

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

Secretary of Labor,

Complainant,

v.

Roofing Concepts Unlimited/Florida, Inc.,

Respondent.

OSHRC Docket No.: **13-0417**

LNOC

Appearances:

Carmen L. Alexander, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia  
For the Secretary

Dale A. Evans, Jr., Esquire, The Soto Law Group, P.A., Fort Lauderdale, Florida  
For the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

**DECISION AND ORDER**

This late notice of contest is before the Occupational Safety and Health Review Commission pursuant to § 10(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (Act). The Secretary moves to dismiss the late notice of contest filed by Roofing Concepts Unlimited/Florida, Inc. (RCU), as untimely. RCU seeks relief from the Final Order issued against it as a result of its failure to contest the Citation and Notification of Penalty (Citation) issued by the Occupational Safety and Health Administration (OSHA) within the prescribed time period. For the reasons that follow, the undersigned determines RCU has not shown a sufficient basis to warrant relief pursuant to Federal Rule of Civil Procedure 60(b) (Rule 60(b)). The Secretary's motion to dismiss is GRANTED.

**Background**

RCU is a commercial roofing contractor. In early 2012, RCU began a year-long roofing project at the Golden Lakes Village condominium complex in West Palm Beach, Florida (Tr. 55). On October 20, 2012, Compliance Safety and Health Officer (CSHO) Henry Shpiruck arrived at the site to conduct an inspection (Tr. 22). The CSHO held an opening conference with

RCU's Vice-President. The CSHO conducted his inspection in the presence of the Vice-President and then held a closing conference. The CSHO informed the Vice-President that he would be recommending that citations be issued and he gave the Vice-President a copy of OSHA's pamphlet, *Employer Rights and Responsibilities Following a Federal OSHA Inspection*, which informs employers they have 15 working days to contest a citation once they receive it (Exh. C-1, p.10; Tr. 24).

On December 5, 2012, the Secretary issued a Citation and Notification of Penalty to RCU alleging serious, repeat, and other-than-serious violations of the Act. The Secretary proposed penalties totaling \$24,640.00 (Exh. C-2). OSHA mailed the Citation to RCU's business address in Coral Springs, Florida, via certified mail, using the United States Postal Service. On December 10, 2012, RCU's Receptionist signed for the Citation (Exh. C-3; Tr. 30-31, 47).

The Citation informed RCU that the employer had 15 working days from the date of receipt to contest the citations therein (Exh. C-2). Excluding weekends and federal holidays,<sup>1</sup> the 15-day period expired on January 3, 2013. RCU did not file a notice of contest by the January 3, 2013, deadline. Accordingly, the Citation became a Final Order of the Commission under § 10(a) of the Act, 29 U.S.C. § 659.

On February 13, 2012, the CSHO called RCU's Vice-President to inquire about a certification of corrective action worksheet that was included in the Citation packet. It was at that point the Vice-President realized the Citation had been issued. He explained to the CSHO that he was unaware RCU had received the Citation (Tr. 31). The CSHO faxed the Vice-President copies of the Citation packet, along with a copy of the return receipt signed by RCU's Receptionist (Exh. C-3). The Receptionist did not remember signing for the Citation and it was never found (Tr. 17). The Vice-President called OSHA Assistant Area Director Jaime Lopez, who explained that the Citation had become a Final Order (Tr. 48, 70-71).

RCU retained counsel and on February 14, 2012, RCU mailed letters to OSHA Area Director Leslie Grove notifying him of RCU's intention to file a notice of contest and requesting an informal conference (Tr. 70-71). RCU also requested that "the 15-working-day contest period be calculated from the date of its receipt of the facsimile [of the citations], with a corresponding

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<sup>1</sup> The federal holidays in that time period included December 25, 2012, and January 1, 2013, as well as December 24, 2012, which was declared a holiday by President Obama in an Executive Order issued on December 21, 2012 (Tr. 48).

deadline of March 7, 2013” (Exh. R-3). On March 12, 2013, the Review Commission received a notice of contest from RCU, dated March 7, 2013.

### **Discussion**

An employer who has filed an untimely notice of contest may be granted relief under Federal Rule of Civil Procedure 60(b) in certain circumstances. A late filing may be excused under Rule 60(b)(1) if the final order was entered as a result of “mistake, inadvertence, surprise or excusable neglect.” 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 2113, 2116-17 (No. 80-1920, 1981). The moving party has the burden of proving it is entitled to relief under Rule 60(b).<sup>2</sup>

In determining whether the late filing of a notice of contest may be found to be due to “excusable neglect” under Rule 60(b)(1), the equitable analysis enunciated by the Supreme Court in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P’ship*, 507 U.S. 380, 393 (1993), is applicable. In *Pioneer*, the Court held that “excusable neglect” is determined based upon equitable considerations that take into account all relevant circumstances, and includes consideration of the following factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the party seeking relief, and (4) whether the party seeking relief acted in good faith. *Id.* at 395. “[N]either a lack of prejudice to the Secretary nor good faith on the part of Respondent in attempting to comply with the statutory filing requirement alone will excuse a late filing.” *Prime Roofing Corp.*, 23 BNA OSHC 1329 (No. 07-1409, 2010). The Commission has held that whether the reason for the delay was within the control of the respondent is a “key factor” in determining the presence of “excusable neglect.” *A. S. Ross, Inc.*, 19 BNA OSHC 1147 (No. 99-0945, 2000).

In the present case, the reason for the delay lies squarely within the control of RCU. It is undisputed that RCU’s Receptionist signed for the Citation on December 10, 2012 (Tr. 30). The

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<sup>2</sup> A late filing also may be excused under Rule 60(b)(3), if the late filing was caused by the Secretary’s “deception or failure to follow proper procedures.” See *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2116-17 (No. 80-1920, 1981); *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1476 (No. 76-2165, 1979); *Keppel’s Inc.*, 7 BNA OSHC 1442, 1443-44 (No. 77-3020, 1979). RCU conceded in the parties’ Joint Prehearing Statement that it “does not allege that the delay in filing was caused by deception on the part of the Secretary or by the failure of the Secretary to follow proper procedures.”

Vice-President acknowledged that the CSHO told him that OSHA would be issuing citations based on his inspection. The Vice-President testified OSHA twice previously had cited RCU for violations and he was aware of the 15-working-day time limit for contesting citations (Tr. 27-28).

Section 9(c) of the Act allows OSHA six months to issue a citation following the discovery of a violation. The Vice-President misunderstood the date by which OSHA was required to issue the citations, which could have worked to heighten his expectation RCU would receive the citations before the end of the calendar year. He asked the CSHO when he could expect the citations and, the Vice-President testified, "I believe [the CSHO] said that they had as much as 60 days, but I'm not 100 percent certain" (Tr. 64). If the Vice-President mistakenly believed the citations would be issued within 60 days of the October 30, 2012, inspection, he should have expected RCU would receive the citations by December 31, 2012. Despite this expectation, RCU gave no instructions to its support staff regarding the handling of the citation.

If something just came in from OSHA and it had OSHA's name on it, I don't know that the girls in the office would necessarily recognize the importance of that. If there was no "Attention To" on it, it may very well just go into the general mail folder that would be gone through. First, I believe my sister goes through it, and then it goes to my brother [RCU's President] for review. General mail would have items such as bills or invoices, items of that nature.

(Tr. 34).

The Commission has consistently ruled that "[e]mployers must maintain orderly procedures for handling important documents," and that when the lack of such procedures results in the untimely filing of a notice of contest, relief under Rule 60(b) is not warranted. *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); see also *Louisiana-Pacific Corp.*, 13 BNA SHC 2020, 2021 (No. 86-1266, 1989) (notice of contest was overlooked due to personnel change in operations manager position).

As RCU points out, the facts of this case are strikingly similar to the facts in *George Harms Constr. Co. v. Chao*, 371 F.3d 156 (3d Cir. 2004). In that case, the company's employee signed for receipt of citations issued by OSHA. The company failed to file a timely notice of contest and OSHA issued a delinquency notice, which was the company president's first indication the company had received citations. As in this case, the employee had no recollection

of signing for the citations and they could not be found despite a diligent search of the company's premises. The company filed a late notice of contest which the Secretary moved to dismiss. An administrative law judge granted the Secretary's motion. The Court of Appeals for the Third Circuit vacated the final order and remanded the case for a hearing on the merits. The court held that the testimony of the company's president detailing the company's "otherwise reliable mail-handling procedures demonstrates the loss of the citations was an unforeseeable human error beyond its reasonable control." *Id.* at 165.

The present case arose in the Eleventh Circuit, where *George Harms* is not precedential. Commission precedent sets a higher bar for the employer to meet the excusable neglect exception. The Commission has held, "The failure of the [company] employee who received the mailed citation to bring it to the attention of the proper officer of the company does not constitute 'excusable neglect' or 'any other reason justifying relief.'" *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830, 1989). The Commission has denied Rule 60(b) relief to employers when the late filing was due to an employee's mishandling or misplacing of the citation. *J.F. Shea Co.*, 15 BNA OSHC 1092, 1094 (No. 89-976, 1991). A mislaid citation does not constitute the basis for Rule 60(b) relief. *Erickson Hall Construction Co.*, 20 BNA OSHC 1159 (No. 02-1694, 2003). An employer's mere carelessness or negligence in failing to timely file a notice of contest does not amount to "excusable neglect" that would justify relief under Rule 60(b).<sup>3</sup>

It is determined RCU has failed to establish excusable neglect or any other justification for relief under Rule 60(b).

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<sup>3</sup> Had RCU established excusable neglect, the employer would also have to establish it alleged a meritorious defense in order to be eligible for relief under Rule 60(b)(1). *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1951 (No. 97-851, 1999). This is "satisfied with minimal allegations that the employer could prove a defense if given the opportunity." *Jackson Assoc. of Nassau*, 16 BNA OSHC 1261, 1267 (No. 91-0438, 1993). A meritorious defense is one that is valid at law with respect to the underlying action. In its Late Notice of Contest, RCU set forth unpreventable employee misconduct, lack of knowledge and infeasibility as meritorious defenses, providing the required minimal allegations to satisfy that it had a meritorious defense. The undersigned allowed RCU to present evidence at the hearing to establish that it had a meritorious defense; however since minimal allegations that RCU could prove a defense were set forth in the Late Notice of Contest, such evidence was not required at the hearing, and will not be considered.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions 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 RCU's requests for relief are DENIED and the Secretary's Motion to Dismiss is **GRANTED**. It is further ORDERED that the late notice of contest filed in this case is DISMISSED and the Citation and Notification of Penalty is AFFIRMED in all respects.

SO ORDERED.

**Date: September 3, 2013**

/s/  
**Sharon D. Calhoun**  
Administrative Law Judge