OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,
Complainant,
v.
HALLIBURTON ENERGY SERVICES, INC.,
Respondent.

OSHRC DOCKET No. 13-1716

ORDER GRANTING MOTION FOR RELIEF FROM FINAL ORDER

Halliburton Energy Services, Inc. (Respondent) has filed a "Motion for Relief of the Final Order under Rule 60(b) of the Federal Rules of Civil Procedure" (Motion). The Secretary did not file a response to the Motion within the time specified by Commission Rule 40(c), 29 C.F.R. § 2200.40(c). During a telephone scheduling conference on February 21, 2014, counsel for the Secretary indicated that the Secretary had determined not to file a response in opposition to the Motion.

For the reasons described below, the Respondent has met its burden to establish that the deemed final order of the Occupational Safety and Health Review Commission (Commission) was the result of the Respondent's "excusable neglect" under Fed. R. Civ. P. 60(b)(1), and thus the Motion is granted.[1]

[1] Unopposed motions are often summarily granted, but a motion that effectively seeks to excuse a late-filed notice of contest is different because a timely filed notice of contest establishes the Commission's jurisdiction. *Sharon & Walter Constr., Inc*., 23 BNA OSHC 1286, 1288, n. 2 (No. 00-1402, 2010), *citing Willamette Iron & Steel Co.*, 9 BNA OSHC 1900, 1904 (No. 76-1201, 1981). The Commission's jurisdiction may not be created by assent. *Atl.& Gulf Stevedores, Inc*., 3 BNA OSHC 1003, 1004 (No. 2818, 1975) (consolidated). The Secretary's decision not to oppose the Motion does not lessen

Background[2]

On April 5-6, 2013, a compliance officer (CO) from the Occupational Safety and Health Administration (OSHA) inspected the hydraulic fracturing operations that the Respondent was conducting at a well site in Epping, North Dakota. The CO completed the inspection without conducting a closing conference conforming to 29 C.F.R. § 1903.7(e),[3] and without otherwise indicating to any of the Respondent's employees that the inspection had revealed any violation of OSHA workplace health or safety standards.

As a result of the inspection, on August 21, 2013, OSHA issued a one item serious citation alleging a violation of the general duty clause of the Occupational Safety and Health Act (the Act). 29 U.S.C. § 654(a)(1). OSHA sent the citation by certified mail to the Respondent's post office box in Williston, North Dakota. Prior to mailing the citation, OSHA had not informed the Respondent that the citation would be forthcoming.

About six weeks before OSHA issued the instant citation, OSHA had issued to the Respondent a citation relating to the Respondent's hydraulic fracturing operation at a different well site located near Watford City, North Dakota. Prior to mailing this citation, OSHA had conducted a closing conference with the Respondent's district manager.

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the Respondent's burden to establish that it is entitled to relief under Rule 60(b)(1).

[2] The Respondent has filed an affidavit and related exhibits in support of the Motion. There being no reason to discredit the affiant's declarations, they are accepted as accurate for purposes of disposing of the Motion.

[3] Section 1903.7(e) provides as follows: "At the conclusion of an inspection, the Compliance Safety and Health Officer shall confer with the employer or his representative and informally advise him of any apparent safety or health violations disclosed by the inspection. During such conference, the employer shall be afforded an opportunity to bring to the attention of the Compliance Safety and Health Officer any pertinent information regarding conditions in the workplace."

After that closing conference, OSHA informed the district manager during a telephone conversation that a citation would be issued. Also, on the same day that OSHA mailed that citation, OSHA sent the district manager a copy of the citation by email. That citation alleged a violation of the general duty clause that is substantially similar to the violation alleged in the instant citation. Upon receiving that citation, the district manager caused to be timely filed a notice of contest. That matter was assigned OSHRC Docket No. 13-1188 and is currently pending before another Commission judge.

A member of the Respondent's administrative staff went to the post office on August 23, 2013, and picked up the certified letter containing the instant citation. Through inadvertence of the Respondent's administrative staff, the unopened certified letter was placed among the Respondent's outgoing mail and was re-deposited in the mail. The postal service thereafter re-delivered the certified letter to the Respondent's post office box. A member of the Respondent's administrative staff again picked up the letter, and it was delivered to the office of the same district manager who had received the previous citation involved in case number 13-1188. The district manager was on vacation when the letter was delivered to his office. Upon returning to his office, the district manager opened the certified letter, discovered the citation, and immediately contacted the OSHA area office that had issued the citation. Based on his experience in connection with the citation issued in case 13-1188, the district manager believed that OSHA's standard operating procedure was to contact the employer representative directly by phone and by email prior to formally issuing a citation.

On September 27, 2013, nine working days after the final day for filing a timely

notice of contest (based upon the original delivery of the certified letter on August 23, 2013), the Respondent caused to be filed a notice of contest with the OSHA area office that had issued the citation. By letter that same day, the OSHA area office advised the Respondent that the citation and penalty had become a final order of the Commission and that any request to reopen the matter should be filed with the Commission. On October 25, 2013, the Respondent filed the instant Motion. The Commission's Executive Secretary issued a notice of docketing on October 28, 2013. The matter was assigned to the undersigned on January 31, 2014.

Discussion

After receiving a citation, the Act allows the cited employer "fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty." 29 U.S.C. § 659(a). Such notification must be in writing and is timely when postmarked within the fifteen working day period. 29 C.F.R. § 1903.17(a). If the employer fails to file a notice of contest within this fifteen-day 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." 29 U.S.C. § 659(a).

The Respondent acknowledges that it did not file a notice of contest within the statutory period and that by operation of § 659(a) the citation was deemed a final order of the Commission on September 16, 2013.

An employer may be relieved from a deemed final order of the Commission pursuant to Fed. R. Civ. P. Rule 60(b). *George Harms Constr. Co. v. Chao*, 371 F.3d 156, 158 (3d Cir. 2004); *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-

1920, 1981). The party seeking relief under Rule 60(b) bears the burden of demonstrating it is entitled to relief. *Burrows Paper Corp.,* 23 BNA OSHC 1131, 1132 (No. 09-1559, 2010). The Respondent claims it is entitled to relief pursuant to Rule 60(b)(1), which allows relief from a final order that resulted from "mistake, inadvertence, surprise, or excusable neglect." [4]

In determining whether relief should be granted from a final order of the Commission pursuant to Rule 60(b)(1), the analysis enunciated by the Supreme Court in *Pioneer Inv. Serv. Co. v. Brunswick Assoc.*, 507 U.S. 380, 393 (1993) (*Pioneer*), is applicable. *George Harms Constr. Co.*, 371 F.3d at 163. "The Supreme Court in *Pioneer* explained that the term 'neglect,' for purposes of interpreting 'excusable neglect' in the federal rules, has its normal, expected meaning: inadvertence, carelessness, and mistake." *Canfield v. Van Atta Buick/GMC Truck, Inc*., 127 F.3d 248, 250 (2d Cir. 1997). The determination of what sorts of neglect will be considered "excusable" is an equitable one that takes into account all relevant circumstances, including 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 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. *Pioneer*, 507 U.S. at 395.

[4] In view of the determination that the Respondent is entitled to relief under Rule 60(b)(1), it is unnecessary to determine whether relief would be appropriate also under Rule 60(b)(3) due to the CO not having conducted a closing conference conforming to 29 C.F.R. § 1903.7(e). *See Prime Roofing Corp.,* 23 BNA OSHC 1329, 1335 (No. 07-1409, 2010) (ALJ).

The facts here are similar to those in *Russell B. Le Frois Builder, Inc*., 18 BNA OSHC 1978 (No. 98-1099, 1999), *rev'd on other grounds*, 291 F.3d 219 (2d Cir. 2002), where the Commission granted relief under Rule 60(b)(1). In *Le Frois*, a company employee went to the post office in her personal vehicle and picked up a certified letter containing a citation that OSHA had sent to the company's post office box. About seven weeks later, the employee discovered the certified letter underneath the seat of her vehicle. Upon opening the certified letter and discovering the citation, the company promptly filed a notice of contest. In granting relief under Rule 60(b)(1), the Commission noted that the company's "[d]eficiencies in mail procedures are not *per se* inexcusable under Rule 60(b)," and that "the reason for the delay … was a highly unusual, inadvertent error by the company employee who picked up the mail on the day in question." *Id.* at 1980. The Commission observed further that the employer had "acted swiftly" upon discovering the citation. *Id.* The Commission ruled that the filing of the late notice of contest "was due to inadvertence or excusable neglect for which relief is appropriate under Rule 60(b)." *Id.*

The delay here is significantly shorter than the delay in *Le Frois*, and the cause of the delay is strikingly similar. Here, there is no indication that (1) granting relief from the final order would prejudice the Secretary by adversely affecting the Secretary's enforcement role, either under the Act generally or in these proceedings specifically, (2) that the nine-day delay in filing the notice of contest would result in a significant delay the ultimate resolution of the citation in proceedings before the Commission, or (3) that the Respondent has not at all times acted in good faith.

Other equitable factors relevant to the *Pioneer* analysis include: (1) the lack of a closing conference that conformed to 29 C.F.R. § 1903.7(e) and the resulting absence of any indication from the inspecting CO that he had identified a violation; (2) the district manager's prior experience in connection with the previously issued citation of having received forewarning through both a telephone conversation and an email message that a citation would be issued; (3) the Respondent's demonstrated diligence in timely contesting the citation in case number 13-1188; and (4) that if the deemed final order in this matter were to stand and the Respondent later successfully defends the alleged violation of the general duty clause in case 13-1188, the Respondent could be subject to separate final orders of the Commission with conflicting outcomes upon substantially identical material facts.

The "control" factor of *Pioneer* does not outweigh the other relevant equitable considerations in view of the unusual circumstances surrounding the delay and the Respondent's prompt action upon discovering the citation. *See George Harms Constr. Co.*, 371 F.3d at 164. The relevant equitable considerations weigh in favor of finding the Respondent should be relieved from the final order due to excusable neglect pursuant to Rule 60(b)(1).

A party seeking relief under Rule 60(b)(1) must also allege that it could present a defense against the citation. *Nw. Conduit Corp*., 18 BNA OSHC 1948, 1951 (No. 97-851, 1999). This requirement is "satisfied with minimal allegations that the employer could prove a defense if given the opportunity." *Id.* (internal citation omitted). In case 13-1188, the Respondent is contesting an alleged violation of the general duty clause that

is substantially similar to the alleged violation in the instant case, and in its Motion the Respondent describes evidence it intends to present to controvert elements of the Secretary's burden of proof. (Motion, pp. 11-15). The Respondent has met the minimal requirement of alleging the existence of a good faith defense to the citation.

For these reasons, the motion for relief from the deemed final order of the Commission is GRANTED.

The Complainant shall file and serve his complaint pursuant to Commission Rule 34(a), 29 C.F.R. § 2200.34(a), within 11 days of the date of this order.

SO ORDERED.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: March 5, 2014