SECRETARY OF LABOR, Complainant, v. NORTHWEST CONDUIT CORP., Respondent.	OSHRC Docket No. 97-851

DECISION

Before: ROGERS, Chairman, and VISSCHER, Commissioner.

BY THE COMMISSION:

At issue is whether relief from a final order should be granted to Northwest Conduit Corp. ("Northwest") under Federal Rule of Civil Procedure 60(b)(1).[1] That order resulted from Northwest's failure to file a timely notice of contest ("NOC") to a citation and notice of proposed penalty issued to the company by the Secretary's Occupational Safety and Health Administration ("OSHA"). The citation and penalty are deemed a final order of the Commission, under section 10(a) of the Occupational Safety and Health Act ("the Act"), 29 U.S.C. § 659(a), if the employer fails to notify the Secretary within fifteen working days of

[1]That rule provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.

receiving them that it intends to contest the citation or penalty.[2] For the reasons that follow, we find that the judge correctly granted relief.[3]

Jack Conie III, Northwest's president, received the citation on February 11, 1997.[4] He immediately asked for an informal conference with the OSHA area director, Deborah Zubaty. The earliest date they could schedule was February 25. At the conference, he and the area director could not reach an agreement to resolve the citation. Among other things, they discussed the final day for filing a NOC, *i.e.*, March 5. Conie also conferred with Zubaty by telephone on February 27, but without success in reaching an agreement.

Then, on February 27, knowing he would be out of town from Friday, February 28, through Wednesday, March 5, Conie contacted Roger Sabo, Northwest Conduit's attorney,

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[2]Section 10(a) states:

> If, after an inspection or investigation, the Secretary issues a citation under section 9(a) of this Act, he shall, within a reasonable time after the termination of such inspection or investigation, *notify the employer by certified mail* of the penalty, if any, proposed to be assessed under section 17 of this Act and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. *If, within fifteen working days from the receipt* of the notice issued by the Secretary *the employer fails to notify the Secretary* that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection © of this section within such time, *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*.

(Emphasis added.)

[3]At one time, the Commission considered holding oral argument concerning the issues in this case. Upon further consideration, we conclude that oral argument would not assist the Commission in deciding this case. Furthermore, no party has requested oral argument.

[4]The citation alleged a serious cave-in hazard in violation of the trenching standard at § 1926.652(a), and it proposed a penalty of $3000.

to ask him to handle the matter. Here, a misunderstanding occurred. Conie testified that he thought he told Sabo to handle everything, because Conie would be out of town from February 28 through March 5. Sabo, however, testified that he understood that Conie would be in the office on February 28 and just wanted language for a counterproposal to present to the area director before leaving town that day. Sabo understood that Conie wished to "avoid the high cost that's associated with any OSHA case" by doing anything he could himself.

Therefore, Sabo faxed proposed language to Conie on the morning of February 28 along with advice to file a NOC if the language was not accepted. Conie was not at the office on February 28, however, having already left for the annual meeting of the National Association of Service Contractors, of which he was the president. Because Northwest has only "a small office" with Conie alone handling matters such as OSHA citations, no one examined the fax in his absence. Thus, when he returned to his office on March 6, he discovered that the citation had not been resolved and no NOC had been filed. He immediately contacted Sabo and found out what had happened. Sabo faxed and hand-delivered a NOC to OSHA that same day, March 6.

At the hearing, Zubaty testified that OSHA considers a NOC timely if postmarked by the 15th working day after receipt of the citation, even if the NOC does not reach OSHA for several days. *See* 29 C.F.R. § 1903.17(a) ("notice of intention to contest shall be postmarked within 15 working days" of receipt of citation and penalty notice).

Chief Commission Administrative Law Judge Irving Sommer found that the late filing "was the result of a misunderstanding or mis-communication between Respondent's president and counsel rather than any lack of diligence on the part of either individual." The judge decided that the lateness resulted from "excusable neglect," based on the Supreme Court's decision in *Pioneer Investment Serv. v. Brunswick Assoc. Lim. Part.*, 507 U.S. 380 (1993). He decided that Rule 60(b) relief is warranted under *Pioneer*, in view of the

significant consequences to Northwest if the final order is not vacated, and the apparent lack of harm to the Secretary due to the minimal lateness of the NOC here.

DISCUSSION

In considering Northwest's request for relief under Rule 60(b)(1), the judge followed long-standing Commission precedent that relief may be granted under that rule from a final order that is due to a late-filed NOC. *E.g.*, *Craig Mechanical Inc.*, 16 BNA OSHC 1763, 1993-95 CCH OSHD ¶ 30,442 (No. 92-372, 1994), *aff'd without opinion*, 55 F.3d 633 (5th Cir. 1995); *Jackson Assoc. of Nassau*, 16 BNA OSHC 1261, 1993-95 CCH OSHD ¶ 30,140 (No. 91-438, 1993); *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 1981 CCH OSHD ¶ 25,591 (No. 80-1920, 1981).

In arguing that relief under Rule 60(b) is not available for late-filed NOC's, the Secretary looks to the language of section 10(a) of the Act, which explicitly provides that an uncontested citation and notice of proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency." The Secretary notes that section 12(g) of the Act[5] makes the Federal Rules of Civil Procedure generally applicable to Commission "proceedings." However, in the case of an uncontested citation and notice of proposed penalty, the citation and proposed penalty is "deemed" a final order of the Commission by operation of law, not as a result of any Commission proceeding.

Rather than viewing section 10(a) of the Act as a provision to which Rule 60(b) applies, the Secretary construes section 10(a) "in the nature of a statute of limitations which is subject to the traditional equitable doctrines of tolling and estoppel," citing *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95 (1990).[6] *Irwin* held, however, that "a garden variety

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[5]That section provides: "Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure." 29 U.S.C. § 661(g).

[6]The deadline at issue in *Irwin* was the original 30-day limit for a person to file a (continued...)

claim of excusable neglect" is insufficient to warrant equitable tolling. *Id.* at 96. As noted, Rule 60(b)(1) permits discretionary relief from a final order that is entered due to the moving party's "excusable neglect." Accordingly, the Secretary argues, the Commission lacks the authority to grant Rule 60(b) relief to set aside a section 10(a) final order. (There is no issue of equitable estoppel in this case.)

In *Jackson*, the Commission held that section 10(a) does not prevent the Commission from ruling on whether to grant relief from a final order under Rule 60(b). The Commission concluded that nothing in the Act indicates that Rule 60(b) relief is unavailable from a final order due to a late-filed NOC. 16 BNA OSHC at 1264, 1993-95 CCH OSHD at pp. 41,451-52. The Commission relied on the Secretary's acknowledgment that the Commission has jurisdiction to conduct a section 10© proceeding to determine whether or not an NOC was untimely, and on section 12(g)'s application of the Federal Rules of Civil Procedure to Commission proceedings generally. *Id.* The Commission further noted that the rule expressly applies to a "final judgment, order or proceeding," *see also J. I. Hass Co. v. OSHRC*, 648 F.2d 190 (3d Cir. 1981), and it held that "the Act recognizes only one type of final order, although there are a number of methods by which an enforceable final order may be obtained." 16 BNA OSHC at 1263-64, 1993-95 CCH OSHD at p. 41,451.

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[6](...continued)
federal civil action claiming employment discrimination by a federal agency, following receipt of a "right-to-sue letter" from the Equal Employment Opportunity Commission ("EEOC"). That deadline, since extended to 90 days, is contained in 42 U.S.C. § 2000e-16(c).

The Court noted that "we have held that the statutory time limits applicable to lawsuits against private employers under Title VII [of the Civil Rights Act of 1964] are subject to equitable tolling." 498 U.S. at 95. The Court referred to decisions addressing the provision of Title VII that gives a person generally 180 days to file a charge with the EEOC claiming employment discrimination by a private employer. *E.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (citing 42 U.S.C. § 2000e-5(c)).

We will apply the Commission's long-standing precedent in this case.[7] The relevant portion of Rule 60(b) in this case is subsection (1), which, as noted, permits discretionary relief from final orders that have been entered due to the party's "mistake, inadvertence, surprise, or excusable neglect." In *Pioneer*, the Supreme Court ruled on the meaning of "excusable neglect." Although *Pioneer* addressed that term in the context of a Bankruptcy Act Rule, the U. S. courts of appeals generally have held that the analysis in *Pioneer* applies to "excusable neglect" as used in other federal procedural rules. *E.g., Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354, 361-62 and n. 6 (7th Cir. 1997) (applying *Pioneer* analysis to Rule 60(b) and noting holdings in eleven circuits that "excusable neglect" has broader meaning since *Pioneer* with respect to federal rules other than Bankruptcy Act rules). *See, e.g., Spitzer Great Lakes Ltd. v. U. S. EPA*, 173 F.3d 412, 416 (6th Cir. 1999) (*Pioneer*

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[7]Chairman Rogers believes that the Secretary's "statutory limitation" argument is a substantial one, particularly in light of the language of sections 10(a) and 12(g) of the Act. In addition, she is concerned about the effect of *Pioneer* -- and its resultant apparent broadening of the meaning of "excusable neglect" -- on the availability of Rule 60(b) relief as it applies to late notices of contest. In her view, the post-*Pioneer* application of Rule 60(b) may result in a lowering of the bar to relief for late-filed notices of contest in a way that may be at distinct tension with the Congressional intent of the Act. Congress provided a short period of time in which to initiate a contest in order to ensure prompt abatement of workplace hazards. Nevertheless, she declines to resolve that argument at this time, however, and will apply the Commission's long-standing precedent in resolving this case.

Commissioner Visscher is not persuaded by the Secretary's "statutory limitation" argument, and he would continue to apply Rule 60(b) to late-filed NOC's. In his view, the statutory deadlines referred to in *Irwin* are different from section 10(a) of the Act, because under none of those provisions would the late-filing party have a judgment automatically entered against it as a result. Thus, a party in those situations would not be able to request relief from the consequences of the late filing under Rule 60(b), because it provides relief only from "a final judgment, order, or proceeding." By contrast, an employer who files an untimely NOC automatically becomes subject to a "final order" to which, in his view, Rule 60(b) explicitly applies by virtue of section 12(g) of the Act, 29 U.S.C. § 661(g). As mentioned, that provision requires the Commission to conduct its proceedings "in accordance with the Federal Rules of Civil Procedure," unless it has adopted a different rule. The Commission has not adopted a different rule on the subject.

definition of "excusable neglect" applies to Federal Rules of Civil Procedure). *Cf. Stutson v. United States*, 516 U.S. 193, 195-96 (1996) (Court perceived "at least a reasonable probability" that Eleventh Circuit on remand would reach result consistent with six other circuits, which hold that *Pioneer* standard applies to "excusable neglect" as used in Federal Rule of Appellate Procedure 4 concerning late-filed appeals).

Pioneer stated:

> With regard to [whether] a party's neglect of a deadline is excusable, . . . we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, 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.

507 U.S. at 395 (footnote omitted). Applying those specific factors here, no prejudice to the Secretary's case or the Commission's adjudication is alleged or apparent here. The NOC was faxed and personally delivered to OSHA only one day after the deadline. Thus, it reached OSHA sooner than it might have if mailed in accordance with the Secretary's regulation. There is no suggestion that Northwest acted in other than good faith.

The record also shows that Northwest's president and its attorney showed some diligence in pursuing their remedies. The delay resulted from a miscommunication between the two of them. It was not due fundamentally to simple neglect by either of them, or to deficient procedures at Northwest for handling important documents. Northwest responded promptly to the citation by scheduling an informal conference with OSHA. Northwest had a small office, which makes it understandable that the president alone dealt with OSHA citations, and that no one else reviewed the attorney's fax during Conie's temporary absence. In any event, deficiencies in office procedures are not *per se* inexcusable under Rule 60(b). *See Pioneer*. *Cf., e.g., Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 1987-90 CCH OSHD ¶ 28,409 (No. 86-1266, 1989) (Commission expects employers to "maintain orderly procedures for handling important documents.")

Miscommunication between a party and its counsel, resulting in a default judgment, has been termed excusable neglect. In a recent case, the Eleventh Circuit found that counsel's failure to file a timely demand for trial *de novo* of an age discrimination claim, following an arbitrator's adverse decision, was "excusable neglect" where it was due to "a failure in communication between the associate attorney and the lead counsel." *Cheney v. Anchor Glass Container Co.*, 71 F.3d 848, 850 (11th Cir. 1996). *See also Butner v. Neustadter*, 324 F.2d 783 (9th Cir. 1963) (counsel's filing of appearance in case one day late, due to flawed communications between various counsel involved, warranted Rule 60(b) relief).

The Commission has granted relief to an employer where miscommunication occurred *within* its attorney's office. *P & A Constr. Co.*, 10 BNA OSHC 1185, 1981 CCH OSHD ¶ 25,783 (No. 80-3848, 1981) (relief granted for late-filed NOC where employer's attorney had dictated it to his secretary before traveling out of town, and secretary assured him when he called that it had been timely mailed, although secretary inadvertently had deleted it instead).[8] Although the delay here was within the reasonable control of Northwest, that fact alone does not negate its claim for relief, however. In *Pioneer*, for example, the attorney's neglect at issue was held excusable even though the situation was within the attorney's control.

We agree with the judge that, considering all the circumstances here, Northwest's neglect was excusable. As in *Pioneer*, "the lack of any prejudice to the [opposing party] or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim." 507

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[8]This case is distinguishable from *Byrd Produce Co.*, 16 BNA OSHC 1268, 1993-95 CCH OSHD ¶ 30,139 (No. 91-823, 1993). There, the Commission held the employer fully accountable for its attorney's neglect, which was held not excusable and resulted in late filing of the NOC. There, either the attorney's assistant failed to get the citations to the attorney in timely fashion, or the attorney neglected to note them in timely fashion. *Byrd* was a case of apparent simple neglect rather than understandable miscommunication.

U.S. at 398. Also, the reason for the delay was an excusable miscommunication between Northwest and its attorney. Moreover, the Commission's proceedings to resolve the merits of Northwest's contest would not have been delayed due to the untimely filing, because as mentioned, the NOC reached OSHA more quickly than it might have if mailed on time. The neglect here was excusable.

In order to be eligible for relief under Rule 60(b)(1), the moving party also must allege a meritorious defense. *Marshall v. Monroe & Sons, Inc.*, 615 F.2d 1156, 1160 (6th Cir. 1980). That element has been "satisfied with minimal allegations that the employer could prove a defense if given the opportunity." *Jackson Assoc.*, 16 BNA OSHC at 1267, 1993-95 CCH OSHD at p. 41,455. *See INVST Financial Group, Inc. v. Chem-Nuclear Systems*, 815 F.2d 391, 399 (6th Cir.) ("The key consideration is 'to determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default'") (quoting 10 Charles A. Wright, *et al.*, *Federal Practice and Procedure* ("*Wright & Miller*") § 2697, p. 531 (1983)), *cert. denied sub nom. Garratt v. INVST Financial Group, Inc.*, 484 U.S. 927 (1987).

We find that Northwest has made the necessary averment of a meritorious defense. Conie testified that "I didn't feel that there was any merit to the violation and . . . that we were within the definition of the code . . . we complied with the code." Sabo testified that Conie "discussed the problems" with the citation, which as noted (note 4) alleged a trenching violation, and "felt that [OSHA] did not follow the terms of the protocol of the trench, its dimensions, the type of soil that was classified." At the hearing, the judge noted that "it's been established that [Conie] opposed the citation[], the penalty and furthermore, the classification[.]"

Thus, we affirm the judge's action in granting relief from the final order, and we remand this case for further proceedings consistent with this decision. SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

Dated: September 30, 1999

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. NORTHWEST CONDUIT CORP., Respondent.	OSHRC Docket No. 97-851

DECISION AND ORDER

On February 5, 1998 the undersigned issued a decision and order granting the Respondent's motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure finding "excusable neglect" present in the late filing of a notice of contest to the citation issued by the Secretary on February 6, 1997, and further directing the Secretary to file a complaint within twenty days of receipt of the order. By letter and statement of position dated February 13, 1998 the Secretary informed the undersigned that a complaint would not be forthcoming.

IT IS THEREFORE ORDERED that the citation issued on February 6, 1997 is hereby VACATED AND SET ASIDE for want of prosecution.

/s/

IRVING SOMMER
Chief Judge

DATED: Mar 6 1998

Washington, D.C.