

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,  
Complainant,

v.

LHC, INC.,

Respondent.

OSHRC DOCKET NO. 12-1450

Ed Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, CO  
For Complainant

Daniel Johns, Esq., Crowley Fleck PLLP, Kalispell, MT  
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

**DECISION AND ORDER**

This matter comes before the Court on Respondent's request for relief pursuant to Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"). On July 17, 2012, Respondent sent Complainant a letter indicating its intent to file a late notice of contest. On July 20, 2012, Respondent filed a late Notice of Contest with the Commission, which issued a Notice of Docketing on July 23, 2012. Although no specific motion was filed by Respondent, the letter to Complainant, combined with the late Notice of Contest, is clearly a request for relief from the operation of Section 10(a) of the Occupational Safety and Health Act ("the Act"), and the Court will treat them as such. *See* Fed. R. Civ. P. 60(b). If an employer fails to notify the Secretary within fifteen working days that he intends to contest the citation or proposed assessment of penalty, Section 10(a) states that "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). On August 21, 2012, Complainant filed its *Opposition to Relief under Federal Rules of Civil Procedure Rule 60(b)* ("Opposition"), wherein Complainant requests that the Court affirm

the citation and assessment as final orders of the Commission. On September 14, 2012, the Court received Respondent's *Response to Complainant's Opposition to Relief Under Federal Rules of Civil Procedure Rule 60(b)* ("Response").

### **Procedural History**

This case began with an OSHA inspection of Respondent's worksite at Hutton Ranch Reserve South, Kalispell, MT 59901. During that inspection, OSHA determined that Respondent had committed four (4) violations of the Act. On May 22, 2012, the Billings, Montana, OSHA Area Office issued to Respondent a Citation and Notification of Penalty ("Citation"). *See* Declaration of Jeff R. Funke; Compl't Ex. A. The Citation consisted of a four-item, serious citation and a proposed penalty of \$10,780.00.

The Citation was delivered to Respondent on May 25, 2012, by certified mail, return receipt requested. *See* Certified Mail Receipt, May 24, 2012; Compl't Ex. C. The certified mail receipt was signed for by Roger Claridge, President and Registered Agent of LHC, Inc. *See id.* Based on the date of receipt, Respondent had until June 18, 2012, to notify Complainant of its intent to contest the Citation. *See* 29 U.S.C. § 659 (employer has fifteen working days to file a notice of contest); *see also* Commission Rule 7(c) (service by personal delivery is effected at time of receipt). Respondent did not notify Complainant of its intent to contest the Citation until July 17, 2012, or approximately one month after the deadline to file the notice of contest. *See* Daniel Johns letter re: LHC, Inc., July 17, 2012; Compl't Ex. D.

### **Discussion**

Rule 60(b) states that "[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). The rule lists the reasons that would provide a sufficient basis for granting the relief requested. *Id.* The subsection applicable in this case is (b)(1), which states that "mistake, inadvertence,

surprise, or excusable neglect” constitutes a sufficient basis for Rule 60(b) relief. *Id.* Rule 60(b) motions claiming excusable neglect are evaluated pursuant to the criteria set forth in *Pioneer Investment Servs. v. Brunswick Assocs.*, 507 U.S. 380, 395 (1993). *See Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1999 OSHD (CCH) ¶ 31,949 (No. 97-851, 1999). 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. According to the Commission, “the reason for the delay, including whether it was within the reasonable control of the movant” is the “key factor” in the determination of whether an employer has established excusable neglect. *A.W. Ross Inc.*, 19 BNA OSHC 1147, 2000 OSHD (CCH) ¶ 32,197 (No. 99-0945, 2000) (citing *Calhar Constr.*, 18 BNA OSHC 2151, 2000 OSHD (CCH) ¶ 32,081 (No. 98-0367, 2000)).

Complainant contends that Respondent has failed to establish mistake, inadvertence, surprise, or inexcusable neglect. Specifically, Complainant argues that Respondent received actual notice of the Citation and failed to comply with the instructions—typed in bold-face print—indicating the deadline for filing a notice of contest. *See Compl’t Ex. B* at 2. Respondent admits that the filing of the notice of contest was within its control; however, Respondent claims that the Citation “inadvertently” remained in Mr. Claridge’s inbox past the fifteen-day deadline for filing the notice of contest. *See Resp’t Response* at 3. Respondent states that it was attempting to gather information about the inspection from the employees that were present at that time; however, due to the fact that those employees had begun projects in other parts of Montana, Respondent states that it was unable to gather the requisite information prior to the lapse of the deadline.

The Court finds Respondent has failed to provide any reason that would justify relief

pursuant to Rule 60(b). Respondent's actions are clearly the product of neglect; however, the Court does not find that such neglect was excusable. The Citation was not only received by Respondent, it was signed for by the President of the company, Mr. Claridge. Although Mr. Claridge's desire to gather additional information to aid the decision of whether to request an informal conference or file a notice of contest is understandable, that does not excuse the failure to either: (a) file a notice of contest and/or request an informal conference prior to the expiration of the deadline; or (b) contact Complainant and request additional time to respond. Respondent received timely and explicit notice of his contest rights and failed to exercise them in the time provided by law. To the extent that Respondent's request for relief is premised on its failure to properly handle mail or documents, the Court would note that the Commission expects employers to "maintain orderly procedures for handling important documents." *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 1987-90 OSHD (CCH) ¶ 28,409 (No. 86-1266, 1989); *see also NYNEX*, 18 BNA OSHC 1967, 1999 OSHD (CCH) ¶ 31,942 (No. 95-1671, 1999) ("The Commission has consistently denied relief to employers whose procedures for handling documents were to blame for untimely filings' of [Notices of Contest]." (quoting *E.K. Constr. Co., Inc.*, 15 BNA OSHC 1165, 1166, 1991-93 OSHD (CCH) ¶ 29,412, p. 39,637 (No. 90-2460, 1991))). Respondent's rationale for its delay in filing the Notice of Contest falls far short of a reasonable excuse.<sup>1</sup>

The Court finds that the service effected by Complainant was "reasonably calculated to provide [Respondent] with knowledge of the citation and notification of proposed penalty and an

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1. Although it is unlikely that Complainant would suffer prejudice if the Court allowed the late filing, which the Court has no cause to believe was not in good faith, the Court finds that the reason for the delay itself is sufficient to find that Respondent's failure was not the result of excusable neglect. As pointed out in Complainant's brief, the Commission has been loath to excuse late filings when the failure could be attributable to a rank-and-file employee. *See, e.g., J.F. Shea Co., Inc.*, 15 BNA OSHC 1092 (No. 89-976, 1991) (finding that late notice of contest filed eight days late because of incorrect date stamp is not inexcusable neglect); *NYNEX*, 18 BNA OSHC 1944 (No. 95-1671, 1999) (employee redirected certified mail because company was without adequate procedures). In this case, Respondent's president received, signed for, and was directly aware of the contents of the Citation and its attendant requirements.

opportunity to determine whether to abate or contest.” *B. J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474, 1979 CCH OSHD ¶ 23,675 (No. 76-2165, 1979). The Court further finds that Respondent has failed to establish any plausible excuse or rationale that would justify relief from the operation of Section 10(a) of the Act. *See* 29 U.S.C. § 659.

**ORDER**

Based on the foregoing, Respondent’s request for relief, pursuant to Rule 60(b), is DENIED. Accordingly, it is ORDERED that:

1. Citation 1, Items 1(a) and 1(b) and the corresponding penalty of \$5,390.00 are hereby AFFIRMED as final orders of the Commission pursuant to Section 10(a) of the Act.
2. Citation 1, Items 2(b) and 2(b) and the corresponding penalty of \$5,390.00 are hereby AFFIRMED as final orders of the Commission pursuant to Section 10(a) of the Act.

Date: October 2, 2012  
Denver, Colorado

/s/ \_\_\_\_\_  
Patrick B. Augustine  
Judge, OSHRC