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

SECRETARY OF LABOR,
Complainant,

v.

TNT CRANE & RIGGING, INC.,
Respondent.

OSHRC Docket No.: 17-1872

ORDER DEEMING ADMISSIONS ADMITTED AND GRANTING MOTION TO WITHDRAW

On May 31, 2018, Respondent filed *Respondent's Motion to Deem Requests for Admissions Admitted* ("*Motion to Deem Admissions Admitted"*). On June 14, 2018, Complainant responded to Respondent's motion by filing *Complainant's Response in Opposition to Respondent's Motion to Deem Requests for Admission Admitted or in the Alternative, Complainant's Motion to Withdraw Admissions* ("Complainant's Opposition and *Motion to Withdraw Admissions"*). On June 14, 2018, the Court ordered Respondent to respond only to Complainant's alternative *Motion to Withdraw Admissions*. On June 22, 2018, Respondent filed *Respondent's Opposition to Complainant's Motion to Withdraw Admissions*.

Case Law

Despite the common approach of one party filing a *Motion to Deem Admissions Admitted*, Commission Rule 54 and Fed.R.Civ.P. 36 do not require such a practice. Both rules dictate admissions are *automatically* admitted if not answered within 30 days of the day they were served upon opposing counsel. *See Sec'y of Labor v. Guillen*, 26 BNA OSHC 1545, 1547 (No. 16-1214, 2017); *See also* 29 C.F.R. § 2200.54; Fed. R. Civ. P. 36.[1] However, admissions which have been deemed admitted are ones which can be withdrawn, if the moving party successfully meets its burden in establishing the elements of the two-prong test laid out in Commission Rule 54(c). *E.g. Sec'y of Labor v. Samsonite Corp.*, 10 BNA OSHC 1583, 1584 (No. 79-5649, 1982) (holding the Secretary's deemed admissions can be withdrawn)[2]; *Wilcox v. Birtwhistle*, 21 Cal. 4th 973, 987 P.2d 727 (Cal. 1999) (holding that per California's clear statutory law, a deemed admission is one which can be withdrawn just as an admission which is admitted to). The two-prong test requires the moving party, by preponderance of the evidence, prove: (1) withdrawal of the admission will not prejudice the non-moving party; and (2) granting the motion will allow the case to be presented on its merits. 29 C.F.R. § 2200.54(c). According to the rule, the party who obtained the admission must show the court they would be prejudiced if the Court allows withdrawal of the admission. *Id.* "The prejudice contemplated by [Rule 54(c)] is 'not simply that the party who obtained the admission will now have to convince the factfinder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence' with respect

[1] Since the Commission has adopted a Rule addressing Admissions, that is the Rule which is applicable for the Court's analysis. *See* Commission Rule 2(b)(in the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure). 29 C.F.R. § 2200.2(b).

[2] The *Samsonite Corp.* case was decided prior to the Commission's adoption of Commission Rule 54 (c).

to the questions previously deemed admitted." *Hadley v. U.S.*, 45 F.3d 1345, 1348 (9th Cir. 1995) (quoting *Brook Village N. Assocs. v. General Elec. Co.*, 686 F.2d 66, 70 (1st Cir. 1982).

The Court has complete discretion in granting the *Motion to Withdraw Admissions*. *See Conlon v. U.S.*, 474 F.3d 616, 625 (9th Cir. 2007). Even if the moving party successfully proves it meets the two-prong test, the Court may still deny the motion if the party, against who the admissions are deemed admitted, did not establish excusable neglect. *See Id.*

Excusable neglect is a form of good cause the Court can use to grant withdrawal. *See Espy v. Mformation Technologies*, No. 08-2211-EFM, 2009 WL 2912506, at *1 (D. Kan. Sept. 9, 2009). The standard for excusable neglect is a factor test which is laid out in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*. The test requires the Court to consider: (1) the danger of prejudice to the adversely affected party; (2) the length of delay and potential impact on judicial proceedings; and (3) the reason for the delay. In determining the reason for the delay, the Court should ask whether the delay was within the reasonable control of the movant, and if the movant acted in good faith. *See Pioneer Inv. Svcs.*, 507 U.S. 380, 395 (1993). *See also Sec'y of Labor v. TMD Contracting*, 24 BNA OSHC 1441, 1444 (No. 12-0962, 2012) (adopting the *Pioneer* Court's standard for excusable neglect).

The *Pioneer* Court also noted that although inadvertent, ignorance of the rules or mistakes construing the rules do not usually constitute excusable neglect. That concept "is a somewhat 'elastic concept', and is not limited strictly to omissions caused by circumstances beyond the control of the movant." *Pioneer*, 507 U.S. at 392. However, the Commission has consistently held that, "ignorance of procedural rules does not constitute 'excusable neglect' and that mere carelessness or negligence does not justify relief." *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). (citing *New Blue Shield Constr., Inc.*, 22 BNA OSHC ¶ 1133 (O.S.H.R.C.A.L.J. Aug. 10, 2007)).

Argument

Respondent requests *Respondent's First Set of Requests for Admissions* be admitted. Further, Respondent requests the Court deny *Complainant's Motion to Withdraw Admissions*. Respondent argues it will be prejudiced if the Court grants *Complainant's Motion to Withdraw Admissions*. Specifically, Respondent makes three arguments in its *Opposition to Complainant's Motion to Withdraw Admissions*: (1) it is not Respondent's job to assist Complainant in prosecuting its claims; (2) because Complainant failed to timely answer its Request for Admission, its ability to timely investigate the allegations and form its defenses is hindered; and (3) there are multiple witnesses who are unavailable for discovery.

While Respondent has cited *Guillen* in its *Motion to Deem Admissions Admitted*, that case is not dispositive. *Guillen*, 26 BNA OSHC at 1545. Though *Guillen* does recite Commission Rule 54(a) in stating that a failure to timely respond serves as an admission, the case is not entirely on point. *Id. Guillen* deals with a Respondent who did not answer the Complaint in addition to the Request for Admissions. *Id.* The *Guillen* Court held that alternatively, the Respondent was in default. *Id.* That is not so in the instant case. Here, Complainant filed the Complaint, and has participated in every step of the litigation thus far. Additionally, *Guillen* does not address Commission Rule 54(c), which permits withdrawal or modification of admissions deemed admitted, which is at issue here.

Complainant contends Respondent's *Motion to Deem Admissions Admitted* should be denied, or alternatively, if the Court finds the admissions to be admitted, then to grant withdrawal of such admissions. Complainant makes five arguments in its *Opposition and Motion to Withdraw Admissions*: (1) upholding the admissions would eliminate any presentation of the merits of its case; (2) Respondent will not be prejudiced if the admissions are withdrawn; (3) the original attorney for Complainant, Christopher Lopez-Loftis, mistakenly overlooked Respondent's Request for Admissions and did not send the complete file to new counsel (Josh Bernstein); (4) Counsel corresponded approximately fifty times from the time Mr. Bernstein appeared in this case, until May 15, 2018, when Respondent informed Complainant it would file a Motion to Deem Admissions Admitted; and (5) Complainant believes Respondent is acting in bad faith by exploiting Complainant's oversight.

Discussion

The Court finds the admissions requested are automatically deemed admitted because Complainant did not answer the Request for Admissions within 30 days of the day they were served upon opposing counsel. *See Sec'y of Labor v. Guillen,* 26 BNA OSHC at 1547. *See also* 29 C.F.R. § 2200.54; Fed. R. Civ. P. 36. The Court further finds Complainant's *Motion to Withdraw Admissions* satisfies the two-prong test laid out in Commission Rule 54(c).

The primary issue here is whether Respondent will be prejudiced if the Court grants withdrawal. The burden is on Respondent to show the Court it will be prejudiced. 29 C.F.R. § 2200.54(c). Prejudice is proven by showing the party will face difficulty proving its case, e.g., because of the sudden need to obtain evidence with respect to the previously deemed admissions caused by the unavailability of key witnesses. *See Hadley v. U.S.*, 45 F.3d 1345, at 1348. To

persuade the Court, Respondent makes three arguments. First, Respondent argues that Complainant should not be given a pass for its failure.[3] This may be valid in other contexts, but here, it is irrelevant. This does not show Respondent is prejudiced. It only shows that it may be unfair to let Complainant get away with not answering in a timely manner.

Second, Respondent argues it is unable to investigate Complainant's allegations while witnesses have "fresh memories" because of Respondent's delay.[4] However, this raises an important question – why did Respondent not bring this issue up to the Court or Complainant sooner than five months after a response was due if it affected its case on such a level? As mentioned above, a party is not required to file a Motion to Deem Admissions Admitted. However, in the present case, Respondent did not assert it began acting as if the admissions were deemed admitted in conducting its discovery. If Respondent showed it acted as if the admissions were automatically deemed admitted, and for the last five months it has been conducting discovery accordingly, the Court would have an easier time finding it would be prejudiced; because it would effectively have to start its discovery process over. Also, the Court has factored in that any prejudice may have been enhanced by Respondent's own failure to timely prosecute this matter.

Finally, Respondent argues two of its witnesses are unavailable for discovery.[5] This argument is also inadequate. The Court would find the unavailability of witnesses to prejudice Respondent if, by granting withdrawal, Respondent had a sudden need to obtain discovery from the unavailable witnesses. This need was not asserted here. As mentioned above, Respondent did not assert it began acting as if the admissions were already deemed admitted. All Respondent

[3] Respondent's Opposition to Complainant's Motion to Withdraw Admissions, at 2.
[4] *Id.*
[5] *Id.* at 3.

argues is they are unable to locate a witness, and another has a medical condition rendering him unavailable. Bare allegations of unavailability without further proof are insufficient for Respondent to meet its burden. Respondent did not assert the actions it has taken to locate the unavailable witness in order to prove it has exercised every option within its means to locate the witness. As to the witness with a medical condition which makes him unavailable, again, bare allegations are not sufficient. What medical condition does the individual have which makes him unavailable? Can he be available with accommodations? Can the witness testimony be obtained through alternative means of discovery, i.e. written deposition or video deposition? Also, the Court is perplexed as to how the withdrawal of the admissions causes these witnesses to be unavailable. Would the position of Respondent in regard to these witnesses be the same had the admissions been timely answered? Had Respondent shown that Complainant's delay or the Court granting withdrawal somehow causes the unavailability of its witnesses, the Court may have a different view on whether Respondent is prejudiced.

The second prong of the two-prong test laid out in Commission Rule 54 requires that granting the *Motion to Withdraw Admissions* will allow the case to be presented on its merits. Respondent agrees the merits of this case will be sub served if withdrawal is not granted.[6] Similarly, Complainant argues that presentation of its case will be practically eliminated if withdrawal is not granted.[7] Well established Commission law demands a case be decided on its merits, rather than on procedural flaws. *Stone & Webseter Constr., Inc.*, 23 BNA OSHC 1939, 1943-44 (No. 10-0130, 2012) (consolidated); *Sealite Corp.*, 15 BNA OSHC 1130, 1133 (No. 88-1431, 1991); *Duquesne Light Co.*, 8 BNA OSHC 1218, 1222-23 (No. 78-5034, 1980)

[6] *See Id.* at 2.
[7] Complainant's Opposition and Motion to Withdraw, at 4.

(consolidated). The second prong of the two-prong test provided in Commission Rule 54 is established.

The Court also finds the Solicitor has established excusable neglect under the *Pioneer* standard. Excusable neglect is established because Respondent is not prejudiced; as there is still sufficient time left before trial to conclude discovery, or in the alternative to ask for a postponement of the trial date. Additionally, Complainant showed good cause in its reason for the oversight. *See Pioneer*, 507 U.S. at 395. Accordingly, the Court finds Respondent is not prejudiced by the granting of Complainant's *Motion to Withdraw Admissions*.

ORDER

Pursuant to Commission Rule 54(b), Respondent's *First Set of Requests for Admissions* is deemed ADMITTED. Further, the Court finds granting Complainant's *Motion to Withdraw Admissions* is proper. Accordingly, the Court hereby GRANTS Complainant's *Motion to Withdraw Admissions.* The Court further ORDERS Complainant to submit a response to *Respondent's First Set of Requests for Admissions* no later than *ten days* from the date of this *Order*.

SO ORDERED.

/s/
Patrick B. Augustine
Judge, OSHRC

Dated: **July 10, 2018**