



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant

v.

Rene Silverio Gonzalez/RG Roofing,
Respondent.

OSHRC Docket No. **22-0369**

Representatives:

Remy B. Smith, Esq.
U.S. Department of Labor, Office of the Solicitor, Dallas, TX, for Complainant

Wayne Duncan, Safety Representative
West Texas Safety Solutions, LLC, for Respondent

JUDGE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER OF DISMISSAL

Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c), confers on the Occupational Safety and Health Review Commission jurisdiction to hold hearings to determine the validity of citations issued by the Secretary of Labor for violations of the Act. To invoke the jurisdiction of the Commission, a cited employer must file a written notice of contest within 15 working days of receipt of any citation. 29 U.S.C. § 659(a). Failure to do so results in the citation becoming a final order of the Commission “not subject to review by any court or agency.” *Id.*

When a cited employer has failed to meet the statutory deadline, it may seek relief from a final order under Federal Rule of Civil Procedure 60. 29 C.F.R. § 2200.33 n.1. Among other grounds, a cited employer may be granted relief, and its late notice of contest accepted, where it establishes 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). Whether Respondent, Rene Silverio Gonzalez d/b/a RG Roofing (RG Roofing), has met this burden and is entitled to relief is the issue before the court.

For the reasons that follow, RG Roofing’s request for relief from a final order of the Commission is **DENIED**.

BACKGROUND

On November 12, 2020, the Houston South Area Office of the Occupational Safety and Health Administration (OSHA) initiated an inspection of a worksite in Hitchcock, Texas, where RG Roofing was performing roofing work. Compliance Safety and Health Officer Marc Greenfield conducted the inspection (Tr. 10). CSHO Greenfield went to the worksite where he observed individuals working on a roof (Tr. 10). CSHO Greenfield identified the company performing the work as RG Roofing.

RG Roofing is owned by Rene Silverio Gonzalez. Mr. Gonzalez was not at the worksite on the day of CSHO Greenfield’s inspection.¹ CSHO Greenfield spoke with Johnathan Gonzalez, Rene Gonzalez’s son (Tr. 10, 60, 72). Johnathan Gonzalez wrote down the company name, contact information, and the names of the employees on site for CSHO Greenfield (Tr. 12-13; Exh. C-13). Following the inspection, the Secretary issued RG Roofing a Citation and Notification of Penalty alleging three serious violations of the standards at 29 C.F.R. §§1926.100(a); 1926.501(b)(13); and 1926.1053(b)(1) and proposing a penalty of \$8,097.00.

Federico Rodriguez-Puente, the safety tech for the Houston South Area Office, generated the Citation after being directed to do so by the Assistant Area Director (Tr. 23). On December 28, 2020, he mailed the Citation by certified mail to RG Roofing at the address provided by Johnathan Gonzalez during the inspection (Tr. 23-25). United States Postal Service records show the Citation was delivered to RG Roofing on January 5, 2021 (Exh. C-2). RG Roofing admits it received the Citation.²

After receiving the Citation, Mr. Gonzalez attempted to contact the Houston South Area Office (Tr. 56). He was unable to specify when or an exact number of times he called the Area Office (Tr. 57). He never left a voicemail message (Tr. 58). RG Roofing did not file a written notice of contest with the Secretary and the Citation became a final order of the Commission on January 27, 2021.

¹ CSHO Greenfield testified he spoke with two individuals, one of whom he believed was Rene Gonzalez. (Tr. 10). Whether CSHO Greenfield was mistaken on the day of the inspection or had a faulty memory is not material to any issue before the court.

² In its prehearing statement and its post-hearing brief, RG Roofing states it was “properly and timely served the Citation and Notification of Penalty.” See *Rene Silverio Gonzalez dba RG Roofing’s Request for ON RECORD Hearing for Scheduled Hearing July 11, 2022*; and *Respondent’s Post-Hearing Brief (Closing Argument)* at p. 3.

Having not received a notice of contest in the Area Office, Safety Tech Rodriguez-Puente confirmed RG Roofing had received the Citation. He then sent a payment demand letter to RG Roofing on April 12, 2021 (Exh. C-4). When payment was not received, Safety Tech Rodriguez-Puente referred the matter to the Debt Collection Accountability Team (DCAT) in Washington, D.C., on May 13, 2021 (Tr. 28; Exh. C-4).

On July 9, 2021, the Houston South Area Office received a voicemail from Mr. Gonzalez in Spanish (Tr. 29; Exh. C-14). Amy Whitney of the Area Office forwarded that message to Safety Tech Rodriguez-Puente, who forwarded it to Jorge Gomez, a compliance assistance specialist with the Houston South Area Office (Exh. C-14). Safety Tech Rodriguez-Puente and Compliance Assistance Specialist Gomez, both of whom speak Spanish, each testified he returned Mr. Gonzalez's call (Tr. 28-29; 45-46). Mr. Gonzalez recalls only speaking with Compliance Assistance Specialist Gomez (Tr. 60). Regardless of with whom he spoke, the record establishes the call was returned the following Monday or July 12, 2021. Mr. Gonzalez was informed the matter had been referred to the DCAT in Washington, D.C., and the local office was unable to help (Tr. 43, 64). Mr. Gonzalez testified he next contacted his representative, Wayne Duncan (Tr. 72-73). He could not recall when he first contacted Mr. Duncan.

On January 19, 2022, the Houston South Area Office conducted an inspection of another RG Roofing worksite in Texas City, Texas (Exh. C-11). Based upon that inspection, the Secretary issued RG Roofing a Citation and Notification of Penalty alleging repeat violations of two of the same regulations as those previously cited in December 2020. The Secretary issued the Citation and Notification of Penalty on February 7, 2022 (Exh. C-11). Commission records show RG Roofing filed a timely notice of contest to that citation on March 2, 2022.

RG Roofing did not contact the Secretary regarding the December 2020 Citation between July 12, 2021, and March 27, 2022. On March 27, 2022, RG Roofing filed *Respondent's Motion for Relief Under Rule 60(B)* requesting relief from the final order related to the December 2020 Citation. The Commission docketed the case and Chief Judge Covette Rooney assigned it to the undersigned.

The undersigned held a hearing on RG Roofing's motion on August 11, 2022, via video teleconference. Mr. Gonzalez was present and represented by Wayne Duncan, a non-attorney representative. He testified via a Spanish language interpreter. The parties filed post-hearing

briefs on October 17, 2022. For the reasons that follow, RG Roofing has failed to establish it is entitled to relief from a final order pursuant to Federal Rule of Civil Procedure 60(b) and its motion is **DENIED**.

DISCUSSION

Federal Rule of Civil Procedure 60(b) provides a mechanism by which a court may “relieve a party or its legal representative from a final judgement, order, or proceeding.” Rule 60(b) sets out six grounds for relief. They are:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Fed. R. Civ. Pro. 60(b)(1) – (6). Courts have consistently held the six grounds for relief are mutually exclusive such that if a claim falls under one subsection, it cannot be brought under another in the alternative. *See, e.g., U.S. v. Hernandez*, 797 F.3d 315, 319 (5th Cir. 2015). RG Roofing has argued it is entitled to relief on the grounds of excusable neglect on its part or subsection (b)(1) of Rule 60.

Timeliness

The Secretary argues RG Roofing’s motion is time-barred under Fed. R. Civ. Pro. 60(c)(1). Rule 60(c)(1) requires any motion brought pursuant to Rule 60(b) be made “within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.” The December 2020 Citation became a final order of the Commission on January 27, 2021.³ RG Roofing filed its motion for relief on March 27, 2022, or two months past the filing deadline of January 27, 2022. RG Roofing provided no explanation for the late filing. RG Roofing’s motion is denied as untimely.⁴

³ In his brief, the Secretary refers to the Citation becoming a final order on January 29, 2021. The court calculates the 15-working day filing period to have expired on January 27, 2021.

⁴ Although a claim brought under Rule 60(b)(6) is not subject to the one-year filing period, RG Roofing did not argue relief should be granted under this “catchall” provision. Nor would such a claim have merit. Rule 60(b)(6) applies where “circumstances such as absence, illness, or similar disability prevent a party from acting to protect its

Excusable Neglect

In addition to its procedural deficiency, RG Roofing's motion lacks merit. RG Roofing has failed to meet its burden to establish its failure to timely file a notice of contest to the December 2020 Citation was the result of excusable neglect.

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) is an equitable one, taking into account all relevant circumstances surrounding RG Roofing'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 RG Roofing acted in good faith. *Pioneer Investment Serv.*, 507 U.S. at 395; *Craig Mechanical, Inc.*, No. 92-0372, 1994 WL 197728, at *3 (OSHRC May 18, 1994). In *Pioneer*, the Supreme Court stated that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." 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 "'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 394.

Long-settled Commission precedent focuses on the third factor in the *Pioneer* equitable analysis. Commission precedent states that a "key factor" when evaluating a request for relief is "the reason for the delay, including whether it was within the reasonable control of the movant." *CalHar Constr., Inc.*, No. 98-0367, 2000 WL 362466, at *2 (OSHRC April 27, 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.*, No. 88-2291, 1991 WL 132730, at *6 (OSHRC June 28, 1991).⁵

interests." *Branciforte Builders, Inc.*, 1981 WL 18814 at *4. To be granted relief under Rule 60(b)(6), a party must show it was faultless in the delay. "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." *Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993). As discussed herein, RG Roofing's failure to act was the reason for the delayed filing, not other outside forces beyond its control.

⁵ The First, Eighth, and D.C. Circuits have agreed with the Commission's interpretation of *Pioneer*, placing primary importance on the third factor. See *Hospital del Maestro v. NLRB*, 263 F.3d 173, 175 (1st Cir. 2001) (per curiam)

“[I]n general, ‘[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has ... applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent.’” *Dana Container, Inc.*, No. 09-1184, 2015 WL 7459426, at n. 10 (OSHR November 19, 2015), *aff’d*, 847 F.3d 495 (7th Cir. 2017) (citation omitted). Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer’s principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose, and the company’s corporate office is, in Texas, which is in the Fifth Circuit.

The Fifth Circuit has explicitly found the Commission’s analysis of *Pioneer* to be “in error.” *Coleman Hammons v. OSHRC*, 942 F.3d 279, 283 (5th Cir. 2019). The Fifth Circuit held,

The Commission has focused on the employer’s “control” of the circumstances causing an untimely response to the exclusion of other equitable factors. But pursuant to *Pioneer*, “key factor” cannot mean “the only factor.” Rule 60(b)(1) contains leeway for parties who make good-faith mistakes. *Pioneer* held that “neglect” by definition encompasses “omissions caused by carelessness.” *Pioneer*, 507 U.S. at 388, 113 S. Ct. at 1495. The excusable neglect inquiry is not limited to whether a party’s mistake caused the delay, such cause being expressed in the term “neglect,” but equally concerns whether the party’s mistake or omission was “excusable.” 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 comprehensive standard. *See Halicki [v. La. Casino Cruises, Inc.]* 151 F.3d [465,]468 [5th Cir. 1998] (reconfirming that the decision in *Pioneer* “abrogated our previous caselaw stringently construing ‘excusable neglect’ ” in a comparable Federal Rules provision); *see also Robb v. Norfolk and W.Ry. Co.*, 122 F.3d 354, 361-62 (7th Cir. 1997) (“excusable neglect” has a new and broader meaning following *Pioneer*).

Id. In a more recent case, the Fifth Circuit found relief under Rule 60(b) was not warranted under its interpretation of *Pioneer* as set out in *Coleman Hammons. D.R.T.G Builders, LLC v. OSHRC*, 26 F.4th 306 (5th Cir. 2022). The Fifth Circuit recognized that the failure to timely file was the result of “neglect” on the part of the employer in both cases but found the neglect “excusable” in

(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 (2d 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).

Coleman Hammons because it was the result of a single instance of failure to follow procedures for handling mail. It found the employer's neglect in *D.R.T.G. Builders* was not excusable because it was the result of the employer's failure to have any mail handling procedures at all. Taken together, these decisions indicate the Fifth Circuit requires an analysis of the reason for the delay that goes beyond merely assigning blame. The court is bound by the analysis followed by the Fifth Circuit in *Coleman Hammons* and *D.R.T.G. Builders*.

The Secretary has alleged the length of the delay makes his prosecution of this case more difficult. Although generally the passage of time negatively affects witness availability and memories, there is no evidence in the record of any specific negative impact on the judicial proceedings or prejudice to the Secretary resulting from the delay. These *Pioneer* factors weigh in favor of granting relief.

The court next turns to the reason for the delay and whether RG Roofing acted in good faith. As in *D.R.T.G Builders*, the record contains scant evidence of a system by which RG Roofing handles its mail. Mr. Gonzalez admits he receives business mail at his home address and confirmed the accuracy of the address to which the Citation was issued. When queried by the court, Mr. Gonzalez, who does not read or write English, testified he engages the aid of his English-literate son when receiving correspondence written in English. RG Roofing presented no other evidence of its mail handling procedures.

Mr. Gonzalez testified when he received an OSHA citation in the past, he had resolved it by calling the area office. He attempted unsuccessfully to follow that same process here. RG Roofing seems to argue its failure to file a timely written notice of contest should be excused because it took all reasonable steps under the circumstances, including the unusual circumstance of the ongoing pandemic.⁶ According to Mr. Gonzalez, he attempted to contact the Houston South Area Office by phone several times without success. Mr. Gonzalez's testimony about these calls is not corroborated and so vague as to lack probative value. Even assuming the veracity of Mr. Gonzalez's claim, this testimony is insufficient evidence to establish RG Roofing acted timely. The court cannot assume those calls were made within the 15-business-day requirement or conclude they were made with reasonable promptness. Mr. Gonzalez could not

⁶ On March 13, 2020, then-President Donald Trump issued *Proclamation 9994 Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*. 85 FR 153337 (March 13, 2020). The court takes judicial notice that, in the following months, many offices of the Federal Government limited their activities and reduced or eliminated in-office staffing.

recall when or how many calls he made. He kept no record of the calls and admitted he did not leave voicemail messages. He provided no explanation why he did not do so. RG Roofing never attempted to contact the Area Office in writing and provided no reason why it could not have done so.⁷ Nor did RG Roofing provide any explanation for its failure to act again until July of 2021. When informed the Area Office could offer no help at that time, RG Roofing did nothing.⁸ RG Roofing's contention it did all it could under the circumstances is unsupported by the facts.

RG Roofing's actions were more than simple negligence. RG Roofing's vague claims it did all it knew to do does not persuade the court to find otherwise. The face of the Citation spelled out RG Roofing's options and obligations. When calling was unsuccessful, RG Roofing could have, and should have, followed the instructions on the first page of the Citation directing it to "mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above." Instead, it did nothing. The court has taken into consideration the unique circumstances presented by the pandemic. The circumstances presented by the pandemic do not explain why RG Roofing never submitted a written notice of contest or why it did nothing from July 12, 2021, to March 27, 2022. The timing of RG Roofing's actions belies any claim it acted in good faith. RG Roofing acted only when the negative consequences of its failure to contest the Citation became evident. RG Roofing has failed to meet its burden to establish it acted in good faith and has failed to establish its negligence should be excused.

Giving weight to all of the factors set out in *Pioneer*, and considering the totality of the circumstances, RG Roofing has not established it is entitled to relief for the Commission's final order under Fed. R. Civ. Pro. 60(b).

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.

ORDER

Based upon the foregoing decision, it is **HEREBY ORDERED** that *Respondent's Motion for Relief Under Rule 60(b)* is **DENIED**.

⁷ The Citation makes repeated references to the requirement a notice of contest must be submitted in writing and contains directions on where to mail a written request to contest a citation.

⁸ Mr. Gonzalez's testimony regarding attempts to contact the DCAT after speaking with Compliance Assistance Specialist Gomez and before contacting Mr. Duncan is inconsistent and vague (Tr. 64 and 72-73). It is given no weight.

It is further **ORDERED** that the notice of contest filed in this case is **DISMISSED**.

SO ORDERED.

Dated: October 31, 2022
Atlanta, GA

/s/

Heather A. Joys
Administrative Law Judge, OSHRC