
SECRETARY OF LABOR,

Complainant,

v.

RUSSELL B. LE FROIS BUILDER, INC.,

Respondent.

OSHRC Docket No. 98-1099

DECISION

Before: ROGERS, Chairman, and VISSCHER, Commissioner.

BY THE COMMISSION:

At issue is whether relief from a final order should be granted to Russell B. Le Frois Builder, Inc. (“Le Frois”) under Federal Rule of Civil Procedure 60(b)(1).¹ That order resulted from Le Frois’s failure to file a timely notice of contest (“NOC”) to a citation and notice of proposed penalty issued to the company by the Secretary’s Occupational Safety and Health Administration (“OSHA”). The citation and penalty are deemed a final order of the Commission, under section 10(a) of the Occupational Safety and Health Act (“the Act”), 29 U.S.C. § 659(a), if the employer fails to notify the Secretary within fifteen working days of

¹That rule provides:

On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.

receiving them that it intends to contest the citation and proposed penalty.² For the reasons that follow, we find that relief should be granted.³

The Secretary of Labor's Occupational Safety and Health Administration ("OSHA") sent a citation to Le Frois, at the company's post office box, by certified mail.⁴ A secretary for Le Frois received and signed for it on May 15, 1998. The evidence indicates that the secretary put it among the day's mail and placed in her car before returning to the office. However, on the July 4th weekend she or her husband discovered the certified mail under the front seat of that car. She gave the certified mail to company president Richard Le Frois

²Section 10(a) states:

If, after an inspection or investigation, the Secretary issues a citation under section 9(a) of this Act, he shall, within a reasonable time after the termination of such inspection or investigation, *notify the employer by certified mail* of the penalty, if any, proposed to be assessed under section 17 of this Act and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. *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, and no notice is filed by any employee or representative of employees under subsection (c) of this section within such time, 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.*

(Emphasis added.)

³We have determined that briefs will be unnecessary in this case. The current Commissioners have stated their positions regarding the grounds for relief from a final order under section 10(a) of the Act in *Northwest Conduit Corp.*, Docket No. 97-851 (September 30, 1999). The essential facts here are undisputed. Thus, we may decide the issue in this case based on that decision.

⁴The citation alleged five serious violations on a construction site, and OSHA proposed a total of \$11,265 in penalties. The citation specifically alleged failure to require hard hats and fall protection where required, and failure to properly protect employees working from an aerial lift.

on Monday, July 6. He promptly contacted OSHA and filed an NOC on July 8, as OSHA suggested. The Commission received the NOC on July 13. Company treasurer Janine Le Frois testified that the company had used the same mail pickup system for 18 years and had not previously had a problem with it. After this incident, however, the company instituted a new procedure -- a mail bag -- to prevent a recurrence.

The judge stated that he could not grant Rule 60(b) relief here, because under Commission precedent the facts constitute only simple negligence, not excusable neglect. He characterized Commission precedent as holding that a citation sent by certified mail to the employer at its business address is “reasonably calculated” to properly inform the employer. He also relied on Commission decisions denying relief where the lateness in filing the NOC was due to flaws in the employer’s office procedures. He stated that he was “sympathetic to Respondent’s plight,” that the company demonstrated “good faith,” and that it acted promptly once its management became aware of the citation. He was impressed by “the obvious sincerity of the company’s primary witness, Janine Le Frois. However, I am constrained to follow Commission precedent.”

DISCUSSION

Under the Commission’s long-standing precedent, relief may be granted in appropriate circumstances under Fed. R. Civ. P. 60(b). *Jackson Assoc. of Nassau*, 16 BNA OSHC 1261, 1993-95 CCH OSHD ¶ 30,140 (No. 91-438, 1993). The Commission will continue to apply that precedent, for the reasons stated in *Northwest Conduit Corp.*, Docket No. 97-851 (September 30, 1999).

The relevant portion of Rule 60(b) in this case is subsection (1), which, as noted, permits discretionary relief from final orders that have been entered due to the party’s “mistake, inadvertence, surprise, or excusable neglect.” The U. S. Supreme Court has ruled on the meaning of “excusable neglect.” *Pioneer Investment Serv. v. Brunswick Assoc. Lim. Part.*, 507 U.S. 380 (1993). Although *Pioneer* addressed that term in the context of a Bankruptcy Act Rule, the U. S. courts of appeals generally have held that the analysis in

Pioneer applies to “excusable neglect” as used in other federal procedural rules. *E.g.*, *Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354, 361-62 and n. 6 (7th Cir. 1997) (applying *Pioneer* analysis to Rule 60(b) and noting holdings in eleven other circuits that “excusable neglect” has broader meaning since *Pioneer* with respect to federal rules other than Bankruptcy Act rules). *See, e.g.*, *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 250 (2d Cir. 1997) (*Pioneer* analysis applies to Rule 60(b)(1)), *cert. denied*, 118 S. Ct. 1055 (1998). *Cf. Stutson v. United States*, 516 U.S. 193, 195-96 (1996) (Court perceived “at least a reasonable probability” that Eleventh Circuit on remand would reach result consistent with six other circuits, which hold that *Pioneer* standard applies to “excusable neglect” as used in Federal Rule of Appellate Procedure 4 concerning late-filed appeals).

Pioneer stated:

With regard to [whether] a party’s neglect of a deadline is excusable, . . . we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission. These include, as the Court of Appeals found, 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.

507 U.S. at 395 (footnote omitted). Applying those specific factors here, the Secretary does not allege, and we do not find, prejudice to her due to the lateness of the NOC. Prejudice in this context includes a lack of opportunity to present her case fully. 6A Wright, Miller, *et al.*, *Federal Practice and Procedure* § 1493, pp. 39-40 (1990), and cases cited therein.⁵ There

⁵*See, e.g., Morrison Knudsen Co.*, 16 BNA OSHC 1105, 1123, 1993-95 CCH OSHD ¶ 30,048, p. 41,281 (No. 88-572, 1993) (in assessing prejudice due to amendment, “it is proper to look at whether the [aggrieved] party had a fair opportunity to defend and whether it could have offered any additional evidence if the case were retried.”) (citations omitted). *See New York State Electric & Gas Corp. (“NYSEG”) v. Secretary of Labor*, 88 F.3d 98, 105 (2d Cir. 1996) (“imprecise pleading is only tolerated where it does not prejudice the employer and has no effect on the outcome of the case.”)

also is no indication of an adverse impact on her enforcement role under the Act, or on these proceedings, due to the delay.

The delay was substantial -- the NOC was filed about seven weeks after the citation was signed for at the post office. There is a strong interest under the Act in the prompt resolution of alleged violations cited by OSHA. As mentioned (note 4), the citation here alleged five serious violations on a construction site, for failure to require hard hats and fall protection where required, and failure to properly protect employees working from an aerial lift. There is no indication, however, that those allegedly violative conditions have continued or recurred.

Based on the evidence, the reason for the delay here was a highly unusual, inadvertent error by the company employee who picked up the mail on the day in question. She allowed the certified mail to fall beneath the passenger seat of her car when she deposited the day's mail there or when she picked it up. The company previously had not experienced a problem with its mail pickup system during the 18 years it had been in effect. The judge found that the company here proceeded in "good faith," and he credited "the obvious sincerity of the company's primary witness, Janine Le Frois." Given those findings, we will credit the company's account of the reasons for the delay in this particular case, although we are wary about crediting an explanation that is so difficult to verify.

The company acted swiftly, once its secretary notified its president about the certified mail. The president contacted OSHA quickly and filed an NOC within two days. Further, the judge credited its treasurer's testimony that the company implemented a new mail procedure after this incident which would prevent losing such a letter again.

The flawed mail procedure that led to Le Frois's late filing was within its reasonable control. On the other hand, that procedure had been used for many years and had not produced any previous problems. The mere fact that the reason for the delay was within its reasonable control does not preclude finding the neglect here excusable. *Pioneer*, 507 U.S. at 395. Deficiencies in mail procedures are not *per se* inexcusable under Rule 60(b),

especially given the Supreme Court’s definition of that term in *Pioneer*. Cf., e.g., *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 1987-90 CCH OSHD ¶ 28,409 (No. 86-1266, 1989) (Commission expects employers to “maintain orderly procedures for handling important documents.”)

Considering the “obvious sincerity” of Le Frois’s explanation of the reasons for the lateness here; the swift action it took once a company manager learned of the citation; the minimal neglect involved (there had been no previous problems with the mail pickup procedure, and an improved procedure was implemented once Le Frois realized the flaw); the lack of adverse impact on the Secretary’s enforcement role and on the Commission’s proceedings; and the potential burden of the proposed penalties (\$11,265) for the small business involved, we conclude that on the specific facts here, the late NOC was due to inadvertence or excusable neglect for which relief is appropriate under Rule 60(b).

In order to be eligible for relief under Rule 60(b)(1), the moving party also must allege a meritorious defense. *Marshall v. Monroe & Sons, Inc.*, 615 F.2d 1156, 1160 (6th Cir. 1980). That element has been “satisfied with minimal allegations that the employer could prove a defense if given the opportunity.” *Jackson Assoc.*, 16 BNA OSHC at 1267, 1993-95 CCH OSHD at p. 41,455. See generally 10 Charles A. Wright, *et al.*, *Federal Practice and Procedure* (“*Wright & Miller*”) § 2697, p. 531 (1983).

We find that Le Frois has made the necessary averment of a meritorious defense, at least as to the proposed penalties. Its letter to the judge states: “we are not denying that there were some safety concerns at this site. We only want a chance to tell our side and to defend ourselves.” Its petition for discretionary review states: “All we want is to settle this matter for a reduced amount of money and a chance to reply to the charges and to justify our position which thus far has not been heard.”

Thus, we reverse the judge's order denying Rule 60(b)(1) relief from the final order, and we remand this case for further proceedings consistent with this decision. SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

Dated: September 30, 1999

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, :
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Complainant, :
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v. :
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RUSSELL P. LE FROIS BUILDER, :
INC., :
Respondent. :

OSHRC DOCKET NO. 98-1099

APPEARANCES:

Noelle B. Fischer, Esquire
New York, New York
For the Complainant.

Richard R. LeFrois
Henrietta, New York
For the Respondent, *pro se.*

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq* (“the Act”), to determine whether Respondent filed a timely notice of contest of a citation and notification of penalty issued by the Occupational Safety and Health Administration (“OSHA”). The hearing in this matter was held on September 28, 1998.

Background

OSHA inspected a work site in Henrietta, New York, where Respondent was engaged in construction work, on March 24 and 25, 1998, and, as a result, Respondent was issued a serious citation on May 14, 1998. Section 10(a) of the Act requires an employer to notify OSHA of the intent to contest a citation within 15 working days of receiving it, and the failure to file a timely notice of contest results in the citation and penalty becoming a final judgment of the Commission by operation of law. The record shows that OSHA mailed the citation by certified mail and that a secretary employed by Respondent signed for it on May 15, 1998. The record also shows that the notice of

contest period ended on June 8, 1998, and that the Commission received Respondent's notice of contest, dated July 8, 1998, on July 13, 1998. The Secretary filed a motion to dismiss Respondent's notice of contest on August 14, 1998.

Discussion

The record plainly shows that Respondent did not file its notice of contest until after the 15-day notice of contest period had ended. An otherwise untimely notice of contest may be accepted where the Secretary's deception or failure to follow proper procedures caused the delay in filing. An employer is also entitled to relief if it establishes that the Commission's final order was entered as a result of "mistake, inadvertence, surprise or excusable neglect" or "any other reason justifying relief," including mitigating circumstances such as absence, illness or a disability which would prevent a party from protecting its interests. *See* Fed. R. Civ. P. 60(b); *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no evidence and no contention that the untimely filing here was a result of deception or failure to follow proper procedures on the Secretary's part. Instead, Respondent is in essence requesting that its late filing be excused under the circumstances.

Janine LeFrois, Respondent's treasurer, testified that someone from the company, usually the secretary, goes to the post office to pick up the mail every day. On May 15, 1998, the secretary went to the post office, signed for the citation, and put it and the other mail in her car and returned to the office; however, the secretary found the envelope containing the citation under the front seat of her car when she was cleaning it out over the July 4, 1998 weekend, and she gave the citation to LeFrois at the office on Monday, July 6, 1998. LeFrois spoke with the company's safety consultant, who phoned the area director of the OSHA office that had issued the citation. The area director advised the company to file a notice of contest with the Commission, and the company did so.⁶ (Tr. 14-18).

Janine LeFrois also testified that the company was about 30 years old, that the mail retrieval system had been the same for approximately 18 years, and that this was the first time there had been a problem. LeFrois noted that after the incident the company purchased a mail bag to prevent a similar occurrence, and she agreed that the mail bag was a much better system and that the citation would not have been misplaced if the bag had already been in use at the time. (Tr. 18-20).

⁶The secretary's affidavit, which is an attachment to Respondent's notice of contest, supports the testimony of LeFrois, as does the testimony of Respondent's safety consultant. (Tr. 21-22).

The Commission has held that sending the citation by certified mail to the employer at its business address “is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest.” *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474 (No. 76-2165, 1979). The Commission has also held that the OSHA citation “plainly state(s) the requirement to file a notice of contest within the prescribed time period.” *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). It is clear from the record in this case that Respondent is not contending that service of the citation was improper or that the citation did not adequately inform it of the notice of contest period; in fact, Respondent’s representative stated at the hearing that the company had been cited previously and had responded in a timely fashion. (Tr. 13). Rather, as indicated above, Respondent is essentially requesting that the misplacing of the OSHA citation be adjudged excusable neglect and that it be granted Rule 60(b) relief. However, Commission precedent precludes such a result in this case.

As the Secretary points out, the Commission has noted that “Rule 60(b) relief cannot be invoked to give relief to a party who has chosen a course of action which in retrospect appears unfortunate or where error or miscalculation is traceable really to a lack of care.” *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1948). The Commission has also held that a business must have orderly procedures for the handling of important documents and has denied Rule 60(b) relief in cases where the employer asserted that the late filing was caused by events such as changes in management, the improper handling of the citation by company personnel, and the absence, even when it was due to illness, of the person responsible for OSHA matters. *See Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989); *J.F. Shea Co.*, 15 BNA OSHC 1092, 1094 (No. 89-976, 1991); *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460); and cases cited therein.

Based on the record, it is apparent that the citation in this case was misplaced because of the company’s manner of retrieving mail from the post office. It is also apparent that Respondent now has a procedure in place to prevent this type of incident from occurring in the future. I am sympathetic to Respondent’s plight in this matter, and I have noted the company’s good faith, the prompt attention to the citation upon becoming aware of it, and the obvious sincerity of the company’s primary witness, Janine LeFrois. However, I am constrained to follow Commission precedent, and, in view of the foregoing case law, I am forced to conclude that Respondent’s late

filing was the result of simple negligence and not excusable neglect. I therefore have no choice but to grant the Secretary's motion to dismiss Respondent's untimely notice of contest. The Secretary's motion to dismiss is accordingly GRANTED, the notice of contest is DISMISSED, and the citation and notification of penalty is AFFIRMED in all respects.

So ORDERED.

/s/

Irving Sommer
Chief Judge

Date: NOV 13 1998