.F.R. § 2200.92(a). Pursuant to its jurisdiction, the Commission has routinely reviewed a judge's interlocutory order in the context

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[1] Prime later sent OSHA four additional letters—dated June and August 2006, and April 2007—in which Prime maintained it had no employees on the worksite at issue and the subcontractor was solely responsible for the violation.

[2] The Commission has recognized that, under the OSH Act, "the existence of a 'contest' is critical to [its] jurisdiction." *See Francisco Tower Serv., Inc.*, 3 BNA OSHC 1952, 1954, 1975-1976 CCH OSHD ¶ 20,401, p. 24,339 (No. 4845, 1976).

of reviewing a final decision. *See, e.g.*, *Manganas Painting Co.*, 1995-1997 CCH OSHD ¶ 31,119 (July 26, 1996) (ALJ Order), *aff'd in part and vacated in part*, 21 BNA OSHC 2043, 2046 & n.3, 2008 CCH OSHD ¶ 32,945, p. 53,799 & n.3 (No. 95-0103, 2007) (consolidated) (addressing interlocutory orders pertaining to motions for suppression of evidence and partial summary judgment following issuance of order that explicitly refused to revisit them), *rev'd in part on other grounds*, 540 F.3d 519 (6th Cir. 2008); *Sturm Ruger & Co., Pine Tree Castings Div.*, 2001 WL 95792, 2001 WL 95794 (Jan. 23, 2001) (ALJ orders), *aff'd*, 20 BNA OSHC 1720, 1721, 1726-29, 2002-2004 CCH OSHD ¶ 32,719, pp. 51,853-55 (No. 99-1873, 2004) (consolidated) (following issuance of orders that only addressed challenges to validity of OSHA's warrants, Commission considered merits of interlocutory orders denying employer's motions to compel discovery and suppress evidence, and squashing subpoenas issued by employer), *aff'd*, 135 Fed. App. 431 (1st Cir. 2005). The Commission, however, has not previously addressed the reviewability of an interlocutory order following a judge's decision to grant a party's request for a voluntary dismissal with prejudice.

The federal courts generally recognize that "a plaintiff may not appeal a voluntary dismissal because there is no involuntary or adverse judgment against him." *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 308-09 (1st Cir.) (citation omitted), *cert. denied*, 537 U.S. 1001 (2002). Nonetheless, most federal circuits permit such appeals where the voluntary dismissal is with prejudice. *See, e.g.*, *Dearth v. Mukasey*, 516 F.3d 413, 415 n.1 (6th Cir. 2008); *Scanlon v. M.V. Super Servant 3*, 429 F.3d 6, 9-10 (1st Cir. 2005); *Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207, 210 (2d Cir. 2005); *Lippitt v. Raymond James Fin. Servs.*, 340 F.3d 1033, 1038 (9th Cir. 2003); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1288 (10th Cir. 2001); *O'Boyle v. Jiffy Lube Int'l, Inc.*, 866 F.2d 88, 92 (3rd Cir. 1989). The First Circuit, a relevant circuit here, views such dismissals as appealable final orders where the party appealing the order sought dismissal "without delay," "made explicit" its intent to appeal in the dismissal motion, and believed that the judge's interlocutory order "significantly prejudiced" its case. *Scanlon*, 429 F.3d at 9-10 (finding no jurisdiction to review case where motion for dismissal was delayed and party had failed to explicitly reserve its right to appeal); *Cashmere & Camel Hair Mfrs. Inst.*, 284 F.3d at 308-09 (finding jurisdiction to review case where judge's interlocutory order significantly prejudiced appellant's case and dismissal motion

explicitly reserved appellant's right to appeal). The First Circuit has explained the necessity of permitting this procedure:

> It is understandable that plaintiffs may sometimes find that an interlocutory ruling has so damaged their case that seeing it to trial would be a waste of resources. However, in such situations, the proper course of action is not to delay the proceedings, but to file a motion for voluntary dismissal with prejudice, stating explicitly that the purpose is to seek immediate review of the interlocutory order in question. Such a voluntary dismissal has the virtues of giving the defendants and the district court notice of the plaintiff's intentions, and of preventing excessive delay. The alternative—to delay and delay until the court loses patience and dismisses the complaint under [Federal Rule of Civil Procedure] 41(b)—needlessly wastes the time and resources of all parties involved.

John's Insulation, Inc. v. L. Addison & Assocs., Inc., 156 F.3d 101, 107 (1st Cir. 1998).

ANALYSIS

Here, the Secretary moved for a voluntary dismissal with prejudice for the explicit purpose of challenging the judge's determination that Prime's April 21, 2006 letter constitutes a valid NOC. By requesting and receiving a dismissal with prejudice, the Secretary relinquished her right to prosecute the merits of the citation. Nonetheless, as the parties' dispute over the judge's NOC order could result in affirmance of the citation, there remains the necessary "contest" to establish the Commission's jurisdiction on review. *See Francisco Tower Serv., Inc.*, 3 BNA OSHC at 1954, 1975-1976 CCH OSHD at p. 24,339. Therefore, based on the direction for review of the judge's dismissal order, the Commission has jurisdiction to review "the entire case," including the judge's interlocutory NOC order. Commission Rule 92(a), 29 C.F.R. § 2200.92(a).[3]

In all respects, the Secretary's method of seeking review here complied with the requirements identified by the First Circuit: she promptly moved for a voluntary dismissal with prejudice and explicitly stated her intent to seek review of the interlocutory NOC order, an

[3] Given the scope of the Commission's review authority under Rule 92(a), the Commission need not resort to the federal courts' "merger rule" to exercise jurisdiction over interlocutory orders. In contrast to Rule 92(a), 28 U.S.C. § 1291 limits the jurisdiction of federal appellate courts to "final decisions" of federal district courts. Accordingly, federal appellate courts adopted the merger rule in order to obtain jurisdiction over interlocutory orders. *See Chao v. Roy's Constr., Inc.*, 517 F.3d 180, 188 (3d Cir. 2008) ("By allowing appellate courts to review interlocutory rulings on appeal from the final judgment, the federal merger rule ensures that those rulings will not escape review.").

adverse ruling that "significantly prejudiced" her case. *Scanlon*, 429 F.3d at 9-10; *Cashmere & Camel Hair Mfrs. Inst.*, 284 F.3d at 308-09. By relinquishing her right to litigate the merits of the case, the Secretary has ensured that the Commission's review of the judge's NOC order will either eliminate or minimize future proceedings, thereby promoting judicial economy and avoiding piecemeal litigation.[4] *See Rabbi Jacob Joseph Sch.*, 425 F.3d at 210 (using voluntary dismissals with prejudice as method for obtaining review of interlocutory orders "furthers the goal of judicial economy by permitting a plaintiff to forgo litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end"). Here, we hold the Secretary properly sought immediate review of an adverse interlocutory order by moving for a voluntary dismissal with prejudice. *Cf. Roy's Constr., Inc*. 21 BNA OSHC 1557, 1558-59, 2006 CCH OSHD ¶ 32,828, pp. 52,716-18 (No. 04-1409, 2006) (upholding default judgment sanction where Secretary attempted to obtain immediate review of adverse interlocutory NOC ruling by defying judge's direct order to file complaint), *aff'd*, 517 F.3d 180 (3rd Cir. 2008). Accordingly, we exercise our discretion to consider the Secretary's challenge to the judge's interlocutory NOC order.

II. NOTICE OF CONTEST

Prime received the OSHA citation on April 4, 2006, and thus had until April 25 to timely file a NOC. *Prime*, 22 BNA OSHC at 1093, 2008 CCH OSHD at p. 53,653. On remand from the Commission, the judge concluded that a letter from Prime dated April 21, 2006, and received by OSHA on April 24, was a valid and timely NOC. However, as the Commission noted in its earlier order, between the end of the contest period and Prime's first communication with the Commission in September 2007, Prime sent several other letters to OSHA, and, "[u]nder Commission precedent, it is possible one of these letters could be considered [Prime's] NOC." *Id.* at 1094, 2008 CCH OSHD at p. 53,654. For the reasons that follow, we conclude the April

[4] Commission Rule 73, 29 C.F.R. § 2200.73, provides the only other vehicle for seeking immediate review of an interlocutory order. That rule applies where (1) "the review involves an important question of law or policy about which there is substantial ground for difference of opinion," and (2) "immediate review of the ruling may materially expedite the final disposition of the proceedings." 29 C.F.R. § 2200.73(a)(1).

21 letter does not satisfy the established criteria for a valid NOC, but that a letter Prime sent to OSHA soon thereafter does satisfy these criteria.

PRINCIPLES OF LAW

The OSH Act requires that, upon receipt of an OSHA citation and proposed penalty, an employer must notify the Secretary within fifteen working days if it wishes to contest the citation and/or penalty. OSH Act § 10(a), 29 U.S.C. § 659(a). If the employer fails to so notify the Secretary, the citation and proposed penalty assessment are "deemed a final order of the Commission and not subject to review by any court or agency." *Id.* Implementing this statutory mandate, the Secretary promulgated the following regulation:

> Any employer to whom a citation or notice of proposed penalty has been issued may, under section 10(a) of the Act, notify the Area Director in writing that he intends to contest such citation or proposed penalty before the Review Commission. Such notice of intention to contest shall be postmarked within 15 working days of the receipt by the employer of the notice of proposed penalty. Every notice of intention to contest shall specify whether it is directed to the citation or to the proposed penalty, or both.

29 C.F.R. § 1903.17(a).

The Commission and courts have both upheld this regulation's requirement that a NOC be in writing. *Acrom Constr. Servs., Inc.*, 15 BNA OSHC 1123, 1125, 1991-1993 CCH OSHD ¶ 29,393, p. 39,563 (No. 88-2291, 1991) (concluding "that an oral notice of contest is not a sufficient means of contesting a citation," and overruling Commission cases that held otherwise); *see also Martin v. Pav-Saver Mfg. Co.*, 933 F.2d 528, 530 (7th Cir. 1991) (holding that Secretary's interpretation of OSH Act's notice requirements is deserving of deference, and that her "multifaceted—and delicate—enforcement responsibilities during [the Act's] fifteen-day period make reasonable her regulatory interpretation of the Act as requiring written notice of contest"); *Sec'y of Labor v. Barretto Granite Corp.*, 830 F.2d 396, 397 (1st Cir. 1987) (per curiam) (concluding it is reasonable for Secretary to require that NOC "be made in writing to the OSHA area director within 15 working days of the employer's receipt of the notice of proposed penalty"). In the absence of precise wording identifying a written document as a "Notice of Contest," the Commission liberally construes the language of an employer's letter to determine whether it "exhibit[s] a clear intent to dispute the citation[]." *Herasco Contractors, Inc.*, 16 BNA OSHC 1401, 1402, 1993-1995 CCH OSHD ¶ 30,229, p. 41,613 (No. 93-1412, 1993) ("*Herasco*"). Applying this legal test, the Commission determined in *Herasco* that the

employer's letter to OSHA, which was captioned "Abatement Letter" and alleged infeasibility and physical impossibility as defenses to the citations, constituted a valid NOC. *Id.*, 1993-1995 CCH OSHD at p. 41,613.

ANALYSIS

Here, the judge determined Prime's April 21 letter was a valid and timely NOC. The entire text of that letter states as follows:

> Per your request the information is enclosed:
>
> 1. Subcontractor address.
> P.O. Box 102
> Temple, NH 03084
> 2. Billings associated to job site.
>
> I[f] you have any questions, please contact our office.

Attached to the letter are several "Contractors Invoices" addressed to Prime from the owner of the company that, during the informal conference, Prime had identified as the subcontractor responsible for the alleged violation. Neither the OSHA citation nor its proposed penalty is referenced in either the plain wording of the letter or the attached invoices and, unlike the letter in *Herasco*, there is no other language from which to discern any intent to contest the citation or penalty amount. *Id*., 1993-1995 CCH OSHD at p. 41,613.

Prime would have us infer, based on the parties' discussion during the informal conference, that the invoices substantiate its denial of responsibility for the alleged violation. However, relying upon oral communications to assess whether a letter constitutes a valid NOC, where the communications are not referenced in the letter, would eviscerate the requirement that a NOC be in writing. 29 C.F.R. § 1903.17(a); *Acrom Constr. Servs., Inc.*, 15 BNA OSHC at 1125, 1991-1993 CCH OSHD at p. 39,563. We therefore reject the judge's determination that the April 21 letter is a valid NOC.

Another letter from Prime, dated April 28, 2006 and received by OSHA on May 1, contains more explicit language that we find evinces the company's intent to contest the citation. In this letter, Prime states it had provided information establishing that the identified subcontractor was "in charge of the project," and was "not an employee of Prime Roofing." As with the letter at issue in *Herasco*, this language conveys a defense to the citation—that Prime was not the employer responsible for the alleged violation. 16 BNA OSHC at 1402, 1993-1995

CCH OSHD at p. 41,613. Accordingly, liberally construed, we conclude that Prime's April 28 letter, filed with OSHA less than one week after the end of the contest period, is a valid NOC.

III. FEDERAL RULE OF CIVIL PROCEDURE RULE 60(b)

The judge originally determined that Prime was not entitled to Rule 60(b) relief for its late filing of a NOC that was more than sixteen months late. *Nw. Conduit Corp.*, 18 BNA OSHC 1948, 1949, 1999 CCH OSHD ¶ 31,949, p. 47,458 (No. 97-851, 1999) (concluding Rule 60(b) relief may be granted from final judgment that is due to late-filed NOC). In view of our decision here that Prime's April 28 letter constitutes a much earlier-filed NOC, we now remand this case to the judge to consider, after conducting an evidentiary hearing, whether Prime is entitled to Rule 60(b) relief for its late filing. *Elan Lawn & Landscape Serv., Inc.*, 22 BNA OSHC 1337, 1339, 2008 CCH OSHD ¶ 32,977, p. 54,051 (No. 08-0700, 2008) (listing "the length of the delay and its potential impact on judicial proceedings" as one of several factors relevant to determining whether late filing is due to "excusable neglect").

With respect to the judge's development of the record on remand and consideration of the appropriateness of Rule 60(b) relief, we note there appear to be several factual disputes regarding the circumstances of Prime's delay in filing its NOC, as well as whether Prime acted in good faith. According to Prime, OSHA agreed to withdraw the citation if Prime provided certain documentation showing that a different company was the employer responsible for the alleged violation. Prime contends that it provided the requested documentation to OSHA and, therefore, it believed the citation would be withdrawn. The Secretary contends, however, that Prime did not submit all of the requested documentation to OSHA before expiration of the contest period, and that statements made by employees to the compliance officer refuted Prime's denial of responsibility. The parties also disagree about what precisely was stated at the informal conference and during an April 25, 2006 telephone call between the AAD and Prime, including whether OSHA had told Prime that April 25 was the last day of the contest period.

Under these circumstances, we conclude an evidentiary hearing is necessary to resolve the parties' factual disputes, as well as any issues that may be relevant to whether Prime is entitled to Rule 60(b) relief. We also note that, regardless of the judge's ruling on the question of Rule 60(b) relief, the Secretary has waived the right to a hearing on the merits of the citation.

CONCLUSION

We vacate the judge's dismissal order, find that Prime's April 28, 2006 letter constitutes a valid NOC, and remand this case to the judge to conduct an evidentiary hearing to determine whether Prime is entitled to Rule 60(b) relief for its late filing.

SO ORDERED.

/s/_____
Thomasina V. Rogers
Chairman

Dated: September 16, 2009

/s/_____
Horace A. Thompson III
Commissioner

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, United States Department of Labor, Complainant, v. PRIME ROOFING CORPORATION, Respondent.	Docket NO. 07-1409 REGION 1 INSP. #306953647

ORDER

Upon consideration of the Secretary's Motion for Voluntary Dismissal With Prejudice, IT IS HEREBY ORDERED that the Citation issued on April 3. 2006 and the Complaint filed on January 14, 2008 are dismissed with prejudice.

/s/
Irving Sommer
Chief Judge, OSHRC

Date: February 5, 2008.