

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

SECRETARY OF LABOR,
Complainant,

v.

AR MEDICAL LLC d/b/a SAN PABLO
MEDICAL CLINIC,

Respondent.

OSHRC DOCKET NO. 12-2023

Uche N. Egemonye, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Beverly Green, Office Manager, AR Medical LLC d/b/a/ San Pablo Medical Clinic, Louisville, Georgia
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

AMENDED DECISION AND ORDER¹

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of AR Medical LLC d/b/a San Pablo Medical Clinic (“Respondent”) in Dalton, Georgia on March 14, 2012. As a result of the inspection, OSHA issued a Citation and Notification of Penalty (“Citation”) to Respondent alleging three serious violations and one other-than-serious violation of the Act with penalties totaling \$7,200.00. The citations were issued on April 17, 2012. Respondent contested the citation items on September 6, 2012.

Procedural History

On December 17, 2012, Complainant filed a Motion to Dismiss Respondent’s Notice of Contest, which requested that the Citation be affirmed as a final order of the Commission. *See*

1. This Amended Decision and Order is being issued because Respondent’s response to the Order to Show Cause was filed one day after it was due. Although the Court could proceed on the basis of default on Respondent’s behalf, the Court will instead address the issue as if Respondent’s request were one for Rule 60(b) relief. *See* Fed. R. Civ. P. 60(b). Therefore, the Decision and Default Order sent to the parties on January 25, 2012 is VACATED.

Villa Marina Yacht Harbor, Inc., 19 BNA OSHC 2185 (No. 01-0830, 2003) (dismissing notice of contest filed one day late). Specifically, Complainant argued that Respondent is not entitled to relief pursuant to Federal Rule of Civil Procedure 60(b), because (1) Respondent filed its Notice of Contest almost four months late; and (2) Respondent failed to establish any reason that would justify relief from the operation of Section 10(a) of the Act, 29 U.S.C. § 659(a). Respondent did not file a response to Complainant’s motion. On January 14, 2013, the Court issued an Order to Show Cause, whereby Respondent was “**ORDERED TO SHOW CAUSE WITHIN TEN (10) DAYS** of this Order as to why the Court should not issue judgment against Respondent and affirm the proposed violations in this case” On January 25, 2013, Respondent filed its response to the Order to Show Cause. *See* 29 C.F.R. § 2200.8(e)(1) (filing is effective upon date of mailing).

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, inexcusable neglect, or that Respondent’s failure to file a timely notice of contest was due to misrepresentation or other conduct on behalf of Complainant. *See Craig Mech., Inc.*, 16 BNA OSHC 1763 (No. 92-0372-S, 1994); *see also Roy Kay, Inc.*, 13 BNA OSHC 2021 (No. 88-1748, 1989) (holding the burden is on Respondent to show sufficient basis for relief). Specifically, Complainant argues that Respondent received actual notice of the Citation² and failed to comply with the instructions—typed in bold-face print—indicating the deadline for filing a notice of contest. Although Respondent filed a response to the Order to Show Cause, Respondent has not provided the Court with any supportable reason as to why it failed to file its Notice of Contest within the 15-day period provided by 29 C.F.R. § 1903.17(a). *See also* 29 U.S.C. § 659(a). Instead, Respondent provided the Court with abatement certifications, training certificates, receipts, and information regarding Respondent’s substantive defenses to the Citation.

The Court finds Respondent has failed to provide any reason that would justify relief pursuant to Rule 60(b). Respondent’s late filed Notice of Contest is clearly the product of neglect; however, the Court does not find that such neglect was excusable. The Citation was received by Respondent on April 27, 2012, but Respondent did not file its Notice of Contest until September 6, 2012. The information provided by Respondent in its response to the Court’s Order to Show Cause is deficient in that Respondent failed to provide the Court with “an

2. The Citation was sent via certified mail, return receipt requested. (Compl’t. Ex. B). The return receipt indicates that Respondent received the Citation on April 27, 2012.

explanation as to why it failed to file a timely Notice of Contest”. *See* Order to Show Cause, dtd January 14, 2013. Although Respondent has provided the Court with reasons why it should not be cited and/or fined, that does not excuse Respondent’s 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 its 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.³

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 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

3. Although it is unlikely that Complainant would suffer prejudice if the Court allowed the late filing, the Court finds that Respondent’s failure to provide any reason whatsoever for its failure to timely file its Notice of Contest 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 received, signed for, and was directly aware of the contents of the Citation and its attendant requirements.

operation of Section 10(a) of the Act. *See* 29 U.S.C. § 659.

Accordingly, with respect to the above-referenced docket, Respondent's Notice of Contest is hereby VACATED and the violations and penalties alleged in the Citation and Notification of Penalty are AFFIRMED.

ORDER

1. Citation 1, Item 1 is AFFIRMED and a penalty of \$2,400.00 is ASSESSED.
2. Citation 1, Item 2 is AFFIRMED and a penalty of \$2,400.00 is ASSESSED.
3. Citation 1, Item 3 is AFFIRMED and a penalty of \$2,400.00 is ASSESSED.
4. Citation 2, Item 1 is AFFIRMED. No penalty was assessed for this violation.

SO ORDERED.

Dated: February 13, 2013
Denver, Colorado

/s/

Patrick B. Augustine
Judge, OSHRC