



United States of America  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
U.S. CUSTOM HOUSE  
721 19<sup>TH</sup> STREET, ROOM 407  
DENVER, COLORADO 80202-2517

SECRETARY OF LABOR,

Complainant,

v.

JRA CONSTRUCTION CORPORATION,

Respondent.

OSHRC Docket No.: 22-0048

For Complainant: Timothy S. Williams, Esq. and Karen Bobela, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd. #515, Denver, CO 80204

For Respondent: Jose Rodriquez, JRA Construction Corporation, 338 Spruce St., Bennett, CO 80102

JUDGE: First Judge Patrick B. Augustine, U.S. Administrative Law Judge

**DECISION AND ORDER GRANTING COMPLAINANT'S MOTION TO DISMISS  
UNTIMELY NOTICE OF CONTEST**

**Jurisdiction**

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (Act) due to the untimely filing of a *Notice of Contest* (NOC) by Respondent with the Commission. Jurisdiction over this action is conferred upon the Commission by Respondent filing a NOC. *See Slingsluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

**Right to Request a Hearing**

On March 7, 2022, the Court issued an *Order to Respondent* which advised the Parties, that either party could request a hearing on this matter within fourteen(14) days of the date of the Order. The *Order to Respondent* also stated that failure to request a hearing would be deemed a waiver

of a hearing and the Court would proceed to issue its Findings of Fact and Conclusions of Law (Decision and Order) based on the filings contained in the record. Neither party requested a hearing on the late NOC issue.

### **Procedural Background**

The Occupational Safety and Health Administration (OSHA) conducted an inspection of Respondent's worksite located at 22721 Narrowleaf, Aurora, CO on May 8, 2021. As a result of the inspection, OSHA issued one "Repeat-Serious" citation to Respondent (Citation.) The Citation proposed Respondent pay a penalty in the amount of \$22,527.00 for the Repeat-Serious citation (Citation 1, Item 1).

OSHA mailed the Citation to Respondent via United States Postal Service (USPS), certified mail, to Respondent's office at 338 Spruce, Bennett, CO 80102. Based on the certified mail return receipt provided by USPS, the Citation was received by and signed for by Respondent at 11:19 am on June 19, 2021 by Maria Velasquez.<sup>1</sup>

The Citation informed Respondent of its right to contest the citation<sup>2</sup> and stated, in part:

#### **Right to Contest: ...**

Unless you inform the area director in writing that you intend to contest the citation(s) and/or proposed penalty(ies) within 15 working days after receipt, the citation(s) and the proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.

*See Citation and Notification of Penalty, p. 2.*

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<sup>1</sup> See Exhibit A attached to Complainant's Opposition to Relief Under Federal Rule of Civil Procedure Rule 60(b).

<sup>2</sup> The Secretary of Labor has prescribed requirements for an employer to timely make a notice of contest. The employer contest must be made in writing. 29 C.F.R. § 1903.17(a). *See Sec'y of Labor v. Barretto Granite Corp.*, 830 F.2d 396, 398 (1st Cir. 1987) (per curiam).

Respondent was entitled to fifteen (15) working days to contest the Citation. Respondent's NOC was due by July 9, 2021. Respondent failed to file its NOC by that date. Respondent filed its NOC contesting the Citations and associated penalties on December 12, 2021, by sending a written NOC, certified United States Mail, to the Commission<sup>3</sup>. Thus, using December 12, 2021, as the operating date on which the timeframe runs, the NOC was over five months late. The late NOC filed with the Commission provided no reason for its delay. It also appears to acknowledge its responsibility for the Citation. Respondent takes issue only with the issue the Citation was issued as Repeat citation. The record indicates no informal conference was held due to the NOC being untimely filed.

By operation of law, the Citation has become a final order of the Commission. By filing a late NOC Respondent has, in effect, requested relief from the operation of § 10(c) of the Act. Rule 60(b) states that “[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding . . . .” Fed. R. Civ. P. 60(b)(Rule 60(b)). Rule 60(b) lists the reasons that would provide a sufficient basis for granting the relief requested. *Id.*

On February 23, 2022, Complainant filed his *Opposition to Relief Under Federal Rule of Civil Procedure Rule 60(b)* (Motion). Complainant seeks affirmance of the Citation and the proposed penalties because Respondent failed: (i) to file a timely NOC; (ii) to demonstrate “excusable neglect” pursuant to Rule 60(b)(1); and (iii) Respondent received actual notice of the Citation and failed to comply with the instructions—typed in bold-face and underlined print—indicating the deadline for filing a NOC.

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<sup>3</sup> The late NOC sent to the Commission came from the same address to which the Citation was sent by OSHA and to which all Orders and Notices of the Court were sent.

### **Controlling Case Law**

Upon receiving a Citation, an employer has fifteen (15) working days within which it must file a NOC. *See* § 10(a) of the Act, 29 U.S.C. § 659(a). If the employer does not file a NOC within the specified time 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.” *Id.* An uncontested citation is generally unreviewable. *See Culver v. U.S. Dept. of Labor Occupational Safety & Health Administration*, 248 Fed. Appx. 403 (3rd Cir. 2007).

The Commission has recognized two situations where the finality of § 10(a) of the Act, 29 U.S.C. § 659(a), does not preclude the Commission from hearing an employer’s challenge to citations even when a timely notice of contest has not been filed. The first is where the Secretary has employed deceptive practices or fails to comply with required procedures. *See Secretary of Labor v. Louisiana-Pacific Corp.*, 13 BNA OSHC 2020 (No. 86-1266, 1989). There is nothing in the administrative record to suggest this situation is present in this case.

The second situation is where the employer requests relief under Rule 60(b). The Commission has held an employer may move under Rule 60(b) for permission to file a late NOC. *Branciforte Builders*, 9 BNA OSHC 2113 (No. 80-1920, 1981). The burden is on the employer to show sufficient basis for relief under the rule. *Id.* *See also Craig Mech. Inc.*, 16 BNA OSHC 1763, 1764 (No. 92-0372s, 1994)(Respondent bears burden to establish basis for relief, *aff’d per curiam* 553 F.3d 633 (5th Cir. 1995)(unpublished).

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.” See *George Harms Constr. Co., Inc. v. Chao*, 371 F.3d 156, 163 (3rd Cir. 2004) (Commission “has jurisdiction to entertain a late notice of contest under” the excusable neglect standard of Rule 60(b)(1));<sup>4</sup> *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981).

A late filing also may be excused under Rule 60(b)(3)<sup>5</sup> if the late filing was caused by the Secretary’s “fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party.” See *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981); *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1476-77 (No. 76-2165, 1979). See also *Atlantic Marine, Inc. v. OSHRC*, 524 F.2d 476, 478 (5th Cir. 1975) (per curiam). Respondent offers no argument Complainant engaged in fraud or misrepresentation. Respondent does argue that for four months it waited for OSHA to get back to it because of a question as to the corporate entity status of Respondent. Therefore, it alleges misconduct by Complainant. However, Respondent does not offer a reason it did not file a timely NOC while it was waiting for OSHA to get back to it. Respondent is not relieved from filing a timely NOC because it had questions as to the Citation it wanted answered from OSHA. To protect its rights it should have filed a timely NOC and then pursued its request for clarification from OSHA before the Court.

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<sup>4</sup> But see *Chao v. Russell P. Le Frois Builder Inc.*, 291 F.3d 219 (2d Cir. 2002) (concluding Commission may not exercise jurisdiction based on Rule 60(b)(1)).

<sup>5</sup> 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

Further, a late filing may be excused under Rule 60(b)(6)<sup>6</sup>, 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 2116-17. 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 Invest. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 393 (1993) (*Pioneer*). In this case, Respondent did not contend or present any evidence in its NOC which would justify relief under Rule 60(b)(6).

In determining whether Respondent’s late filed NOC was due to “excusable neglect,” the Commission follows the Supreme Court’s test in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 381 (1993). Under *Pioneer*, the Court must consider “the danger of prejudice to the [opposing party], 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.” *Pioneer*, 507 U.S. at 395. *See Evergreen Envntl Serv*, 26 BNA OSHC 1982, 1984 (No. 16-1295, 2017). In *Pioneer*, “excusable neglect” is defined as an equitable determination of all relevant circumstances surrounding the party’s omission, and the prejudice these circumstances presented to the opposing party.<sup>7</sup>

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<sup>6</sup> Rule 60 also has provisions for relief under Rule 60(b)(2) which allows for relief when newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b). Rule 60(b)(4) also provides relief when a judgment is void. Finally, Rule 60(b)(5) also provides relief when the judgment has been satisfied, released, or discharged. Nothing in the factual record of the case indicates any of these provisions are implicated since a trial has not been held to invoke the “newly discovered” provisions. Likewise, there is nothing to indicate the judgment is void. Finally, Respondent’s late NOC clearly states the judgment has not been satisfied, released, or discharged.

<sup>7</sup> This definition has been applied to other federal procedural rules, including proceedings by the Commission. *See NW Conduit Corp.*, 18 BNA OSHC at 1950.

The Supreme Court stated that “inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute ‘excusable’ neglect.” *Pioneer*, 507 U.S. at 392.<sup>8</sup> The Court found “excusable neglect” to be, in part, an “elastic concept” not restricted to “omissions caused by circumstances beyond the control of the movant.” *Id.* Regarding relief sought pursuant to Rule 60(b)(1), the Court stated that “‘excusable neglect’ is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” *Id.* at 394

In *NW Conduit*, the Commission quoted *Pioneer*, noting that the “reason for the delay, including whether it was within the reasonable control of the movant,” is a “key factor” and, in appropriate circumstances, the dispositive factor. *NW Conduit Corp.*, 18 BNA OSHC at 1950. *See also A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148 (No. 9-0945, 2000); *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-0367, 2000); *NYNEX*, 18 OSHC 1944, 1947 (No. 95-1671, 1999) (finding because employer failed to present evidence on the reason for delay, it did not establish excusable neglect). *See also Hospital Del Maestro v. NLRB*, 263 F.3d 173, 174-75 (1st Cir. 2001) (“excuse given for the late filing must have the greatest import”).

Therefore, long-settled Commission precedent<sup>9</sup> focuses on the third factor in the *Pioneer* equitable analysis. *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153-54 (No. 98-0367, 2000). In appropriate circumstances, the Commission finds this to be the dispositive factor. Commission decisions state that “[e]mployers must maintain orderly procedures for handling important

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<sup>8</sup> Commission precedent states that ignorance of procedural rules does not constitute “excusable neglect” and that mere carelessness or negligence, even by a lay person, in failing to timely file a notice of contest does not justify relief under Rule 60(b)(6). *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).

<sup>9</sup> The Tenth Circuit, which is where this case arose, has not decided a contrary application of *Pioneer* and how the Commission has applied it. Thus, the Court will follow Commission case law on the issue presented. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96- 1719, 2000) (“Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission’s precedent.”).

documents,” and when the lack of such procedures results in the untimely filing of a notice of contest, Rule 60(b)(6) relief is not warranted. *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148-49 (No. 99-0945, 2000) (relief under Rule 60(b)(6) denied where the employer’s president failed to carefully read and act upon information contained in the citation); *CalHar Constr.*, 18 BNA OSHC at 2153-54 (relief denied where administrative employees assigned to process the citation did not exercise diligence in timely filing a written contest).

It well settled 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. The Commission has consistently held “[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, relief under Rule 60(b)(6) is not warranted. *Villa Marina Yacht Harbor, Inc.*, 19 BNS OSHC 2185, 2187 (No. 01-0830, 2003) (company messenger mishandled mail); *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1149 (No. 99-0945, 2000) (employer's president failed to carefully read and act upon information contained in citation); *Montgomery Security Doors & Ornamental Iron, Inc.*, 18 BNA OSHC 2145, 2148 (No. 97-1906, 2000) (record showed a breakdown of business procedures such that relief was not warranted even assuming employee sabotage); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (notice of contest was overlooked due to personnel change in operations manager position).

### **Analysis**

Respondent seeks relief from the operation of § 10(a) of the Act, which states:

If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty . . . 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.

29 U.S.C. § 659(a).

While there is no evidence Respondent's late contest filing was prejudicial to the Secretary or negatively impacted the Commission proceedings, the reason for the delayed filing was within Respondent's reasonable control. *See CalHar Constr.*, 18 BNA OSHC at 2153 n.5. Respondent's delay in filing the notice of contest was a result of Respondent's lack of diligence in failing to carefully read and act upon the information contained in the citation regarding filing a timely contest. This factor is dispositive. There is no justification for granting Rule 60(b) relief under any subsection.

Because the Respondent failed to respond to the Motion, and in the hope Respondent would provide additional information as to the reasons why its NOC was late and provide information of its business process it had in place to process incoming mail, the Court issued on July 30, 2021, an *Order to Respondent*, directing Respondent to show cause within fourteen (14) days, why the Court should not issue judgment against Respondent, affirming the proposed violations in this case for: (1) failure to timely file a *Notice of Contest* pursuant to Commission Rule 33(b), 29 C.F.R. § 2200.33(b); and (2) for failure to respond to Complainant's Motion. To-date, Respondent has failed to file a response to the Court's *Order to Respondent*. In addition, the *Order to Respondent* has not been returned to the Court by the U. S. Postal Service as undeliverable. The *Order to Respondent* was sent to the address provided Respondent in its late NOC and also emailed to Respondent at the email provided in the late NOC. Under Commission Rule 6, it is Respondent's

duty to advise the Court of any change of address. *See 29 C.F.R. § 2200.6.*<sup>10</sup> Respondent has not filed a change of address with the Court.

Respondent was provided an opportunity to provide the Court needed information by responding to the *Order to Respondent*. Respondent failed to take advantage of this opportunity to provide the Court with any information which could assist the Court in determining whether Respondent's late NOC could be accepted under Rule 60(b)(1).

The Court finds OSHA, as well as this Court, have conveyed due notice to Respondent of its procedural rights and provided ample warning that its failure to comply with Court orders may result in the dismissal of its NOC. Respondent has failed to take advantage of the opportunity to advise the Court that it has not abandoned its case before the Commission. Every indication before the Court is that Respondent has walked away from its contest. Under these circumstances, the Court sees no worthwhile purpose in allowing this case to proceed by finding a basis for relief for its late NOC under any provision of Rule 60(b). There is no basis to believe Respondent will fulfill its pre-trial obligations or actually appear at the trial should the Court find Respondent is entitled to relief under Rule 60(b). *11 See Twin Pines Constr. Inc./Teles Constr., 24 BNA OSHC 1500, 1504 (No. 12-1328, 2012) (No worthwhile purpose in proceeding to a hearing where a party has abandoned the case). The Court finds that Respondent relinquished its case with the intent to abandon. 1 C.J.S. Abandonment § 13 (2013).*

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<sup>10</sup> Rule 6 of the Commission's Rules of Procedure, 29 C.F.R. § 2200.6, provides that:

Record Address: Every pleading or document filed by any party or intervenor shall contain the name, current address, and telephone number of his representative or, if he has no representative, his own name, current address, and telephone number. Any change in such information shall be communicated promptly in writing to the Judge, or the Executive Secretary if no Judge has been assigned, and to all other parties and intervenors. *A party or intervenor who fails to furnish such information shall be deemed to have waived his right to notice and service under these rules.*

29 C.F.R. § 2200.6 (emphasis added).

**Order**

Respondent bears the burden of demonstrating that it is entitled to relief. *See Burrows Paper Corp.*, 23 BNA OSHC 1131 (No. 09-1559, 2010); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No., 86-1266, 1989). Here, Respondent has provided no excusable basis for its failure to file a timely NOC before its due date. The Court finds Respondent failed to file a timely NOC and no relief under any provision of Rule 60(b) is justified.

Complainant's Motion is GRANTED. Respondent's NOC is dismissed, with prejudice, as untimely filed. The citations and penalties are AFFIRMED. Accordingly, the Court ORDERS:

1. Citation 1, Item 1 is AFFIRMED as a Repeat-Serious citation and a \$22,527.00 penalty is ASSESSED.

SO ORDERED.

*Patrick B. Augustine*

Patrick B. Augustine  
First Judge – Denver OSHRC

Date: May 9, 2022  
Denver, CO