

BEFORE THE N.C. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR OF THE )  
STATE OF NORTH CAROLINA, ) DOCKET NO: OSHANC 2022-6482  
) )  
COMPLAINANT, ) INSPECTION NO: 318235348  
) )  
) CSHO ID.: Q0750  
) )  
v. ) **ORDER ON MOTION TO DISMISS**  
) )  
ENVIVA PELLETS HAMLET, LLC. )  
d/b/a ENVIVA BIOMASS )  
*and its successors,* )  
) )  
RESPONDENT. )

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THIS MATTER is before the undersigned Hearing Examiner on Respondent's Motion to Dismiss, filed May 9, 2023. Complainant responded to the Motion on May 22, 2023. On June 5, 2023 Respondent filed a reply to Complainant's response. Respondent moves this Court to dismiss the Complainant's Citation and Notification of Penalty as a sanction for Complainant's failure to timely file a formal pleading.

According to the documents in the N.C. Occupational Safety and Health Review Commission's ("Review Commission") file:

1. Following an accident and serious injury, an inspection of Respondent's worksite at 1125 NC Highway 177 in Hamlet, NC was conducted on December 30, 2021.
2. On June 24, 2022 Complainant issued a penalty for a serious violation of OSHA regulations, including four items alleging failure to develop and implement procedures for the effective control of potentially hazardous energy when employees were servicing a rotary valve feeder and where an employee suffered partial amputation of three fingers.
3. Following an informal conference, Complainant sent Respondent a "no change" letter dated July 27, 2022. Respondent timely submitted its Notice of Contest dated August 2, 2022 via email. Respondent did not provide a mailing address different than the address of Respondent's plant in Hamlet, NC.
4. The Review Commission attempted to send a docketing notice to Respondent on August 15, 2022 at the address previously provided by Respondent. The certified letter was returned because there was no mailbox at the address of Respondent's Hamlet plant. On August 26, 2022 the Commission sent a docketing notice via certified mail to

Respondent's Registered Agent, as identified in Respondent's filings with the N.C. Secretary of State. The docketing notice was received on August 29, 2022.

5. Respondent timely filed its Statement of Position on September 12, 2022 providing the address of its then attorney, Michael McKnight at the law offices of Ogletree Deakins in Raleigh, NC, as the address for Respondent. Respondent's Statement of Position did not state whether it denied the violations and/or penalties of the individual items; the position statement only requested that formal pleadings be filed by Complainant.
6. On September 14, 2022, with Respondent's consent, Complainant filed a Motion for Extension of Time to File [the] Complaint. The Motion was granted by Order of the Review Commission the following day and Complainant was ordered to file its Complaint "not later than December 5, 2022."
7. On December 12, 2022 Respondent's former attorney, Mr. McKnight, sent an inquiry to the Commission asking whether a formal Complaint had been filed by Complainant and received a response that a formal Complaint had not been filed.
8. Without seeking any order for additional time to file its Complaint, Complainant filed its Complaint on December 20, 2022 and served Respondent via the address provided on Respondent's Statement of Position, as well as by email addressed to Respondent's attorney Mr. McKnight.
9. On January 4, 2023 Respondent, by and through attorney McKnight, filed a motion to extend the time to answer the Complaint by sixty days. Complainant consented to said motion. Respondent also asserted in its motion that it had not yet received a copy of Complainant's Complaint.
10. On January 4, 2023 the Review Commission allowed Respondent's motion for an extension of time to file its Answer up to and including March 10, 2023.
11. On February 3, 2023, by and through attorney McKnight, Respondent filed its "Second Consent Motion for an Extension of Time" to file its Answer, requesting it be allowed up to and including April 10, 2023 to file its Answer. In its second motion for an extension of time Respondent acknowledged that Complainant had emailed the Complaint on December 20, 2022 and that Respondent had been provided with a copy of the inspection file on January 23, 2023. Respondent also represented to the Commission that settlement discussions with the Complainant had been ongoing and were expected to continue and that the extension, therefore, would be beneficial to both parties in the use of their respective resources.
12. On March 6, 2023 the Review Commission entered a second order extending the time for Respondent to file its Answer up to and including April 10, 2023.

13. Other than what has been identified herein, the undersigned has not been provided with any other motions or orders regarding extensions of time for either party to complete its required filings.
14. On May 2, 2023 Attorneys Travis Vance and Curtis Moore and their law firm, Fisher & Phillips LLP, entered their appearance on behalf of Respondent.
15. On May 9, 2023 Respondent filed its Answer to the Complaint by and through its current counsel, asserting as one of its defenses that the Complaint was not timely filed nor properly served.
16. On May 9, 2023, Respondent filed its Motion to Dismiss asking the Court to dismiss Complainant's Citation and Notification of Penalty on the following grounds:
  - a) Complainant failed to timely file its Complaint when it filed the Complaint fifteen days past the deadline ordered by the Commission; and,
  - b) Complainant failed to serve the Complaint on Respondent by U.S. mail or personal service.
17. Complainant answered the Motion to Dismiss, stating that:
  - a) Complainant "believed in error that the Complaint had been filed prior to December 5, 2022;"
  - b) On December 20, 2022, Complainant was made aware that the Complaint had not been filed on or before December 5, 2022; and,
  - c) Complainant filed the Complaint on December 20, 2022 and thereafter served Respondent's prior counsel, Mr. McKnight, by email and by first class U.S. mail.
18. On June 5, 2023 Respondent filed a Reply to Complainant's response to the Motion to Dismiss, asserting, *inter alia*, that Complainant's position amounts to treating compliance with the Rules of Procedure as optional and that Respondent is prejudiced by unequal treatment under the rules.

### ANALYSIS

Respondent asks this Court to dismiss Complainant's Citation and Notification of a Serious Violation of OSHA Safety Regulations as a sanction for filing its formal pleading after the deadline ordered by the Commission. Although Complainant did fail to file its pleadings in accordance with the Review Commission's Rules of Procedure and September 14, 2022 Order, the undersigned denies the motion to dismiss for the following reasons:

Although compliance with the Rules of Procedure is mandatory and dismissal against a party for failure to comply with procedural rules is an appropriate sanction in some instances, "[w]hether

and how a Court may excuse noncompliance with the rules depends on the nature of the default." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 363 (2008). As an initial matter, the filing of the Complaint is not a prerequisite to the Commission's authority to enforce the provisions of the Act. The Commission's exercise of its authority is statutorily granted. See e.g., N.C. Gen. Stat. §95-137(b)(1)(b) (where the statute provides that uncontested citations become final orders of the Commission, the Commission has jurisdiction over the subject matter by issuing a citation). *Accord. J.I. Hass Co. v. OSHRC*, 648 F.2d 190, 193 (3d Cir. 1981) (applying the same reasoning in deciding that Employer's Position Statements are not jurisdictional and, therefore, reviewable under Civil Procedure Rule 60). Thus, dismissal of the citations is by no means a required response by the Court.

There is no doubt that Complainant's failure to file the Complaint by the deadline set forth in the September 14, 2022 Order of the Commission was an act of neglect. In considering whether and in what way the act should be sanctioned, the issue is whether the neglect on the part of Complainant's attorney is excusable neglect. To be sure, the explanation provided by Complainant's attorney for his failure to comply with the Commission's order does not, by itself, provide an adequate rationale for excusing the procedural violation. However, the strength or weakness of the excuse offered is but one important consideration in deciding whether the neglect should be excused in a particular case. It is not the only consideration. Excusable neglect "encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness." *Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380,388-89 (1993) (urging a flexible understanding of "excusable neglect").

Our legal system has a strong preference that cases be decided on their merits. See e.g., *Bailey v. McPherson*, 233 N.C. 231, 236, 63 S.E. 559 (1951) ("The object of our present system of procedure is to try cases upon their merits regardless of those technicalities which do not promote but defeat justice..."); *Brown v. American Messenger Services*, 129 N.C. App. 207, 211, 498 S.E.2d 384 (1998) ("...the general policy of the Rules of Civil Procedure is to disregard technicalities of form and determine the rights of litigants on the merits.") *Internal citations omitted*. "The law generally disfavors default and 'any doubt should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits.'" *Atkins v. Mortenson*, 183 N.C. App. 625, 629 (2007) (Internal quotations and citations omitted).

The determination of whether neglect should be excused "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick*, 507 U.S. at 395. Factors to consider include "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." *Id.*<sup>1</sup> See also, *Coleman Hammons Constr. Co. v. OSHRC*, 942 F.3d 279, 283 (5th Cir. 2019). (Holding that focusing narrowly on whether a party is at fault for the delay and denying relief if it bears any blame clearly conflicts with *Pioneer's* more lenient and

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<sup>1</sup> Although *Pioneer* was a civil bankruptcy case, its rationale has been applied to other "excusable neglect" inquiries under the Federal Rules of Civil Procedure. See *Halicki v. La. Casino Cruises, Inc.*, 151 F.3d 465, 469 (5th Cir. 1998); *Coleman Hammons Constr. Co. v. OSHRC*, 942 F.3d 279, 283 (5th Cir. 2019).



comprehensive standard); *George Harms Constr. Co., Inc. v. Chao*, 371 F.3d 156, 164 (3d. Cir. 2004) (The "excusable neglect" calculus must "take into account all relevant circumstances surrounding a party's failure to file.")

In this case, Complainant's filing was fifteen days late and the Respondent followed the filing by asking for and then receiving two extensions of time to file its answer, resulting in an additional ninety days permitted to complete its own filing. Respondent then took an additional twenty-nine days to file its own pleading, for a total of 119 days from the filing of Complainant's formal pleading to file an Answer. It cannot be said, therefore, that Complainant's failure to meet the Commission's deadline was a substantial cause to delay the administration of justice. Furthermore, Respondent represented to the Commission that delay would be beneficial to both parties and to the administration of justice.

There is also no evidence before the undersigned to suggest that Complainant's failure to comply with the Commission's order was made in bad faith. Respondent's own motion for an extension of time to file its pleadings cites ongoing settlement discussions between the parties. Respondent contends that prejudice lies in the potentially unequal treatment of Complainants and Respondents, citing the case of *Lost Forest Dev. v. Comm'r of Labor of N.C.*, 280 N.C. App. 174 (2021) to support its position that similarly situated employers have been subjected to dismissal for procedural rule violations. First, in this case we have a situation where Complainant was fifteen days late in its filing and Respondent was twenty-nine days late in its filing. Second, the employer in *Lost Forest* failed to contact the North Carolina Department of Labor for more than one year to file its notice of contest and then did not timely respond to the Motion to Dismiss. *Id.*, at 182. Thus the comparison to the *Lost Forest* case is inapposite.

On the other hand, the Respondent's direction of the Court's attention to the importance of procedural rules and their impact on the administration of justice must receive due weight. The undersigned affirms that, given a different set of circumstances, dismissal would be an appropriate sanction. See, e.g., *Pruitt v. Wood*, 199 N.C. 788, 790. 156 S.E.2d 126, 127 (1930) ("rules of procedure are necessary . . . in order to enable the courts [to] properly discharge their duty" of resolving disputes). *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 193-194, 657 S.E.2d 361, 362 (2008) (Compliance with rules is mandatory and "essential to the application of principle in courts of justice, and . . . cannot be dispensed with." Internal citations and quotations omitted). Were there evidence of a pattern of noncompliance or evidence of bad faith before the Court, those factors could result in a different outcome.

With respect to Respondent's contention of improper service, Respondent has failed to offer any evidence to overcome the presumption of legal service. *Sellers v. Morton*, 199 N.C. App. 75, 80, 661 S.E.2d 915, 920 (2008) ("the certificate of service raises a rebuttable presumption of valid service). Furthermore, Respondent acknowledged receipt of the Complaint in its second motion for extension of time to file its Answer and receipt of the Complaint was not a jurisdictional issue.

In summary, given the short amount of delay caused by Complainant's failure to timely file the Complaint, the amount of time afforded Respondent to file its own pleading, including time beyond what was permitted by the Commission, the lack of demonstrated prejudice to Respondent, the lack of evidence of bad faith or other contumacy on the part of Complainant, and, the

preference of our judicial system for deciding serious cases on their merits, the undersigned DENIES Respondent's Motion to Dismiss. The parties should proceed with prosecuting their respective cases on the facts and evidence and, going forward, in accordance with procedural rules.

This the 12th day of June 2023.

*Mary-Ann Leon*

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Mary-Ann Leon

Hearing Examiner Presiding

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

TRAVIS VANCE  
FISHER & PHILLIPS LLP  
227 WEST TRADE ST.  
SUITE 2020  
CHARLOTTE, NC 28202

By depositing same in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid at Raleigh, North Carolina, and upon:

RORY AGAN  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
PO BOX 629  
RALEIGH, NC 27602-0629

By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR  
LEGAL AFFAIRS DIVISION  
1101 MAIL SERVICE CENTER  
RALEIGH, NC 27699-1101  
carla.rose@labor.nc.gov

via email.

THIS THE 14 DAY OF June 2023.



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Karissa B. Sluss  
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