



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor,
Complainant

v.

Apollo Auto Sales & Service, Inc.,
Respondent.

OSHRC Docket No.: **18-1194 & 18-1195**

On Pleadings:

Jennifer J. Johnson, Esq.
Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Apollo Auto Sales & Service, Inc., Houston, Texas
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission on a late notice of contest filed with the Commission on July 25, 2018, by Apollo Auto Sales & Service, Inc. (Apollo Auto). The Court construes Apollo Auto's late notice of contest as a request for relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (Rule 60(b)). On October 15, 2018, the Secretary of Labor, United States Department of Labor (Secretary) filed an Opposition to the request for Rule 60(b) relief.

For the reasons that follow, Apollo Auto's request for relief pursuant to Rule 60(b)(1) is **DENIED**.

Background

This matter arises out of an inspection of Apollo Auto's jobsite located at 2218 North Loop W., Houston, Texas by the Occupational Safety and Health Administration (OSHA) during the period January 9, 2018 through January 18, 2018. As a result of the inspection, on February 16, 2018, the Secretary issued a Citation and Notification of Penalty (Citation) alleging a serious violation of section 5(a)(1) of the Act, and two serious violations of the standards promulgated

under section 5(a)(2) of the Act. The Citation also alleges an other-than-serious violation. Penalties in the total amount of \$6,652.00 were proposed for the alleged violations.

The Citation also provides Apollo Auto had 15 working days from the date of receipt to contest the Citation. The Citation initially was mailed to Apollo Auto by first class mail, however it was returned “undeliverable.” OSHA then sent the Citation to Apollo Auto by United Parcel Service (UPS), and it was delivered on March 6, 2018 (Opposition, Exh. A, ¶ 2; Exh. A, attachment 2). As a result of the March 6, 2018, delivery date, excluding weekends and Federal holidays, the 15-day contest period expired on March 27, 2018. Apollo Auto did not file a Notice of Contest within the 15-day contest period. Therefore, the Citation became a Final Order of the Commission under § 10(a) of the Act, as of the end of the contest period. On May 1, 2018, OSHA requested abatement documentation and notified Apollo that the Citation had become final on March 27, 2018.

OSHA conducted a follow up inspection of Apollo Auto’s cited worksite on May 9, 2018. As a result of the follow up inspection, on May 17, 2018, OSHA issued a Notification of Failure to Abate Alleged Violations (Failure to Abate) regarding the violation previously issued on February 16, 2018, as a serious violation of section 5(a)(1) of the Act; and proposed a penalty in the amount of \$25,868.00 for the Failure to Abate violation. OSHA hand delivered the Failure to Abate notification to Apollo Auto Sales’ manager, Stacy Williams on May 18, 2018 (Opposition, Exh. A, ¶ 6). The Failure to Abate provides Apollo had 15 working days from receipt to contest. The fifteen-day period for contesting the Failure to Abate expired on June 11, 2018. Apollo Auto did not file a Notice of Contest within the 15-day contest period. Therefore, the Failure to Abate became a Final Order of the Commission under § 10(a) of the Act, as of the end of the contest period.¹

As set forth in its July 25, 2018 Request for Relief, Apollo Auto disputes the citations, charges and penalties, stating that it considers OSHA’s actions as “very harsh.” Apollo Auto also

¹ On June 29, 2018, OSHA issued an other-than-serious Citation to Apollo Auto proposing a penalty in the amount of \$311.00. Apollo Auto timely contested the June 29, 2018 Citation. The Commission’s Executive Secretary docketed the matter as OSHRC Docket No. 18-1193. On December 11, 2018, Judge Brian Duncan issued a Decision affirming the Citation and assessing the proposed penalty due to Apollo Auto failing to appear on a scheduled Simplified Proceedings Conference Call and failing to respond to his Order to Show cause for not appearing. The Decision became a Final Order of the Commission on January 28, 2019.

provided in the filing the name and telephone number for attorney Afton Izen, advising that Ms. Izen would contact OSHA to resolve the matter.²

DISCUSSION

Pursuant to the requirements of the Act, an employer is required to notify the Secretary of its intent to contest (Notice of Contest) a Citation within 15 working days of receipt. Failure to timely file a Notice of Contest results in the Citation becoming a final order of the Commission by operation of law. Apollo Auto's contest was filed with the Commission on July 25, 2018, (nearly four months after receiving the Citation, and approximately six weeks after receiving the Failure to Abate), outside of the requisite 15-day period set out in the Act.

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 F.3d 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." 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). Apollo Auto has failed to provide sufficient proof that it is entitled to relief.

In determining whether the late filing of a Notice of Contest 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

² Ms. Izen has not filed a Notice of Appearance in this matter. On November 6, 2018, Ms. Izen advised the Court that she would not be representing Apollo Auto in this matter.

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 at 1763.

It is the Secretary’s burden to establish service of the Citation. Apollo Auto does not dispute the Citation was served. It also is not disputed that Apollo Auto did not contest the Citation and Failure to Abate within the requisite time periods. Apollo Auto’s contest letter was received by Commission on July 25, 2018, well after the final contest due dates. Therefore, by operation of law, the Citation, Failure to Abate and proposed penalties must be deemed Final Orders of the Commission, unless Apollo Auto can demonstrate it is entitled to relief.

The Court finds Apollo Auto has not demonstrated it is entitled to relief. Neither the record evidence nor Apollo Auto’s explanations for its late filing show deception or a failure to follow proper procedures on behalf of the Secretary. Apollo Auto received the Citation and the Failure to Abate. Both unambiguously provide in conspicuous typeface that Apollo Auto had 15 working days after receipt within which to file a notice of contest. Therefore, the Court finds the Secretary did not engage in deception and followed proper procedures in this matter.

The only reason Apollo Auto has provided to the Court for the delay is that it considers OSHA’s actions to be “very harsh.” This provides insufficient basis for the Court to conclude that the reason for the delay was not under Apollo Auto’s control. Therefore, the Court finds the delay

was within Apollo Auto's control. The Court finds that Apollo Auto failed to exercise due diligence and was simply negligent in failing to file contests before the expiration of the contest periods. 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).

Apollo Auto has not provided the Court evidence regarding any good faith efforts to timely contest. However, the Secretary asserts in his motion Apollo represented it was unable to respond because of preoccupation with personal family medical issues (Opposition, p. 7). The record does not demonstrate that Apollo Auto made any efforts prior to the statutory filing deadline or immediately after, regarding the Citation or Failure to Abate. Therefore, the Court finds that Apollo Auto did not make a good faith effort to comply.

The Court also finds that Apollo Auto has not alleged a meritorious defense, which is also required for relief. An employer must also establish the presence of a meritorious defense for Rule 60(b)(1) relief. *Northwest Conduit Corp.* 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).

The Secretary has not argued that he is prejudiced by the late filing. 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).

The final consideration is the impact of the delayed filing on the judicial proceedings. The delayed filing in this matter would not adversely impact the proceedings.

Having considered all factors enunciated in *Pioneer*, relief from the Final Order in this matter is not warranted. Apollo Auto's control over the delay and its lack of good faith are determinative. Apollo Auto has not shown "extraordinary circumstances" suggesting that it is faultless in the delay" as required for relief under Rule 60(b)(6).

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, Apollo Auto's request for relief pursuant to Rule 60(b)(1) is **HEREBY DENIED**. The Final Orders for the Citation and the Failure to Abate are undisturbed and are **AFFIRMED**.

SO ORDERED.

Dated: February 14, 2019

/s/ _____
Administrative Law Judge
Atlanta, Georgia