United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. QUICK ROOFING LLC And its Successors Respondent.	OSHRC DOCKET NO. 21-0983

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

For Respondent: Wayne Duncan, Safety Representative, West Texas Safety Solutions LLC, P.O. Box 11147, Spring, TX 77391

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

DECISION AND ORDER DENYING RESPONDENT'S MOTION FOR RELIEF FROM A FINAL ORDER PURSUANT TO RULE 60(b)(1), FEDERAL RULES OF CIVIL PROCEDURE

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 a filing of a late *Notice of Contest* (NOC) by Respondent with the Commission. *See Slingluff v. OSHRC,* 425 F.3d 861 (10th Cir. 2005).

Sole Issue

Respondent raises arguments and defenses which are substantive in nature in its *Motion for Relief Under Rule 60(b)* (Motion). Those issues cannot come before the Court until it decides whether Respondent is entitled to relief under Federal Rule of Civil Procedure Rule 60 (b) (Rule

60(b)) for the filing of a late NOC. That is the sole issue before the Court. If such relief is granted, Respondent can proceed, in a litigation forum, with its substantive arguments.

Waiver of Hearing on the Motion

On October 25, 2021, the Court entered an Order directing Respondent to respond to Complainant's *Opposition To Relief Under Federal Rule of Civil Procedure 60(b)* (Response). In that Order, the Court indicated it would proceed to decide the Motion on the record submitted by the parties unless either party requested an oral hearing within fourteen (14) days of the Order. Neither party requested a hearing on the Motion. The Court finds the parties have waived a hearing on this matter.

Procedural Background

The Occupational Safety and Health Administration (OSHA) conducted an inspection of Respondent's worksite located at 6903 Maidford Drive, Colorado Springs, Colorado on May 15, 2021. *See* ¶ 2 of Response. On June 6, 2021, OSHA issued one citation with two serious items ("Citation") to Respondent. See ¶ 4 of Response. The Citation proposed Respondent pay a penalty in the amount of $4,681.00. *Id*. OSHA mailed the Citation to Respondent via United States Postal Service ("USPS") certified mail on June 7, 2021. *Id*. The Citation was sent to the business address provided during the inspection, which was identified as 210 Fifth Street, Suite 200, Castle Rock, Colorado 80104. *Id*. The certified mail green card indicates the Citation was delivered to an individual at that address who signed for and accepted it on June 10, 2021. *See* Exh. C to and ¶ 4 of Response.

The Citation informed Respondent of its right to contest the Citation.[1] Upon receiving a citation, an employer has 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). Respondent claims it did not receive the Citation under September 14, 2021, when the Citation was forwarded to it by the new occupants of the property. Response ¶ 6. Respondent filed its NOC on September 22, 2021. The deadline for filing a timely NOC was July 1, 2022. Respondent filed its NOC 83 days late.

On September 27, 2021, Respondent filed its Motion. By filing its Motion, Respondent has requested relief from the operation of § 10(c) of the Act. Fed. R. Civ. P. 60(b) states "[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) lists the reasons that provide a sufficient basis for granting the relief requested. *Id*. Rule 60(b)(1) states that "mistake, inadvertence, surprise, or excusable neglect" constitute sufficient bases upon which Rule 60(b)(1) relief can be granted. *Id*.

In its Motion, Respondent contends Respondent was never served with the Citation since Respondent had not occupied the address the Citation was sent to since March 31, 2021. *See* Motion, ¶ 3. Respondent further states the inspection took place after it had moved from this

[1] 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 . Barretto Granite Corp*., 830 F.2d 396, 398 (1st Cir. 1987) (per curiam).

address thereby being proof the inspection performed was not of Respondent. Respondent clarified it was seeking relief under Rule 60(b)(1) on the basis of excusable neglect and surprise.

On October 7, 2021, Complainant filed his Response. Complainant seeks affirmance of the Citation and the proposed penalty because Respondent: (1) failed to file a timely NOC; (2) has not demonstrated "excusable neglect" pursuant to Rule 60(b)(1); and (4) the failure to timely file a NOC was within Respondent's sole control. Complainant contends Respondent has failed to establish mistake, inadvertence, surprise, or excusable neglect. *See* Response, pp.4-7.

Complainant indicates Respondent signed an agreement to serve as a subcontractor to builder DR Horton on construction jobs. That agreement lists Respondent's business address as 210 Fifth Street, Suite 200, Castle Rock, Colorado 80104. Response, Exh. A, Agreement p. 1. Complainant further states Respondent provided OSHA with information regarding its business on a questionnaire. Carlos Campos, who was identified as Respondent's foreman,[2] indicated in writing Respondent's mailing address was 210 Fifth Street, Suite 200, Castle Rock, Colorado 80104. Response, Exh. B, OSHA-1 Questionnaire. The questionnaire also listed Ana Mosqueda as the owner of Respondent. *Id.*

Complainant contends Respondent alleges it had not occupied the location at 210 Fifth Street, Suite 200, Castle Rock, Colorado 80104 since March 31, 2021. However, Complainant states Respondent provided OSHA with that address as its business address on May 15, 2021, the date the inspection began. Response ¶ 5. Complainant also states that as of the day of his Response, which was after the issuance of the Citation, the Respondent's website at

[2] Respondent contends while it knows Mr. Campos, he was not an employee of Respondent but rather a contractor. *See* Reply ¶ 3. Whether or not Mr. Campos was an employee of Respondent is a substantive issue which cannot be resolved at this time. Respondent can raise this defense should the Court grant the relief its requests in its Motion.

www.quickroofing.com/denver-co/. still listed the address of Respondent as 210 Fifth Street, Suite 200, Castle Rock, Colorado 80104.

Pursuant to the Court's Order dated October 25, 2021, Respondent filed its *Reply to Secretary's Opposition to Motion to Rule 60(b) Relief* (Reply) on October 29, 2021. In its Reply, Respondent acknowledged it entered into a contract to provide roofing services for DR Horton in 2019 and at that time the address provided therein was accurate. Reply ¶ 1. Respondent also stated the inspection could not have been inspected as it had no employees at the worksite identified as the inspection location. Reply ¶ 2. Respondent argues Mr. Campos was not an employee of Respondent and when Ana Mosqueda, the owner of the Respondent was contacted, she stated Mr. Campos was a sub-contractor. Respondent also argues it gave no information to OSHA on May 15, 2021, since Mr. Campos was not an employee. *Id.*

Respondent further alleges the fact a certified mail return green card was signed for a returned to OSHA is not proof the individual who signed for it was a representative of Respondent. ¶¶ 4 and 5. Finally, responding to the address listed on Respondent's website which Complainant identified in its Response, Respondent alleges "websites are notoriously outdated and are not evidence of occupancy." *Id.* Finally, Respondent alleged it was OSHA which was negligent by not checking the Secretary of State's records in Colorado and Texas and otherwise verify the correct corporate address of Respondent. Reply ¶¶ 7 and 8.

General Case Law Applicable to Case

The Commission has held that "[w]here 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." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The Court will apply the precedent

of the Tenth Circuit or District of Columbia Circuit Courts of Appeals where it differs from the Commission in deciding this case.

Although the Commission recognizes the difficulties a self-represented litigant may face when participating in Commission's proceedings, the Commission still requires the self-represented litigant to follow the rules and exercise reasonable diligence in the legal proceedings in which it is taking part. *Sealtite Corp*., 15 BNA OSHC 1130 (No. 88-1431, 1991). An unrepresented employer must "exercise reasonable diligence in the legal proceedings" and "must follow the rules and file responses to a judge's orders, or suffer the consequences, which can include dismissal of the notice of contest." *Wentzel d/b/a N.E.E.T. Builders*, 16 BNA OSHC 1475, 1476 (No. 92-2696, 1993) (citations omitted).

Sufficiency of Service

It is Complainant's burden to establish service of the Citation. Although the Act refers only to the penalty, the Commission has consistently held § 10(a) of the Act governs service of citations. *B. J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474 n.6 (No. 76-2165, 1979). It requires Complainant to "notify the employer by certified mail of the penalty…" Complainant is under no obligation to request signature by a specific person at the business location. Nor is it Complainant's responsibility to identify the person who signed the return receipt.[3] Once the Citation was addressed to 210 Fifth Street, Ste. 200, Castle Rock, Colorado 80104 and submitted to the USPS, Complainant had every reason the USPS would carry out its duties and deliver the Citation to the address location as it did in this case.

[3] The return receipt is self-authenticating pursuant to Rule 902(5) of the Federal Rules of Evidence. The Court further finds the information contained in the return receipt card is excepted from the hearsay rule pursuant Rule 803(6) of the Federal Rules of Evidence.

Once Complainant places the Citation in a USPS mailbox, within the six months period required by the Act, the statute of limitations is tolled. Complainant is neither responsible for, nor has control over, the amount of time it takes for the USPS to deliver mail. *Earth Developers, Inc.*, 2017 CCH OSHD ¶33,642 (Dec. 22, 2017) (holding that "although the actions of the USPS are out of both parties' control," OSHA must have placed the Citation in the mail within the statutory timeframe to satisfy Section 9(c)).

In *B. J. Hughes,* the Commission addressed Complainant's obligation under § 10(a), holding:

> The test to be applied in determining whether service if proper is whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of the proposed penalty and an opportunity to determine whether to abate or contest.

7 BNA OSHC at 1474. *See also, Secretary of Labor v. NYNEX,* 18 BNA OSHC 1944 (No. 95-1671. 1999) and *George Harms Construction Co.*, 20 BNA OSHC 1155 (No. 02-0371. 2003) *rev'd* (3d Cir.).

Further, the Commission's holding in *B. J. Hughes* that "[t]he test to be applied in determining whether service is proper is whether the service is reasonably calculated to provide an employer with knowledge of the citation and notice of the proposed penalty and an opportunity to determine whether to abate or contest" satisfies the due process requirements set forth by the United States Supreme Court that notice be "reasonably calculated, under all the circumstances, to apprise inspected parties of the pendency of the action and afford them an opportunity to present their objections. *Mulvane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Neither section 10(a) of the Act nor the Due Process Clause require "[a]ctual receipt" of the citation. *See Dusenbery v. United States,* 534 U.S. 161, 170 (2002) (Supreme

Court procedure "does not say that the [government] *must provide* actual notice, but that it *must attempt to provide* actual notice." (Emphasis in original)). *See also United States v. Robinson*, 434 F.3d 357, 366 (5th Cir. 2005) ("Due process does not require actual notice or actual receipt of notice."); *P & Z Co., Inc*. 7 BNA OSHC 1589 (No. 14822, 1979) (section 10(a) does not require actual notice).

The D.C. Circuit Court of Appeals and the Commission has found service of a citation via certified mail was proper when sent to a worksite rather than a corporate office. *See NYNEX*, 18 BNA OSHC at 1947 (finding citation sent to a worksite address, though not addressed to a specific person, was proper); *David E. Harvey Builders Inc. v. Sec'y of Labor*, 724 F. App'x 7, 8 (D. C. Cir. 2018) (finding service of citation proper when sent via certified mail to office rather than corporate headquarters).

Applying the reasonable calculated test, the Commission held service on an employee in charge of a local worksite valid. In so holding the Commission reasoned:

> A company that maintains multiple worksites necessarily invests the person in charge with a certain degree of discretion and authority to conduct the company's business. As with other aspects of its business it is reasonable to expect such an employee to implement internal procedures for dealing with OSHA citations.

B. J. Hughes, Inc., 7 BNA OSHC at 1475.

The Commission has also held that OSHAs mistake as to location of corporate headquarters, based on what an employee representative told OSHA was reasonable, and thus did not render service ineffective. *See Harvey-Cleary Builders*, 26 BNA OSHC 2014, 2016-17 (No. 17-0743, 2017) *aff'd* 724 F. App'x 7 (D.C. Cir. 2018).

In direct contravention to Respondent's argument that OSHA should have checked the corporate filings in the Secretaries of State of Colorado and Texas, OSHA need not deliver a citation to an employer's registered agent, its corporate headquarters, or a manager or officer of the employer. The Commission has rejected such rigid requirements in favor of the "reasonable calculated" test. *See NYNEX*, 18 BNA OSHC at 197 n. 9. "The Secretary's representatives should not have to spend time ferreting out the complexities of a corporate hierarchy." *B. J. Hughes*, 7 BNA OSHC at 1474. The Court rejects Respondent's attempt to shift the "blame" in this case to Complainant for failure to check the state corporate records to identify the corporate address.[4]

As for Respondent's argument that Mr. Campos was a contractor and not an employee (which issue is not being resolved here), the Court wonders how a contractor would have the information contained in the OSHA questionnaire such as the address of Respondent, phone numbers, the owner of the company, the number of total employees, the number of employees at the worksite or the contact person for DR Horton. The Court, by reasonable inference, concludes this is detailed information that a contractor on a worksite would not normally know or have access to. *Okland Construction Co*., 3 BNA OSHC 2023, 2024 (No. 3395, 1976) (reasonable inferences can be drawn from circumstantial evidence). "[T]he Commission may draw reasonable inferences from the evidence*[.]" Fluor Daniel*, 19 BNA OSHC 1529, 1531 (Nos. 96-1729 & 96- 1730, 2001) (citing *Atlantic Battery Co*., 16 BNA OSHC 2131, 2159 (No. 90-1747,

[4] According to Respondent's Reply, the owner of Respondent knew Campos and allegedly stated that he was a contractor. Through this relationship, whether it be a contractor an employee, it would be expected that Campos would have notified Respondent of the OSHA inspection; therefore, providing Respondent with notice of the possible issuance of a citation by OSHA.

1994)). As such, OSHA had the right to rely on the information provided by Mr. Campos in the questionnaire.

The Court finds Complainant's service in this case meets the test as set forth in *B. J. Hughes.* The test is one of reasonableness. The Citation was sent by United States Mail, return receipt, which was signed for. It was mailed within the timeframes of section 10(a) of the Act. The Citation was sent to the address provided during the inspection and the return receipt demonstrates it was received at that address. The service was reasonably calculated to provide the employer with the required notification and opportunity to determine whether to abate or contest.

Respondent's argument the Citation was sent to the wrong address fails for the following reasons. First, the address provided in the OSHA questionnaire, which was completed during the inspection, is the same address used in Respondent's contract with DR Horton entered into in 2019. Thus, we have continuity as to location. Second, the address was consistent with the address of Respondent which was posted on its website as of the date Complainant filed its Response. If the address was not correct on the website it was in Respondent's sole power to correct the misinformation. Third, from the date of the DR Horton contract until October 7, 2021- the date Complainant filed its Response - the address of the Respondent was consistent. Fourth, if Respondent no longer occupied the premises on the date of the inspection it should have had a forwarding address on file – which it did not. *See infra* for a discussion of the matter under the Rule 60(b) analysis. Finally, it is reasonable for an individual in the Castle Rock, Colorado office upon receipt of the Citation to forward it to the corporate headquarters to determine if it wanted to abate or contest thereby meeting the requirements of caselaw set forth above. The Court finds the Citation was properly processed and served.

Controlling Case Law under Rule 60(b)

The Commission has recognized situations where the finality of § 10(a) of the Act does not preclude the Commission from hearing an employer's challenge to citations even when a timely NOC has not been filed. 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.*, 507 U.S. at 393. The Commission has held an employer may move under Rule 60(b)(1) for permission to file a late NOC. *Branciforte Builders*, 9 BNA OSHC at 2113. 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." *Id* at 163 (Commission "has jurisdiction to entertain a late notice of contest under" the excusable neglect standard of Rule 60(b)(1));[5] *Branciforte Builders, Inc.*, 9 BNA OSHC at 2117. The burden is on the employer to show sufficient basis for relief under the rule. *Id*. *See also Craig Mech. Inc.,* 16 BNA OSHC at 1764 (Respondent bears burden to establish basis for relief), *aff'd per curiam* 553 F.3d 633 (5th Cir. 1995)(unpublished).

To determine whether Respondent's late 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). In *Pioneer*, "excusable neglect" is defined[6] as an equitable determination of all relevant circumstances surrounding the party's omission, and the prejudice these circumstances presented to the opposing party. The Court found "excusable neglect" to be, in part, an "elastic concept" not restricted to "omissions caused by circumstances

[5] *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)).

[6] This definition has been applied to other federal procedural rules, including proceedings by the Commission. *See NW Conduit Corp.*, 18 BNA OSHC at 1950.

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

Respondent is evidentially aware of the requirements of *Pioneer* as in its Motion it referred to the case as supporting the relief it requests under the Motion.[7] *See* Motion, p. 2. 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 Envtl Serv*, 26 BNA OSHC at 1984.

When evaluating claims of excusable neglect, many circuit courts focus on the third factor in the *Pioneer* equitable analysis, "the reason for the delay, including whether it was within the reasonable control of the movant." *Id.* at 395.

> The four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry . . .. [A]t the end of the day, the focus must be upon the nature of the neglect.

Hospital del Maestro v. NLRB, 263 F.3d 173, 175 (1st Cir. 2001) (per curiam) (quoting *Lowry v. McDonnell Douglas Corp*., 211 F.3d 457, 463 (8th Cir. 2000*)). See Cohen v. Bd. of Trs. of Univ. of D. C.,* 819 F.3d 476, 479-80 (D.C. Cir. 2016) (same); *Dimmitt v. Ockenfels*, 407 F.3d 21, 24-25 (1st Cir, 2005) (same); *Silivanch v. Celebrity Cruises, Inc.,* 333 F.3d 355, 366, 366 n.7 (2d Cir. 2003) (same); *Graphic Communications Int'l Union v. Quebecor Printing Providence, Inc.*,

[7] The Supreme Court stated "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer*, 507 U.S. at 392. *See also 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).

270 F.3d 1, 5-6 (1st Cir. 2001) (same); *David E. Harvey Builders, Inc. v. Sec'y of Labor*, 724 Fed. Appx. 7, 9 (D.C. Cir. 2018) (same). [8]

Other circuit courts emphasize the *Pioneer* equitable analysis requires consideration of "all relevant circumstances" surrounding a party's request for relief due to excusable neglect. Therefore, the "control" factor must not be weighted too heavily at the expense of the other relevant *Pioneer* factors. *Avon Contractors, Inc. v. Sec'y of Labor*, 372 F.3d 171, 174 (3d Cir. 2004). *See Coleman Hammons Constr. Co. v. OSHRC*, 2019 WL 5782425, at *3 (5th Cir. 2019) (same); *George Harms Constr.,* 371 F.3d at 164 (same).

The D.C. Circuit[9] and the Commission precedent which apply to this case, agree as to the factors to be considered and the weight being given the *Pioneer* factors. It is 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 when the lack of such procedures results in the untimely filing of a NOC, relief under Rule 60(b)(1) is not warranted. *Villa Marina Yacht Harbor, Inc.*, 19 BNA 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,

[8] This matter could be appealed to either the D.C. Circuit or the Tenth Circuit. The Commission generally applies the law of the circuit where a case will likely be appealed. *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The Tenth Circuit has not ruled on this issue; thus, the Court will follow established D.C. Court of Appeals precedent and Commission caselaw on weighing the factors.

[9] *See Cohen v. Bd. of Trs. of Univ. of D. C.,* 819 F.3d 476, 479-80 (D.C. Cir. 2016); *David E. Harvey Builders, Inc. v. Sec'y of Labor*, 724 Fed. Appx. 7, 9 (D.C. Cir. 2018).

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).

In addition to establishing the *Pioneer* factors , the Commission requires a party seeking relief under Rule 60(b)(1) to show it had a meritorious defense that might have affected the outcome. *Northwest Conduit*, 18 BNA OSHC 1948, 1949, 1951 (No. 97-851, 1999). *See Evergreen Envtl Serv*, 26 BNA OSHC 1982, 1985 (No. 16-1295, 2017). The Commission has found this requirement "satisfied with minimal allegations that the employer could prove a defense if given the opportunity." *Jackson Assocs. of Nassau*, 16 BNA OSHC 1261, 1267 (No. 91-0438, 1993). Before reaching the issue of whether Respondent has a meritorious defense to a citation, the record first must establish Respondent has a basis for relief from the Commission's final order under Rule 60(b)(1). *Id.* If the record does not establish a basis for relief from the Commission's final order for Respondent's untimely filing under Rule 60(b)(1), the issue of a meritorious defense need not be addressed.

Analysis and Findings of Fact

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 this Court has jurisdiction over this case, at this stage in the proceeding, that jurisdiction is limited to a very narrow issue. That issue is whether relief can be granted to

Respondent under Rule 60(b)(1) for its late NOC and whether it has a meritorious defense. The Court does find Respondent has established the existence of a meritorious defense. *See B. J. Hughes Inc.*, 7 OSHC BNA 1471 (No. 76-2165, 1979).

Respondent, being aware of *Pioneer*, failed to address the factors in its favor to warrant a finding of "excusable neglect," Respondent evidentially takes the position it is not necessary to go through a Rule 60(b)(1) *Pioneer* analysis even though it asks for relief under Rule 60(b)(1) in its Motion. Respondent's three main arguments are: (1) OSHA did not send the Citation to a correct address; (2) OSHA was the negligent party; and (3) OSHA did not conduct an inspection at this worksite.

The Court disagrees with Respondent's position that the *Pioneer* factors do not need to be considered. The Citation in this case is a final order. The accepted method for seeking relief from a final order is to request relief under Rule 60(b)(1). Respondent evidentially agreed this is the accepted approach because that is what it asked for in filing its Motion. When it filed its Motion, Respondent undertakes the responsibility to establish it is entitled to relief under Rule 60(b) and also has a meritorious defense. No Commission case has permitted an employer to file for Rule 60(b) relief and then permit what Respondent advocates here – ignore the *Pioneer* factors and go directly to the meritorious defense. If Respondent's position would be permitted, then in the future employers would need to simply file a motion for relief from a final order due to lack of service under section 10(a) of the Act.[10]

[10] As noted above, the Federal Rules of Civil Procedure Rule 12(b)(2) recognizes this as an affirmative defense. By so classifying it as an affirmative defense, Respondent must have proper standing to assert it. In Commission procedure, to assert the affirmative defense in a case where there is a final order, Respondent would need to request relief under Rule 60(b) and establish it is entitled to relief under the *Pioneer* factors. If the Court agrees and grants the relief requested, then Respondent would have standing to assert its affirmative defense that it was not properly served the Citation under § 10(a) of the Act. To permit Respondent's approach to prevail, the Court would be abrogating long standing Commission caselaw which has defined the procedural process an employer must utilize to obtain relief from a final order. The Court declines Respondent's invitation to do that.

Respondent is essentially raising an affirmative defense the Court lacks personal jurisdiction over Respondent since it alleges it was not properly served with the Citation in accordance with the Act because OSHA mailed it to the wrong address. *See* Fed. R. Civ. P. 12(b)(2) (lack of personal jurisdiction is an affirmative defense). While an affirmative defense may constitute a meritorious defense, the Court does not have jurisdiction to hear such a defense on the merits until it has decided whether or not Respondent's case may move forward because relief from the final order in this case is warranted under Rule 60(b)(1). Therefore, the burden is on Respondent to first establish it is entitled to relief under Rule 60(b)(1).

Respondent has centered its entire case around the Citation being mailed to the wrong address. The Court gave Respondent the opportunity to address the *Pioneer* factors in its Reply which Respondent did not do. In fact, in ¶¶ 9 and 10 of its Reply, Respondent stated the Complainant's arguments in addressing the *Pioneer* factors in its Response at ¶¶ 9 thru 12 "isn't relevant to the subject matter of this particular case." Respondent has elected to forego any argument under *Pioneer* that it had a basis for a finding of "excusable neglect."

Respondent has advanced one argument that is considered a *Pioneer* element. The Commission has consistently held "[e]mployers must maintain orderly procedures for handling important documents," and when the lack of such procedures results in the untimely filing of a NOC, relief under Rule 60(b)(1) is not warranted. *Keefe Earth Boring Company, Inc*., 14 BNA OSHC at 2192. However, Respondent in its Motion and Reply provided the Court with no information as to the procedures it had in place to handle important mail and communications. The only information Respondent provided was that it did not occupy the premises to which the Citation was sent and "Respondent had no reason to provide a forwarding address because they

were unaware of the inspection." Motion, ¶ 4. The Court finds this statement illustrative of one of two things. First, normally when a company moves it provides a forwarding address to the USPS so mail of any kind sent to the vacated address would be forwarded to a correct address where the company could process it OR the company was still in business at that address conducting business and not having proper procedures in place to handle important mail.[11] Failure to place a forwarding address with the USPS indicates a lack of an orderly process to receive mail which may have been sent to the address allegedly having been vacated. *BCB Constr. Inc.,* No. 98-0536, 1998 WL 769391 (O.S.H.R.C. Oct. 30, 1998)(noting that delivery at an address no longer occupied indicated a change of address had not been filed). Respondent has provided no excusable basis for its failure to file a timely NOC.

Finally, Respondent alleges that it was "surprised" when it learned of the inspection of its workplace. No surprise would have arisen if Respondent had appropriate business procedures in place to timely process incoming mail and communications. Likewise, as noted above, the relationship between Respondent and Mr. Compos was such - that regardless of what role Mr. Campos had with Respondent and this inspection – information regarding the inspection was likely communicated to the owner and other corporate officials. The Court finds no surprise to support Respondent's allegation in this regard.

ORDER

Respondent has not met its burden. The Court finds Respondent failed to file a timely NOC and no relief under Rule 60(b)(1) is justified.

[11] On several occasions Respondent stated at trial it could prove that it was not at the address to which the Citation was sent. Respondent could have done the same in its Motion and Reply by providing written documentation or an affidavit to that extent but failed to do so. Therefore, the Court made its factual findings based upon the evidence in the record which indicates otherwise.

Respondent's Motion is DENIED. Respondent's late NOC is DISMISSED, with prejudice. as untimely filed, and the Citation, classification and penalty are AFFIRMED in all respects.

SO ORDERED.

/s/ *Patrick B. Augustine*
Patrick B. Augustine
First Judge - OSHRC

Date: **November 15, 2021**