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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
100 Alabama St. S.W
Building 1924 Room 2R90
Atlanta, GA 30303-314

SECRETARY OF LABOR,
Complainant,

v.

EVERGREEN ENVIRONMENTAL SERVICES,
Respondent.

OSHRC Docket No. 16-1295

**ORDER DENYING EVERGREEN ENVIRONMENTAL SERVICES'
MOTION FOR RULE 60(b) RELIEF**

COUNSEL:

Christopher D'Allen Lopez-Loftis, Attorney, Office of the Solicitor, U.S. Department of Labor, Dallas, TX, for Complainant.

W. Jackson Wisdom, Attorney, Martin, Disiere, Jefferson & Wisdom, LLP, Houston, TX, for Respondent.

I. INTRODUCTION

Pending before the Court is Evergreen's motion seeking relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure.¹ In its motion, Evergreen argues it is entitled to relief under Rule 60(b)'s "excusable neglect" standard. (Mot. 3.) The Secretary filed a response indicating he did not oppose the motion. However, the Commission's jurisdiction may not be created by assent. *Atl. & Gulf Stevedores, Inc.*, 3 BNA OSHC 1003, 1004 (No. 2818, 1975).² Although unopposed

¹ Upon recently reviewing the case file, the Court noted Evergreen's Rule 60(b) motion, which had been filed while the case was still assigned to the chief judge, was still pending.

² It has long been recognized courts are not bound to accept stipulations as to questions of law. *Estate of Sanford v. Comm'r of IRS*, 308 U.S. 39, 51 (1939). Rather, when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law. *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, (1991); and *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77, (1990).

motions are often summarily granted, a motion that effectively seeks to excuse a late-filed notice of contest is different because a timely filed notice of contest establishes the Commission's jurisdiction. *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1288, n. 2 (No. 00-1402, 2010) (citation omitted). The burden is still on Evergreen to show it is entitled to relief under the rule. *U.S. v. Harrison County, Mississippi*, 463 F.2d 1328, 1330 (5th Cir.1972).

Under section 10(a) of the Occupational Safety and Health Act, an employer is required to notify the Secretary of Labor ("Secretary") of its intent to contest a citation within 15 working days of receipt. *See* 29 U.S.C. § 659(a). Failure to timely file a contest notice results in the citation becoming a final order of the Commission by operation of law. *Id.* On June 28, 2016, the Occupational Safety and Health Administration ("OSHA") issued³ a citation to Evergreen Environmental Services ("Evergreen") with a proposed penalty of \$14,000.00, which was received by Evergreen on June 30, 2016. Therefore, July 22, 2016, was the last day to timely file a notice of contest. On August 2, 2016, Evergreen mailed its contest to the OSHA Area Director, which was rejected by OSHA as untimely on August 8, 2016, since the citation had already become a final order of the Commission by operation of law.

II. UNDISPUTED FACTS⁴

The citation was received on June 30, 2016, by Evergreen's receptionist, Shelia Houston, and promptly given to Elizabeth Botello, Evergreen's Safety Analyst. (Motion at 1) (*citing* Shaw Aff. ¶ 4; Ex. A). After returning to work from the July 4th holiday weekend, Botello found water damage to her office ceiling and water dripping onto her desk, including on the paperwork, keyboard computer, monitor, and phone on her desk. (*Id.*) (*citing* Botello Aff. ¶ 2). These items, including the citation, were immediately moved out of Botello's office and she began working out of a conference room. (*Id.* 1-2) (*citing* Botello Aff. ¶ 3).

³ The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSAH, except the authority to bring legal proceedings under the Act, which the Secretary delegated exclusively to the Solicitor of Labor. *See* Order No. 4-2010 (75 FR 55355), as superseded in relevant part by 1-2012 (77 FR 3912). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably in this Order.

⁴ Since the Secretary did not file a response to the motion, Evergreen's factual assertions in its motion are deemed undisputed. Any reference to an exhibit or affidavit herein is to the identified exhibit or affidavit attached to Evergreen's motion in support thereof.

Evergreen called an air conditioner repair company to determine the cause of damage and a construction company to repair and repaint the damaged sheet rock. (*Id.* at 1-2) (*citing* Shaw Aff. ¶ 6; Ex. B-C). After more damage was found, Evergreen initiated more repairs on July 23, 2016. (*Id.* at 2) (*citing* Shaw Aff. ¶ 6; Ex. D). Botello did not move back into her office until August 1, 2016. (*Id.*) (*citing* Botello Aff. ¶ 4).

According to Bill Shaw, Evergreen’s “Vice President of HSE,” on August 1, 2016, Evergreen found the citation among the wet papers that had been removed from Botello’s office. (*Id.*) (*citing* Shaw Aff. ¶ 7). On August 2, 2016, Evergreen mailed its notice of contest to the Area Director and on August 8, 2016, Mark Briggs, OSHA’s Area Director, issued a letter to Evergreen rejecting the contest as untimely. (*Id.*) (*citing* Ex. E; Ex. F).

III. ANALYSIS

Rule 60(b) of the Federal Rule of Civil Procedure provides 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). Under longstanding Commission and Fifth Circuit⁵ precedent, relief may be granted under Rule 60(b) for noncompliance with the contest period specified in section 10(a) of the OSH Act in certain situations. *Calhar Constr., Inc.*, 18 BNA OSHC ¶ 2151, 2153 (No. 98-0367, 2000) (*citing* *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1949-50 (No. 97-851, 1999); *Jackson Assocs. of Nassau*, 16 BNA OSHC 1261, 1264-65 (No. 91-438, 1993); *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2116-17 (No. 80-1920, 1981); *Atlantic Marine Inc. v. Occupational Safety & Health Review Comm’n*, 524 F.2d 476, 478 (5th Cir. 1975); *Craig Mechanical Inc. v. Occupational Safety & Health Review Comm’n*, 55 F.3d 633 (5th Cir. 1995).⁶

Rule 60(b)(1) provides in relevant part that relief may be granted from a final order entered due to the party’s excusable neglect. Fed.R.Civ.P. 60(b)(1). In *Northwest Conduit*, the Commission held it applies the meaning of “excusable neglect” as enunciated by the Supreme Court in *Pioneer Inv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993). *See*

⁵ The Commission has held that “[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case-- even though it may differ from the Commission's precedent.” *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000); *see also* *D.M. Sabia Co.*, 17 BNA OSHC 1413, 1414 (No. 93-3274, 1995), *vacated and remanded on other grounds*, 90 F.3d 854, 17 BNA OSHC 1680 (3rd Cir. 1996). Since the present case arose in Texas, and it is highly probable that it will be appealed to the Fifth Circuit, this Court applies the Fifth Circuit’s precedent.

⁶ Fifth Circuit Rule 47.5.3 provides that unpublished opinions before January 1, 1996 are precedent.

Northwest Conduit, 18 BNA OSHC at 1950. In *Pioneer*, the Supreme Court held “excusable neglect” is “understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” *Pioneer*, 507 U.S. at 394. As the *Pioneer* Court found, “the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission. These include ... the danger of prejudice to the [nonmovant], 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.

As Evergreen notes, the Commission has recognized in Rule 60(b)(1) late filing cases “it is usually a given that there is ‘a lack of prejudice to the Secretary or to the interests of efficient judicial administration, combined with a lack of bad faith by the employer.’” (Mot. 3) (*citing Calhar Constr., Inc.*, 18 BNA OSHC at 2151 n. 5). Since the Secretary did not oppose Evergreen’s motion for relief, the Court concludes there is no prejudice to the Secretary or to the interests of efficient judicial administration and there is no evidence of bad faith by Evergreen.

In support of its argument that it is entitled to relief under Rule 60(b)'s “excusable neglect” standard, Evergreen asserts “due to a temporary crisis in the office, Evergreen had to focus its efforts in repairing its office, preventing and mitigating mold, fixing damaged ceilings, and restoring a safe work environment” and that “[a]fter ... Evergreen was able to return to its regular course of business, Evergreen quickly acted upon the Citation and sent the Area Office its Notice of Contest.” (Mot. 4) (*citing* Ex. E). As indicated *infra*, the Court concludes Evergreen’s conduct did not amount to excusable neglect warranting Rule 60(b)(1) relief.

As the Fifth Circuit has recently reiterated, Rule 60(b)(1) provides relief for a party “if the party demonstrates that its failure (1) ‘resulted from justifiable neglect’ and (2) ‘that a fair probability of success on the merits existed if the judgment were to be set aside.’” *Long v. James*, 667 F. App'x 862, 863 (5th Cir. 2016) (citation omitted). Here, even though Evergreen was involved in numerous repairs, “which were a high priority of business,” it has not shown those repairs interfered in its ability to timely file its notice of contest.

While the repairs were ongoing Botello continued to work out of a conference room and she offers no explanation in her affidavit for her failure to timely file the notice of contest, other than she was not able to move back into her office “to conduct normal business until August 1,

2016.” (Botello Aff. ¶ 4). The Court concludes this is not an adequate excuse for Evergreen’s inaction under the terms of Rule 60(b)(1), “which requires a showing of ‘excusable’ neglect and not just a showing of simple negligence.” *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2023 (No. 86-1266, 1989). Therefore, Botello’s neglect was not “excusable.”

Equally important, employers must maintain orderly procedures for handling important documents, and when the lack of such procedures results in the untimely filing of a notice of contest, Rule 60(b) relief is not warranted. *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1149 (No. 99-945, 2000); *Louisiana-Pacific Corp.*, 13 BNA OSHC at 2021. Gross carelessness is an insufficient basis for 60(b)(1) relief. *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 357 (5th Cir. 1993). *Cf. Sadowski v. Bombardier Ltd.*, 539 F.2d 615, 618 (7th Cir.1976) (Rule 60(b) cannot be invoked “to give relief to a party who has chosen a course of action which in retrospect appears unfortunate or where error or miscalculation is traceable really to a lack of care.”).

The record reflects Evergreen failed to timely file the notice of contest because it failed to maintain orderly procedures for handling its important documents. As Evergreen admits, on August 1, 2016, it “found” the citation among the wet papers that had been removed due to water damage. (Shaw Aff. ¶ 7) (emphasis added). However, Evergreen offered no explanation as to why the citation could not have been found while repairs were being made, in particular, since Botello continued working, albeit, out of the conference room. This gross carelessness is an insufficient basis for 60(b)(1) relief.

Thus, the Court concludes the reason for the delay was within the reasonable control of Evergreen; had it simply maintained orderly procedures for handling important documents such as the citation, it could have ensured that its notice of contest was timely filed. Taking account of all relevant circumstances surrounding Evergreen’s omission, the Court concludes Evergreen has not shown excusable neglect under Rule 60(b)(1). Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT Evergreen’s motion for Rule 60(b) relief based upon excusable neglect is **DENIED**, its late Notice of Contest is **DISMISSED**, and the scheduling order setting this case for trial is **VACATED**.

SO ORDERED.

Dated: June 20, 2017

/s/ John B. Gatto

John B. Gatto
Administrative Law Judge