



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor,

Complainant,

v.

Stone House Enterprises, Inc., dba
Jacksonville Granite,

Respondent.

OSHRC Docket No. **19-1247 & 19-1248**

Appearances:

Jeremy K. Fisher, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for Complainant

Michael J. Rich, Stone House Enterprises, Inc., dba Jacksonville Granite, for Respondent

JUDGE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This matter, involving two inspections, is before the Occupational Safety and Health Review Commission on the *Complainant's Motion to Dismiss Respondent's Late Notice of Contest* pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act). Stone House Enterprises, Inc., d/b/a Jacksonville Granite (Stone House) opposes the motion and is seeking relief under Fed. R. Civ. P. 60(b). For the reasons that follow, I find Stone House is not entitled to relief pursuant to Rule 60(b) and **GRANT** the Secretary's Motion to Dismiss Respondent's Untimely Notice of Contest.

PROCEDURAL BACKGROUND

This matter involves citations issued to Stone House following two inspections conducted by the Jacksonville Area Office of the Occupational Safety and Health Administration. Stone House filed a single notice of contest addressing both inspections which the Commission received August 2, 2019. The Commission issued separate notices of docketing for the inspections on August 13, 2019, assigning docket numbers 19-1247 and 19-1248. On September

17, 2019, and September 19, 2019, the Secretary filed motions to dismiss Stone House's notice of contest in docket numbers 19-1247 and 19-1248, respectively. Chief Judge Rooney assigned the matters to the undersigned. The matters were set for a hearing to be held November 20, 2019, to resolve the jurisdictional issue presented by the Secretary's motions.

In the court's scheduling order, the parties were required to file prehearing statements by November 6, 2019. Those prehearing statements were to include, among other things, each party's position on:

- a. Whether Respondent was served with the Citation and Notification of Penalty and if so, the date of receipt;
- b. Whether the delay in filing was caused by deception on the part of the Secretary or by the failure of the Secretary to follow proper procedures;
- c. Whether there is excusable neglect for a late filing;
- d. Whether Respondent has a meritorious defense;
- e. Whether there is prejudice to the Secretary if relief is granted;

The Secretary timely filed his prehearing statement. Stone House did not file a prehearing statement.

The undersigned held a hearing on November 20, 2019, in Jacksonville, Florida. The hearing was limited to the Secretary's motion to dismiss and Stone House's request for relief. The undersigned consolidated the two dockets for the purposes of hearing evidence on the jurisdictional issue. At the end of the hearing, the Secretary requested the opportunity to submit written closing arguments. The parties were given the opportunity to submit written post-hearing summations by January 6, 2020. Secretary filed a post-hearing brief. Stone House did not file a written summation.

FACTUAL BACKGROUND

Stone House fabricates and installs granite countertops (Tr. 50). Its principle place of business is at 124 Industrial Loop W., in Orange Park, Florida. There it has an office and fabrication shop. Two people work in the shop fabricating the countertops, one person works in the yard moving materials, and three people work in Stone House's office (Tr. 51). In addition, it has four to five installers who work in the field. The company is owned by Michael Rich who

performs managerial or administrative tasks as well as fabricating countertops in the shop and overseeing installation in the field.

In December of 2018, the Jacksonville Area OSHA office received a complaint alleging various safety and health concerns at Stone House's fabrication shop (Tr. 10-11). Compliance Safety and Health Officer (CSHO) Nolan Houser was assigned to perform an inspection of Stone House's facility to investigate the complaint. He went to Stone House's shop December 20, 2018, and held an opening conference with Mr. Rich (Tr. 11). Along with a trainee, he conducted a walk-around inspection of the shop (Tr. 11-12). He held a closing conference with Mr. Rich the following day during which he explained he would be recommending citations be issued to Stone House and the process by which the company could contest them (Tr. 12, 18-19).

During his walk-around inspection, CSHO Houser observed stone cutting being performed by individuals working in Stone House's shop (Tr. 17). Based on his observation, he made a referral to the Jacksonville Area office of potential silica exposure at the facility (Tr. 17). The Jacksonville Area Office dispatched CSHO Rembrandt Moses to perform an industrial hygiene inspection to determine whether individuals working at Stone House's facility were exposed to silica. CSHO Moses conducted an inspection during which he performed air monitoring on the individual performing grinding and polishing of the stone countertops in Stone House's shop. As a result of his air monitoring findings, CSHO Moses recommended citations be issued to Stone House related to overexposure to silica.

According to Mr. Rich,¹ he and CSHO Moses discussed the air monitoring findings in person during a closing conference (Tr. 53).² Mr. Rich had installed a ventilation system after a prior OSHA inspection revealed overexposure and expected air monitoring results to show the ventilation system reduced exposure below the permissible exposure level (Tr. 59). He explained to CSHO Moses the individual he had monitored was not an employee of Stone House, but an independent contractor (Tr. 53). He allowed CSHO Moses to speak privately with the individual. He presented CSHO Moses with documentation showing how the individual was paid. After this discussion, CSHO Moses told Mr. Rich "we are done here" and left, leaving Mr. Rich with the impression he would not be receiving citations (Tr. 53). A few days later, Mr.

¹ CSHO Moses was not called to testify. The Secretary presented no evidence to rebut Mr. Rich's version of his interaction with CSHO Moses.

² Mr. Rich used the term "exit interview" to refer to the closing conference.

Rich received a phone call from CSHO Moses during which CSHO Moses told Mr. Rich he needed to set up another closing conference to discuss citations he was recommending be issued (Tr. 53). When Mr. Rich expressed surprise based upon their prior discussions, CSHO Moses told him “the higher-ups said we need to go a different route.” (Tr. 53)

Mr. Rich and CSHO Moses set up a closing conference at Mr. Rich’s office the following Monday (Tr. 54). CSHO Moses did not appear for that meeting (Tr. 54). Rather, he sent an email to Mr. Rich detailing the basis for the citations he was recommending and explaining the contest process (Exh. C-2).

On June 4, 2019, the Secretary issued Stone House a citation alleging three repeat violations of the general industry standards based on CSHO Houser’s inspection (Exh. C-6). On June 5, 2019, the Secretary issued Stone House two citations alleging serious and repeat violations of the general industry standards based on CSHO Moses’s inspection (Exh. C-3). Consistent with standard procedures, both citations were sent via certified mail (Tr. 33). Both were delivered to Stone House’s office on June 6, 2019 (Exhs. C4; C-5; C-7; and C-8). Both citations contained an explanation of the employer’s right to contest the citations, including the 15 working day deadline for filing a notice of contest underlined and in bold print (Exhs. C-3 and C-6). The citations were signed for by Cathy Babbitt, an office worker for Stone House (Exh. C-4; Tr. 46, 48). According to Mr. Rich, Ms. Babbitt placed the envelopes on a stack of mail in his office (Tr. 46). Mr. Rich testified he was working 80 to 90 hours per week at the time in the office, the shop, and the field (Tr. 46-49). He stated he had a large pile of mail on his desk. Mail continued to accumulate on that pile after Ms. Babbitt placed the envelopes containing the citations on it (Tr. 49). Mr. Rich testified due to his efforts to keep his business afloat, his mail simply “stacked up.” (Tr. 56) Once he was able to attend to it and found the citations, he contacted the Jacksonville Area Office. Based upon the date of receipt, Stone House’s last day to contest was June 27, 2019. The Jacksonville Area Office informed Mr. Rich his contest period had lapsed and was given instructions on how to file a notice of contest directly with the Review Commission which he did on July 25, 2019 (Exh. C-9).³

DISCUSSION

Pursuant to the requirements of the Act, an employer must notify the Secretary of its intent to contest a citation within 15 working days of receipt of the citation. Failure to timely file

³ The record is silent as to when Mr. Rich found the citations or made the call to the Jacksonville Area Office.

a notice of contest results in the citation becoming a final order of the Commission by operation of law. A late notice of contest may be accepted, however, where the employer establishes the delay in filing was due to deception by the Secretary, or where the delay was caused by the Secretary's failure to follow proper procedures. A late notice of contest also may be excused under Rule 60(b), if the final order was entered as a result of "mistake, inadvertence, surprise or excusable neglect." See *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981)(citations omitted). The moving party has the burden of proving it is entitled to relief under Rule 60(b).⁴

An employer must also establish the presence of a meritorious defense for Rule 60(b)(1) relief. *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1951 (No. 97-851, 1999). A meritorious defense is one that is valid at law with respect to the underlying action. *Park Nursing Center, Inc., v. Samuels*, 766 F.2d 261, 264 (6th Cir. 1985). The presence of a meritorious defense is "satisfied with minimal allegations that the employer could prove a defense if given the opportunity." *Jackson Assoc. of Nassau*, 16 BNA OSHC 1261, 1267 (No. 91-0438, 1993).

In cases involving a request for relief from a final order, the Commission has long applied the Supreme Court's analysis stated in *Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993). The determination of excusable neglect pursuant to Rule 60(b)(1)⁵ is an equitable one, taking into account of all relevant circumstances surrounding Stone House's failure to file a timely notice of contest, including the danger of prejudice to the Secretary, the length of delay and its potential impact on the judicial proceedings, the reason for the delay and whether Stone House acted in good faith. *Pioneer Investment Serv.*, 507 U.S. at 395; *Craig Mechanical, Inc.*, 16 BNA OSHC 1763 (No. 92-0372, 1994); *Merritt Electric Company*, 9 BNA OSHC 2088 (No. 77-3772, 1981). 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. 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), the Court stated that

⁴ The Secretary has the burden to establish he properly served the employer. The record contains sufficient evidence the Secretary served Stone House with the citations consistent with the requirements of § 10(a) the Act (Tr. 33-39; Exhs. C-4, C-5, C-7, and C-8). Stone House does not dispute of the Secretary's evidence of valid service of the citations.

⁵ Stone House does not contend its failure to timely contest the citations was the result of deception on the part of the Secretary or the Secretary's failure to follow proper procedures.

“excusable neglect’ is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” *Id.* at 394.

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 curium) (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); *Silivanich v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366, 366 n.7 (2^d Cir. 2003) (same); *Graphic Communications Int’l Union v. Quebecor Printing Providence, Inc.*, 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).

Other circuit courts emphasize that 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 (3^d 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 Eleventh Circuit, the circuit in which this case arose, has applied a three-part equitable analysis. *In re Worldwide Web Systems, Inc.*, 328 F.3d 1291 (11th Cir. 2003). To establish excusable neglect entitling it to relief from a default judgment, a party must show “(1) it had a meritorious defense that might have affected the outcome; (2) granting the motion would not result in prejudice to the non-defaulting party; and (3) a good reason existed for failing to reply to the complaint.” *Worldwide Web*, 328 F. 3d at 1295 quoting *Florida Physician’s Ins. Co., v. Ehlers*, 8 F.3d 780, 783 (11th Cir. 1993) (citing *E.E.O.C. v. Mike Smith Pontiac GMC, Inc.*, 896 F.2d 524, 528 (11th Cir. 1990). An equitable analysis under *Pioneer* “necessarily involves consideration of all three elements.” *Worldwide Web*, 328 F. 3d at 1297.

Long-settled Commission precedent focuses on the third factor in the *Pioneer* equitable analysis. Evaluating a request for relief for a late filed notice of contest due to excusable neglect, Commission precedent states that a “key factor” is “the reason for the delay, including whether it was within the reasonable control of the movant.” *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. Mere carelessness or negligence, even by a layperson, in failing to timely file a notice of contest does not amount to “excusable neglect” that would justify relief under Rule 60(b). *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991).

That Stone House did not contest the citations within the requisite time period is not disputed. Stone House received the citations on June 6, 2019 (Exhs. C-4 and C-8). Its notice of contest was due June 27, 2019. The record reveals it did not file its notice of contest until July 25, 2019. Therefore, by operation of law, the citations and proposed penalty must be deemed a final order of the Commission unless Stone House can demonstrate it is entitled to relief.

Did Stone House Establish It Could Raise a Meritorious Defense?

Commission precedent states “to be eligible for relief under Rule 60(b)(1), the moving party []must allege a meritorious defense.” *Northwest Conduit*, 18 BNA OSHC at 1951. With regard to the citation issued pursuant to Inspection No. 1367361 (Docket No. 19-1247), Stone House has not met that burden to establish it is eligible for relief. When given the opportunity to articulate a defense, Mr. Rich admitted the validity of the allegations. The citation contains three alleged repeat violations. Item 1 alleges a violation of 29 C.F.R. § 1910.157(e)(3) for failure to conduct an annual maintenance check on portable fire extinguishers. Mr. Rich conceded he had not followed up with the company that performs these checks to ensure they were timely conducted (Tr. 52). Item 2 alleges a violation of 29 C.F.R. § 1910.178(l)(1)(ii) for failure to ensure the employee using a forklift had been trained to do so. Mr. Rich admitted he had not ensured that employee was licensed (Tr. 52). Item 3 alleges a violation of 29 C.F.R. § 1910.1200(h)(1) for failure to train employees on hazardous chemicals. Mr. Rich admitted new employees had not been trained (Tr. 51). Stone House has not alleged a meritorious defense and would not be entitled to relief under Rule 60(b) for Docket No. 19-1247.⁶

⁶ Following Eleventh Circuit three-part equitable analysis, Stone House’s failure to articulate a defense to the allegations in the citation issued pursuant to Inspection No. 1367361 weighs against a finding of excusable neglect.

With regard to the citation issued pursuant to Inspection No. 1370519 (Docket No.19-1248) addressing exposure to silica, Stone House contends the individual exposed to the hazard was not an employee but an independent contractor. Mr. Rich testified Stone House pays the individual's business entity. The individual sets his own schedule and uses his own hand tools (Tr. 61-62). This is sufficient to meet Stone House's burden to raise a meritorious defense as to Docket No. 19-1248.

The Secretary contends even if Stone House could successfully establish the exposed individual was an independent contractor, it can be cited for exposing that individual under OSHA's multi-employer worksite policy. The Secretary notes Stone House has sole control over the worksite and has the authority to correct the overexposure hazard. The Secretary's argument falls short of establishing a total lack of merit to Stone House's position with regard to all violations alleged in the citations arising out of Inspection No. 1370519. For example, the record does not definitively establish Stone House created or controlled abatement of violations related to respirator selection or training. The record contains sufficient contentions to establish Stone House could raise a defense that would have an impact on the outcome of Docket No. 19-1248.

Was Stone House's Failure to Timely File due to Excusable Neglect?

On behalf of Stone House, Mr. Rich offered little explanation for his failure to meet the 15-day filing deadline. Mr. Rich testified his mail handling procedures consisted of placing all incoming mail on a stack on his desk in his office (Tr. 56). He allowed the mail to simply "stack up" until he found time to tend to it (Tr. 56). As a result of his personal commitments and attempts to keep his small business operating, Mr. Rich spent little time in his office attending to administrative matters. His testimony left the impression he allowed his business mail to accumulate for long periods (Tr. 46-47, 56).

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) 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).

Although sympathetic to the pressures of running a small business and personal obligations, the undersigned is hard-pressed to find stacking all incoming mail on one's desk and ignoring it until "whenever" one gets time to be an orderly procedure for handling important documents. Nor is it an exercise of due diligence. Assuming Mr. Rich acted with dispatch upon finding the citations leads to the conclusion he allowed business mail to remain unopened on his desk for at least 45 days. His testimony suggests mail lay neglected for longer. Mr. Rich's testimony regarding his handling of emails suggests he took no more care with electronic communications. This conduct is more than merely negligent, it is dilatory.

Mr. Rich has had experience contesting OSHA citations and was aware of the 15-day filing deadline (Tr. 58). Much of Mr. Rich's testimony focused on his interaction with CSHO Moses and his belief the citations alleging overexposure to silica were unfounded and would not be issued. The record as a whole does not support a finding Stone House had a reasonable expectation it would not receive any citation. CSHO Houser told Mr. Rich in his closing conference he intended to recommend citations based on his findings. Even if Mr. Rich thought CSHO Moses would not recommend citations be issued at the end of his onsite inspection, he could not have believed so after receiving a call from CSHO Moses in which CSHO Moses told him to the contrary. Stone House is solely to blame for the delay in filing.

Stone House presented no evidence regarding the other equitable considerations enumerated in *Pioneer*. The Secretary does not contend he would be hindered in presenting his case. The short length of the delay makes it less likely evidence will have been lost. Nor is there evidence the delay has an impact on efficient judicial administration. Although there is no evidence of bad faith on the part of Stone House, it has failed to comply with the undersigned's orders.

The Secretary contends failure to timely file a notice of contest results in the inability to

ensure abatement of the violations.⁷ The legislative intent behind the short filing deadline is to ensure expeditious elimination of hazardous conditions. There is little record evidence regarding the status of abatement. According to the citations, at least one of the alleged violations was corrected during the inspection (Exh. C-6 at p. 8). The alleged violations addressing overexposure to silica had an abatement date of July 23, 2019 (Exh. C-3). Stone House filed its notice of contest two days later, staying its abatement requirement. 29 U.S.C. § 659(b); *Reich v. Manganas*, 70 F.3d 434 (6th Cir. 1995). In general, delayed abatement weighs against a finding of excusable neglect. In this instance, it is not a significant factor weighing against a grant of relief.

“[N]either a lack of prejudice to the Secretary nor good faith on the part of Respondent in attempting to comply with the statutory filing requirement alone will excuse a late filing.” *Prime Roofing Corp.*, 23 BNA OSHC 1329 (No. 07-1409, 2010). As the Commission noted in *CalHar Construction, Inc.*,

in almost all 60(b) late filing cases before the Commission, it is a given that there is a lack of prejudice to the Secretary or to the interests of efficient judicial administration, combined with a lack of bad faith by the employer. These 60(b) cases involve neglect, and a determination as to whether that neglect is excusable must focus principally on the reason for the delay, including whether it was within the control of the employer.

18 BNA OSHC 2151, 2153 n. 5 (No. 98-0367, 2000). When focusing principally on the reason for the delay, taking into consideration the equities that favor Stone House does not tip the scales in Stone House’s favor. Stone House provided no evidence it had adequate procedures that were not followed, or intervening events or circumstances interfered with its timely processing of the citations. The undisputed evidence regarding Stone House’s handling of the citation establishes the company was to blame for the failure to timely file its notice of contest. Relief under Rule 60(b) is not warranted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusion of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

⁷ The Secretary also argued the length of the delay in filing was “unreasonable.” Neither the Secretary nor the Commission has articulated a specific period of time that would constitute a “reasonable” delay. Such a determination would depend on the totality of the circumstances and the equitable considerations enumerated in *Pioneer*.

ORDER

Based upon the foregoing decision, it is **HEREBY ORDERED** that the Secretary's Motion to Dismiss Respondent's Late Notice of Contest is **GRANTED**.

It is further **ORDERED** that the notice of contest filed in this case is **DISMISSED** and the Citation and Notification of Penalty is **AFFIRMED** in all respects.

SO ORDERED.

/s/
Heather A. Joys
Administrative Law Judge, OSHRC

Dated: February 4, 2020
Washington, DC