



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

Secretary of Labor,

Complainant

v.

Toby Bell d/b/a South Texas Pigeon Removal,

Respondent.

OSHRC Docket No. **13-0487**

LNOC

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (Act), to determine whether relief should be granted pursuant to Federal Rule of Civil Procedure 60(b) (Rule 60(b)). Toby Bell d/b/a South Texas Pigeon Removal (Toby Bell) seeks relief from the Final Order issued against it as a result of its failure to contest the Citation and Notification of Penalty within the prescribed time period. In lieu of a hearing on the request for relief, the parties agreed to a decision on the record.

For the reasons that follow, Toby Bell has not shown a sufficient basis to warrant relief pursuant to Rule 60(b).

Background¹

On January 28, 2013, the Occupational Safety and Health Administration (OSHA) inspected a work site located at 160 West Bay Area Boulevard, Webster, Texas. As a result of the inspection, on February 5, 2013, OSHA issued a Citation and Notification of Penalty (Citation) to Toby Bell alleging one serious violation of the Act, and proposing a penalty of \$2,800.00. OSHA sent the Citation by United States Parcel Service Second Day Air to Toby Bell at its business address located at 1580 Dickinson Road-C, Alvin, Texas 77511. Toby Bell received the Citation on February 6, 2013, at 10:01 a.m. The Citation was signed for by Bell (Secretary's Opposition, Exh. C). The Citation issued to Toby Bell provided in bold underlined text that a contest must be

¹ The background information set forth herein is based on the representations of fact set forth in the Secretary's Opposition to Relief Under Rule 60(b), exhibits attached thereto, and Toby Bell submissions filed in this matter.

sent in writing within fifteen days of receipt (Secretary's Opposition, Exh. B). Based on Toby Bell's receipt of the Citation on February 6, 2013, the last date to contest the citation was February 28, 2013.

Toby Bell did not contest by the final contest date, and did not pay the assessed penalty. Instead, it sent a letter dated March 5, 2013, to Area Director Mark Briggs, contesting the Citation. By letter dated March 7, 2013, Area Director Briggs advised Toby Bell that its contest was untimely and further advised Toby Bell that it could transmit its request for a late filed notice of contest to the Review Commission. The letter also provided, in the alternative, that Toby Bell could contact the Houston South OSHA Area Office to resolve the case through a Compromise of Debt (Secretary's Opposition, Exh. D). Toby Bell filed an undated letter with the Executive Secretary of the Commission seeking simplified proceedings for the Citation (Letter to the Executive Secretary). The letter was received by the Executive Secretary on March 25, 2013 (Notice of Docketing).²

The Secretary construed Toby Bell's letter to the Executive Secretary to be a request for relief under Rule 60(b) of the Federal Rules of Civil Procedure, and on June 7, 2013 filed an Opposition to Relief Under Rule 60(b) alleging that Toby Bell's notice of contest was not timely and that Toby Bell could not establish excusable neglect or a meritorious defense (Secretary's Opposition).

Discussion

Pursuant to the requirements of the Act, an employer is required to notify the Secretary of its intent to contest (notice of contest) a citation within 15 working days of receipt of the citation. Failure to timely file a notice of contest results in the citation becoming a final order of the Commission by operation of law. The record in this case reveals Toby Bell did not file a notice of contest within the requisite 15-working day period set out in the Act. The undersigned construes Toby Bell's letter to the Executive Secretary to be a request for relief under Rule 60(b) of the Federal Rules of Civil Procedure.

An employer who has filed an untimely notice of contest may be granted relief under Rule 60(b) in certain circumstances. *George Harms Constr. Co. v. Chao*, 371 F.3d 156 (3d Cir. 2004). A

² A demand letter was sent to Toby Bell by OSHA on March 25, 2013 (Secretary's Opposition, Exh. E).

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 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).³ In addition, 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).

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. *George Harms Constr. Co.*, 371 F.3d 155, 163 (3d Cir. 2004). In *Pioneer, supra*, 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. 507 U.S. at 395; see also *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1950 (No. 97-851, 1999). “[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); See also *Calhar Constr., Inc.*, 18 BNA OSHC 2151 (No. 98-0367, 2000).

Toby Bell’s contest was not filed within the requisite time period, as its letter to the

³ Toby Bell does not allege that there was deception or a failure to follow proper procedures on behalf of the Secretary. Nor does the record reflect any evidence that the Secretary engaged in improper conduct. Therefore, the undersigned finds that the Secretary did not engage in deception and followed proper procedures in this matter.

Executive Secretary was sent approximately four weeks after the contest period expired. Therefore, by operation of law, the citation and proposed penalty must be deemed a final order of the Commission, unless Toby Bell can demonstrate that it is entitled to relief. In its letter to the Executive Secretary, Toby Bell did not set forth any reasons for the delay. It merely states that it is contesting the citation and penalty and requests a Simplified Proceedings hearing. During a telephone conference call with the parties on August 2, 2013, however, Toby Bell represented for the first time that it was not the employer of the exposed employee at the inspection site. The undersigned construes this representation as Toby Bell's explanation for its late filing, but also finds, as discussed below that this explanation establishes a meritorious defense for Toby Bell.

The Citation unambiguously stated in conspicuous typeface that Toby Bell had fifteen working days after receipt within which to file a notice of contest. The record demonstrates that Toby Bell's untimely filing of the notice of contest was due to its contention that it was not the employer of the exposed employee on the jobsite. Although this explanation qualifies as a meritorious defense to the Citation, it fails to rise to the level of excusable neglect. Toby Bell should have contested the Citation timely to preserve its ability to defend on the basis it is not the employer of the exposed individual. Its failure to do so is simple negligence, not excusable neglect. It was within Toby Bell's control to ensure that its business affairs were taken care of, especially where it contends that it was not the employer to whom the Citation should have been issued. An employer that has filed a late notice of contest "must bear the burden of its own lack of diligence in failing to carefully read and act upon the information contained in the citations." *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *see also Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989). The undersigned finds that the delayed filing was entirely within the control of Toby Bell. The late filing could have been avoided if Toby Bell had exercised reasonable diligence. It was not the result of "excusable neglect" within the meaning of Rule 60(b).

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 Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 393 (1993). Toby Bell has not shown extraordinary circumstances demonstrating that it is

faultless in the delay; therefore circumstances which would warrant relief have not been established. An employer's mere carelessness or negligence, even by a layperson, in failing to timely file a notice of contest does not amount to "excusable neglect" that would justify relief under Rule 60(b). *Acrom Constr. Serv.* 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991).

In considering all relevant circumstances surrounding the delayed filing here, the undersigned has considered whether Toby Bell acted in good faith. Toby Bell's failure to contest until approximately two and one-half weeks after it was notified by Area Director Briggs to file a late contest with the Review Commission is not indicative of a lack of good faith. In fact, Toby Bell contacted the OSHA Area Office within one week after expiration of the contest period. The undersigned finds Toby Bell acted in good faith. The undersigned has also considered whether the delay in filing prejudiced the Secretary, and finds that since Toby Bell acted quickly, there is little if any prejudice to the Secretary.

In order to be eligible for relief under Rule 60(b)(1), the moving party also must allege a meritorious defense. *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. As a meritorious defense, Toby Bell asserts that it was not the employer on the jobsite. In support of its defense, Toby Bell submitted a letter from the exposed individual, Eric Looper, wherein Looper denies that he was employed by Toby Bell or that he was directed by Toby Bell to perform work for it (Looper Letter). Toby Bell has set forth a meritorious defense as required; however it failed to establish excusable neglect as set forth above. Therefore, based on the facts of this case and Commission precedent, the undersigned finds Toby Bell is not entitled to relief pursuant to Rule 60(b).

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 Toby Bell's request for relief is DENIED.

It is further ORDERED that the notice of contest filed in this case is DISMISSED and the Citation and Notification of Penalty is AFFIRMED in all respects.

SO ORDERED.

/s/ _____

Date: September 4, 2013

Judge Sharon D. Calhoun

1924 Building, Suite 2R90

100 Alabama Street, S.W.

Atlanta, Georgia 30303-3104

Phone (404) 562-1640 Fax (404) 562-1650