United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. D. R. T. G. BUILDERS, LLC. Respondent.	OSHRC DOCKET NO. 20-0243

For Complainant: Christopher D'Allen Lopez, Esq., U.S. Department of Labor, Office of the Solicitor, 525 S. Griffin Street, #501, Dallas, TX 75202

For Respondent: Steven R. McCown, Esq. and Andrew R. Gray, Esq., Littler Mendelson, PC, 2001 Ross Ave., #1500, Dallas, TX 75201

JUDGE: Judge Patrick B. Augustine, U.S. Administrative Law Judge

DECISION AND ORDER DENYING RESPONDENT'S MOTION FOR RELIEF FROM A FINAL ORDER PURSUANT TO RULE 60(b)(1) & (6), FEDERAL RULES OF CIVIL PROCEDURE

Jurisdiction

This proceeding is before the Occupational Safety and Health Review Commission (the "Commission") pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the "Act") due to a filing of a late *Notice of Contest* ("NOC") by Respondent with the Commission. *See Slingluff v. OSHRC,* 425 F.3d 861 (10th Cir. 2005).

Procedural Background

The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's worksite located at 8900 Point 6 Circle Rd., Houston, TX on March 28, 2019. Exh. C-4. On September 13, 2019, OSHA issued one citation with two serious items ("Citation") to Respondent. Tr. 41-42; Exh. C-4. The Citation proposed Respondent pay a penalty in the amount

of $10,608.00. Exh. C-4. OSHA mailed the Citation to Respondent via United States Postal Service ("USPS") certified mail on September 13, 2019. Exh. C-4, C-12. The Citation was sent to the business address provided during the inspection located at 3206 Turner Drive, Houston, Texas 77093. Tr. 47-48; Exh. C-4, C-11. The certified mail was deemed unclaimed by USPS as an unsuccessful attempt at delivery was made on September 16, 2019. Tr. 44; Exh. C-4. OSHA then sent the Citation package to the same business address by certified United Parcel Service ("UPS") on September 23, 2019 and it was delivered on September 24, 2019. Tr. 45-46; Exh. C-4. According to the UPS tracking history, the package was delivered to the front door of Respondent's business address. Tr. 47-48; Exh. C-4. Respondent's business address is a residential address. Exh. C-21, p. 7.

The Citation informed Respondent of its right to contest the citations[1] and stated, in part:

Right to Contest: …

> Unless you inform the area director in writing that you intend to contest the citation(s) and/or proposed penalty(ies) within 15 working days after receipt, the citation(s) and the proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.

Exh. C-4.

On October 1, 2019, OSHA sent out a next of kin letter, which contained the Citation, to Israel Rodriquez at 3301 Turner Dr., Houston, TX. Tr. 59-62; Exh. C-14. Upon receipt, the Citation in the next of kin letter was forwarded to Respondent's counsel.

On October 17, 2019, an OSHA representative spoke with Jose Padron, Respondent's owner and registered agent, regarding the required abatement certificate and documentation. Tr.

[1] The Secretary of Labor has prescribed requirements for an employer to timely make a notice of contest. The employer contest must be made in writing. 29 C.F.R. § 1903.17(a). *See Sec'y of Labor . Barretto Granite Corp*., 830 F.2d 396, 398 (1st Cir. 1987) (per curiam).

102; Exh. C-12. OSHA then followed-up the conversation with a letter to Mr. Padron giving Respondent an additional seven days to provide the abatement certification and documentation. Tr. 102; Exh. C-13. Respondent failed to provide the required abatement certificate. On October 25, 2019, OSHA issued an additional citation[2] (Citation 2, Item 1 and 2) for failure to provide verification of abatement of the underlying Citation ("Abatement Citation"). Tr. 55.

On November 5, 2019, OSHA received Respondent's Notice of Contest ("NOC") via FAX from Respondent's counsel. Tr. 53; Exh. C-2. On November 6, 2019, OSHA sent a written response to Respondent's counsel explaining Respondent had failed to timely file its NOC as to the Citation. OSHA also informed Respondent's counsel the NOC would be considered timely as to the Abatement Citation. Tr. 53-54; Exh. C-3. OSHA also explained Respondent's late NOC would have to be filed with the Commission for a decision to grant relief to reopen the Citation for a determination on the merits. Tr. 57-59; Exh. C-3.

More than three months later, on February 10, 2020, Respondent filed its *Motion for Relief From a Final Order Pursuant to Rule 60(b)(1) & (6), Federal Rules of Civil Procedure*[3] ("Motion") with the Commission. By filing its Motion, Respondent has requested relief from the operation of § 10(c) of the Act. Fed. R. Civ. P. 60(b) states "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding . . . ." Fed. R. Civ. P. 60(b)("Rule 60(b)"). The rule lists the reasons that would provide a sufficient basis for granting the relief requested. *Id*. Rule 60(b)(1) states that "mistake, inadvertence, surprise, or

[2] Citation 2, Items 1 and 2 have been docketed before the Commission under OSHRC Docket 19-1772 and which is assigned to the undersigned. That citation is not at issue in this proceeding.
[3] The Federal Rules of Civil Procedure ("Fed. R. Civ. P.") are made applicable to Commission proceedings by Commission Rule 2(b), 29 C.F.R. § 2200.2(b).

excusable neglect" constitute sufficient bases upon which Rule 60(b)(1) relief can be granted. *Id*. Rule 60(b)(6) states relief can be granted for "any other reason that justice requires." *Id*.

In its Motion, Respondent contends Respondent was never properly served with the Citation since Respondent never received the USPS certified mail and the UPS service by leaving it on the doorstep of the business address provided during the inspection is not authorized by law or any regulation applicable to the service of citations. *See* Motion, p. 2.

On March 5, 2020, Complainant filed his *Opposition to Relief Under Rule 60(b)* ("Response"). Complainant seeks affirmance of the Citation and the proposed penalty because Respondent failed to file a timely NOC and has demonstrated neither "excusable neglect" pursuant to Rule 60(b)(1) nor has a meritorious defense and failure to timely file a NOC was within Respondent's sole control. Complainant contends Respondent has failed to establish mistake, inadvertence, surprise, or excusable neglect. *See* Response, pp.4-7.

Hearing Held

The Court held a hearing on July 29, 2020 to obtain testimony from witnesses. Complainant called Joann Figueroa, David Squires and James Jacob. Respondent called no witnesses but did cross exam each of Complainant's witnesses.

Determination of Subject Matter Jurisdiction

Subject matter jurisdiction is required for the Court to have jurisdiction to hear this disputed matter. While neither party raised the issue of the Court lacking subject matter jurisdiction, lack of subject matter jurisdiction may be raised at any stage in the proceeding – even by the Court itself. *See* Fed. R. Civ. P. 12(h)(3). While the Court is mindful the Commission has permitted Rule 60(b) to be used as the basis of relief for the late filing of a notice of contest[4], the Court is

[4] *See Branciforte Builders*, 9 BNA OSHC 2113 (No. 80-1920, 1981).

also aware the Fifth Circuit, to which this case can be appealed, has raised the issue in a recent footnote in a case which it issued in 2019.[5] The Court is aware it is required to follow Commission caselaw. *Gulf & W. Food Prods. Co.*, 4 BNA OSHC 1436, 1439 (No. 6804, 1976) (consolidated) ("[T]he orderly administration of [the OSH Act] requires that the Commission's administrative law judges follow precedents established by the Commission.") However, where the Supreme Court has issued decisions after the Commission has issued a holding, the Administrative Law Judge is no longer required to follow Commission case law if the intervening decision conflicts with Commission precedent. In the federal system, the decision of a lower court may no longer be valid based on an intervening Supreme Court or Court of Appeals decision. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

On April 20, 2020, the Court issued an *Order Pursuant to Commission Rule 39* to the parties to brief the issues of whether the language in § 10(a) of the Act is jurisdictional and if jurisdictional whether *Branciforte* is still good law due to the Supreme Court's decision in *Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. _____, 138 S. Ct. 13 (2017). Both parties submitted briefs on the issues posed in the Court's Order.

The Statutory Language set forth at 29 U.S.C. § 659(a) is not Jurisdictional in Nature

A. Supreme Court Cases.

Under *Hamer,* the Supreme Court held if language in a statute is jurisdictional in nature, that ends the inquiry and parties must meet the timeframes for taking actions as set forth in the statute. *Id.*

[5] *See Coleman Hammons Constr. Co.*, 942 F.3d 279, 282 n.1 (5th Cir. 2019) (assuming "that Rule 60(b) applies because the parties do not contest its applicability").

The Supreme Court has issued numerous decisions in recent years seeking to clarify the term "jurisdictional." While it is clear the Commission has issued decisions authorizing Rule 60(b) relief being available to an employer who has failed to timely file a notice of contest, the cases have turned on the Commission's determination of the intent of Congress in adopting such language. *See Branciforte Builders, Inc.*, 9 OSHC BNA at 2113. *See also Jackson Assocs. of Nassau*, 16 BNA 1261 (No. 91-0438, 1993); *Craig Mechanical Inc.*, 16 BNA OSHC 1763 (No. 92-372, 1994), *aff'd without opinion*, 55 F.3d 633 (5th Cir. 1995); *NW Conduit Corp.*, 18 OSHC BNA 2072 (No. 97-851, 2000); *Villa Marina Yacht Harbor*, 19 OSHC BNA 2185, n.2 (No. 01-0830, 2003); J Clark Framing, 21 OSHC BNA 2216 (No. 06-2049, 2007); *Mission Constructors, Inc.*, 21 OSHC BNA 2219 (No. 06-2050, 2007); *Stoltzfus Welding & Rentals, LLC.*, 24 OSHC BNA 1841 (No. 13-0471, 2013); *J & M Miller Constr., LLC.*, 26 OSHC BNA 1242 (Nos. 14-1765 & 14-1860, 2016); *Frame Q, LLC*, 2018 OSHC BNA CCH 33653 (No. 16-2018).

None of the Commission cases have addressed the issue raised in some recent Supreme Court cases which have accessed whether such language - as appears in § 10(a) of the Act - is considered a "claims-processing rule," which is considered non-jurisdictional or whether the language is other than a "claims-processing rule" which could result in a jurisdictional finding and possibly question the long line of cases referenced above. *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). Thus, the Court's analysis will be limited to whether the § 10(a) language is a "claims processing rule."

Claims processing rules "are rules that seek to promote the orderly progress of litigation by requiring the parties to take certain procedural steps at certain specified times. *Id.* (citations omitted). Such rules should only be treated as jurisdictional where there is a "clear indication" that

Congress intended the rule to be jurisdictional. *Id.* *See also Arbaugh v. Y & H Corp.*, 546 U. S. 500, 516 (2013).

The Court notes the placement of § 10(a) of the Act. It is not contained in a section which addresses jurisdiction. The language is in a section called "Procedures for Enforcement." *See* 29 U.S.C. § 659(a). *Also see Henderson*, 562 U.S. at 439 ("Congress placed §7266, numbered § 4066 in the enacting of the legislation, in a subchapter entitled 'Procedure.' The placement suggests Congress regarded the 120-day limit as a claim-processing rule."). In contrast, § 11 of the Act, entitled "Judicial Review" specifically discusses certain aspects of jurisdiction under the Act. *See* 29 U.S.C. § 660(c).

In addition, if the language in § 10(a) were to be read as a jurisdictional limitation, it would conflict with § 12(g) incorporation of Fed. R. Civ. P. Rule 60. *See Marshall v. Monroe & Sons, Inc.*, 615 F.2d 1156, 1159 (6th Cir. 1980) ("The statutory language providing for the finality of OSHRC orders does not conflict with the application of Rule 60(b), but rather is consistent with the application of that rule.") "While perhaps clear in theory, the distinction between jurisdictional conditions and claims processing rules – including this Court – have sometimes mischaracterized claims processing rules or elements of a cause of action as jurisdictional limitations…" *Reed Elservier, Inc. v. Muchnick*, 559 U. S. 154, 161 (2009).

While the Supreme Court has not directly confronted the jurisdiction question in the context of §10(a) of the Act, it has characterized an array of mandatory time prescriptions for procedural steps in judicial or agency forums as non-jurisdictional claims processing rules. *See e.g. Fort Bend Cty., Texas v. Davis*, --- U.S. ---, 139 S.Ct. 1843, 1851 (2019) (Title VII's 180 EEOC charge-filing requirement); *Hamer*, 138 S.Ct. at 17 (Federal Rule of Appellate Procedure 4(a)(5)(C)'s 30 day limitation of time to file a notice of appeal); *Musacchio v. United States*, 136

S.Ct. 709, 716-17 (2016) (five year criminal statute of limitation); *United States v. Kwai Fun Wong,* 757 U.S. 402, 409 (2015) (two-step requirement of tort claim against the United States or claim. is "forever barred"); *Sebelius v. Auburn Reg'l Med. Ctr*., 568 U.S. 145, 148 (2013) (Health care provider's 180 day filing requirement for administrative appeal for federal benefits); *Eberhart v. United States*, 546 U.S. 12, l3 (2005) (Federal Rules of Criminal Procedure 33(a)'s 7 day limitation on motion for a new trial); *Scarborough v. Principi*, 541 U.S. 401, 414 (2004) (Equal Access to Justice Act's 30 day-filing requirement for attorney fee application) and *Kontrick v. Ryan*, 540 U.S. 443, 447 (2004) (Chapter 7 bankruptcy time limit for creditor to file objection to discharge).

B. Fifth Circuit Court of Appeals Cases.

The Fifth Circuit has not directly addressed the issue. The Court is aware the Fifth Circuit has issued a decision under § 12(j) of the Act. *See Brennan v. OSHRC (S.J. Otinger Constr.)*, 502 F.2d 30, 34 (5th Cir. 1974) (holding that Commission could not use Rule 60(b) to extend 30-day period under § 12(j) of the OSH Act for considering whether to grant discretionary review). The Court finds this case can be distinguished as it is in the section of the Act addressing discretionary review and when an administrative law judge decision becomes final. Also, § 12(j) does not have the language which is at issue as contain in § 10(a) of the Act.

The Court concludes recent Supreme Court decisions determining when language is jurisdictional and when it is considered claims processing does not abrogate *Branciforte Builder, Inc*. The Court finds the § 10(a) language to be claims processing in nature and therefore not jurisdictional. The Court's finding is consistent with Commission precedent since in examining the history of the Act and determining the intent of Congress the Commission has held that Rule 60(b) may be used as a vehicle to grant relief to an employer who files a late notice of contest.

Having determined the language in § 10 (a) is claims processing in nature, it does not act as a jurisdictional bar to applying Rule 60(b) relief which the Commission has held is available through its precedent.

Controlling Case Law under Rule 60(b)

Upon receiving a citation, an employer has 15 working days within which it must file a NOC. *See §* 10(a) of the Act, 29 U.S.C. § 659(a). If the employer does not file a NOC within the specified time 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." *Id*. An uncontested citation is generally unreviewable. *See Culver v. U.S. Dept. of Labor Occupational Safety & Health Administration*, 248 Fed. Appx. 403 (3rd Cir. 2007).

The Commission has recognized situations where the finality of § 10(a) of the Act, 29 U.S.C. § 659(a), does not preclude the Commission from hearing an employer's challenge to citations even when a timely NOC has not been filed. One instance is where the employer requests relief under Rule 60(b)(1). The Commission has held an employer may move under Rule 60(b)(1) for permission to file a late NOC. *Branciforte Builders*, 9 BNA OSHC at 2113. The burden is on the employer to show sufficient basis for relief under the rule. *Id*. *See also Craig Mech. Inc.,* 16 BNA OSHC at 1764 (Respondent bears burden to establish basis for relief), *aff'd per curiam* 553 F.3d 633 (5th Cir. 1995)(unpublished).

An employer who has filed an untimely NOC may be granted relief under Rule 60(b)(1) in certain circumstances. *George Harms Constr. Co. v. Chao*, 371 F.3d 156 (3d Cir. 2004). A late filing may be excused under Rule 60(b)(1) if the final order was entered because of "mistake, inadvertence, surprise or excusable neglect." *Id* at 163 (Commission "has jurisdiction to entertain

a late notice of contest under" the excusable neglect standard of Rule 60(b)(1));[6] *Branciforte Builders, Inc.*, 9 BNA OSHC at 2117.

In addition, the Commission requires a party seeking relief under Rule 60(b)(1) to show it had a meritorious defense that might have affected the outcome. *Northwest Conduit*, 18 BNA OSHC 1948, 1949, 1951 (No. 97-851, 1999). *See Evergreen Envtl Serv*, 26 BNA OSHC 1982, 1985 (No. 16-1295, 2017). The Commission has found this requirement "satisfied with minimal allegations that the employer could prove a defense if given the opportunity." *Jackson Assocs. of Nassau*, 16 BNA OSHC 1261, 1267 (No. 91-0438, 1993). Before reaching the issue of whether Respondent has a meritorious defense to a citation, the record first must establish Respondent has a basis for relief from the Commission's final order under Rule 60(b)(1). *Id.* If the record does not establish a basis for relief from the Commission's final order for Respondent's untimely filing under Rule 60(b)(1), the issue of a meritorious defense need not be addressed.

In determining whether Respondent's late NOC was due to "excusable neglect," the Commission follows the Supreme Court's test in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 381 (1993). Under *Pioneer*, the Court must consider "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." *Pioneer*, 507 U.S. at 395. *See Evergreen Envtl Serv*, 26 BNA OSHC at 1984.

[6] *But see Chao v. Russell P. Le Frois Builder Inc.,* 291 F.3d 219 (2d Cir. 2002) (concluding Commission may not exercise jurisdiction based on Rule 60(b)(1)).

The Supreme Court stated "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer*, 507 U.S. at 392.[7] 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)(1), 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

In *Pioneer*, "excusable neglect" is defined as an equitable determination of all relevant circumstances surrounding the party's omission, and the prejudice these circumstances presented to the opposing party. This definition has been applied to other federal procedural rules, including proceedings by the Commission. *See NW Conduit Corp.*, 18 BNA OSHC at 1950.

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 curiam) (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

[7] Commission decisions are in comport with Supreme Court decisions that state ignorance of procedural rules does not constitute "excusable neglect" and mere carelessness or negligence, even by a lay person, in failing to timely file a notice of contest does not justify relief under Rule 60(b)(1). *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).

(1st Cir, 2005) (same); *Silivanch 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). [8]

Other circuit courts emphasize 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 (3d 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 D.C. Circuit[9] and the Commission agree as to the factors to be considered and the weight being given those factors. However, the Fifth Circuit, as noted above and to which this decision may be appealed, differs. The Court will follow the Fifth Circuit decision in *Coleman Hammons Constr. Co.*, which emphasize the *Pioneer* equitable analysis requires consideration of "all relevant circumstances" surrounding a party's request for relief due to excusable neglect.

It is also well settled 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

[8] This matter could be appealed to either the D.C. Circuit or the Fifth Circuit. The Commission generally applies the law of the circuit where a case will likely be appealed. *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

[9] *See Cohen v. Bd. of Trs. of Univ. of D. C.,* 819 F.3d 476, 479-80 (D.C. Cir. 2016); *David E. Harvey Builders, Inc. v. Sec'y of Labor*, 724 Fed. Appx. 7, 9 (D.C. Cir. 2018).

when the lack of such procedures results in the untimely filing of a NOC, relief under Rule 60(b)(1) is not warranted. *Villa Marina Yacht Harbor, Inc.*, 19 BNA 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).

Further, a late filing may be excused under Rule 60(b)(6), for any other reason that justifies relief, such as when "absence, illness, or a similar disability prevent[s] a party from acting to protect its interests." *Branciforte Builders*, 9 BNA OSHC at 2116-17. It is the moving party's burden to show that it is entitled to Rule 60(b)(6) relief. *See Burrows Paper Corp.,* 23 BNA OSHC 1131, 1132 (No. 09-1559, 2010); *NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999). A party seeking relief under Rule 60(b)(6) "must show 'extraordinary circumstances' suggesting that the party is 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. *See Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. at 393.

Analysis and Findings of Fact

Respondent seeks relief from the operation of § 10(a) of the Act, which states:

> 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 . . . 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).

Respondent argues it is not necessary to go through a Rule 60(b)(1) or (b)(6) analysis even though it asks for relief under those provisions. Respondent argues since Respondent was not properly served with the Citation under § 659 of the Act, the fifteen working day period for contesting the Citation has not run. Respondent states "… as a threshold matter, the Citations were not served on Respondent in compliance with 29 U.S.C. § 659(a) (*hereinafter,* §659(a)). The 15-day timeframe set forth in § 659(a) does not begin until an employer receives notice of the Citation. In its Motion, Respondent provided uncontroverted evidence that it did not receive Notice of the Citation until October 18, 2019, after which its Notice of Contest was filed within 15-days. Respondent's Notice of Contest was timely filed, and ergo, the Citation was improperly deemed a "final order of the Commission" by the Secretary of Labor … , making Rule 60(b) unnecessary." *See* Brief in Support of Respondent's Motion for Relief from a Final Order, p. 3.

The Court disagrees with Respondent's position. Respondent appears to be putting the cart before the horse. Respondent has not cited any caselaw to support this position. Likewise, the Court did not locate any case which adopted Respondent's position.

The Citation in this case is a final order. The accepted method for seeking relief from a final order is to request relief under Rule 60(b). Respondent evidentially agreed this is the accepted approach because that is what it did in filing its Motion. When it filed its Motion, Respondent undertakes the responsibility to establish it is entitled to relief under Rule 60(b) and has a meritorious defense. No Commission case has permitted an employer to file for Rule 60(b) relief and then permit what Respondent advocates here – ignore the *Pioneer* factors and go directly to the meritorious defense. If Respondent's position would be permitted, then in the future employers would need to simply file a motion for relief from a final order due to lack of service under section

10(a) of the Act.[10] The Commission has never permitted an employer to circumvent the Rule 60(b) requirements by permitting a direct filing of a motion on its meritorious defense.

While this Court has jurisdiction over this case, at this stage in the proceeding, that jurisdiction is limited to a very narrow issue. That issue is whether relief can be granted to Respondent under Rule 60(b)(1) and (6) for its late NOC and whether it has a meritorious defense. The Court does find Respondent has established the existence of a meritorious defense. *See B. J. Hughes Inc.*, 7 OSHC BNA 1471 (No. 76-2165, 1979).

Respondent is essentially raising an affirmative defense that the Court lacks personal jurisdiction over Respondent since it alleges it was not properly served with the Citation in accordance with the Act. *See* Fed. R. Civ. P. 12(b)(2) (lack of personal jurisdiction is an affirmative defense). While an affirmative defense may constitute a meritorious defense, the Court does not have jurisdiction to hear such a defense on the merits until it has decided whether or not Respondent's case may move forward because relief from the final order in this case is warranted under Rule 60(b)(1) and (6). Therefore, the burden is on Respondent to first establish it is entitled to relief under Rule 60(1) and (6).

Respondent, at hearing, centered its entire case around the lack of service in accordance with the Act. It called no witnesses at the hearing to address the *Pioneer* factors. There is nothing

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[10] As noted above, the Federal Rules of Civil Procedure Rule 12(b)(2) recognizes this as an affirmative defense. By so classifying it as an affirmative defense, Respondent must have proper standing to assert it. In Commission procedure, to assert the affirmative defense in a case where there is a final order, Respondent would need to request relief under Rule 60(b) and establish it is entitled to relief under the *Pioneer* factors. If the Court agrees and grants the relief requested, then Respondent would have standing to assert its affirmative defense that it was not properly served the Citation under § 10(a) of the Act.

To permit Respondent's approach to prevail, the Court would be abrogating long standing Commission caselaw which has defined the procedural process an employer must utilize to obtain relief from a final order. The Court declines Respondent's invitation to do that.

in the record for the Court to assess the *Pioneer* factors so a decision could be made as to whether Respondent is entitled to relief under Rule 60(b)(1) and (6). Respondent has provided no excusable basis for its failure to file a timely NOC. Respondent has not met its burden. On the above bases the Motion is DENIED.

In addition, as noted above, Respondent's compliance with Commission Rule 40(g) is questionable. Respondent filed its late NOC on November 5, 2019 but did not file its Motion seeking Rule 60(b)(1) and (6) relief with the Commission until February 10, 2020. More than three months had lapsed. Such lapse questions whether Respondent was truly interested in protecting its interests or in facilitating further delay. Commission Rule 40(g) states "Motions shall be made as soon as the grounds for the motion are known." Respondent was informed by OSHA it needed to file its late NOC and request for relief with the Commission on November 6, 2019. Respondent had control of its own actions in not timely filing its Motion. The Court notes Commission Rule 40(g) uses the word "shall" which is nondiscretionary or nonpermissive - the word "shall" mandates an action be taken. *See Simplex Time Recorder Company*, 12 BNA OSHC 1591, n.3 (No, 82-12, 1985); *Arcadian Corp*., 20 BNA OSHC 2001 (No. 93-0628, 2004). The action required the Motion to be filed sometime in November 2019. Respondent was well positioned to file its Motion at the earliest stage of this litigation and consciously failed to do so. *See, Astra Pharmaceutical Products*, 10 BNA OSHC 1697 at 1700 citing *Noranda Aluminum, Inc.*, 593 F.2d. 811, 814 and n.5 (8th Cir. 1979), *Stephenson Enterprises, Inc.*, 578 F.2d 1021, 1026 (5th Cir. 1978). *See also Secretary of Labor v. Kit Carson Apartments LLC; Helten Enterprises, LLC. and Ronald Helten*, 20 BNA OSHC 1557 (O.S.H.R.C.A.L.J.), 2003 WL 22672215 (decided under the prior version Commission Rule 40 but which contains the exact same wording as the current version of Rule 40). In filing its Motion over 90 days from the date it knew of the action

to take makes the Motion untimely under Commission 40(g). As an alternative basis, the Motion is DENIED for non-compliance with Commission Rule 40(g).

ORDER

The Court finds Respondent failed to file a timely NOC and no relief under Rule 60(b)(1) or (6) is justified.

Respondent's Motion is DENIED. Respondent's late NOC is DISMISSED, with prejudice. as untimely filed, and the Citation, classification and penalty are AFFIRMED in all respects.

SO ORDERED.

/s/ Patrick B. Augustine
Patrick B. Augustine
Judge - OSHRC

Date: September 8, 2020
Denver, CO