SECRETARY OF LABOR, Complainant, v. CALHAR CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 98-0367

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

At issue in this case is whether relief from a final order of the Occupational Safety and Health Review Commission ("Commission") should be granted to CalHar Construction, Inc., ("CalHar") under Federal Rule of Civil Procedure 60(b). Administrative Law Judge Stanley M. Schwartz denied relief. For the reasons that follow, we affirm his decision.

I. BACKGROUND

CalHar is a construction firm that employs four administrative employees in its Richardson, Texas office and approximately sixty construction workers in the field. Following a fatal accident at a Plano, Texas worksite involving a CalHar employee, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of the worksite. On January 28, 1998, OSHA cited Respondent for two serious violations of standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 ("OSH Act"), and proposed a total penalty of $3,375. The certified mail receipt shows that CalHar received the citation at its office on January 29, 1998. The administrative employees read the citation and discussed it with CalHar's owners, who "charged [them] to follow through and find out what needed to be done." One or two days later, administrative

employee Rhonda G. Ferguson telephoned OSHA's area office because she found the citation "very confusing" and wanted "to get it clearer." After being disconnected twice, Ferguson called a third time and left her name and telephone number; she was told that someone would return her call. CalHar's administrative employees put the matter aside because they did not "have the staff to stay on it and just continue calling." More than three weeks later, on February 25, 1998, when they realized they had not resolved the matter, Ferguson called OSHA again. She spoke to an individual in the regional office, who informed her that the contest period had expired, so CalHar would have to file a late notice of contest with the Commission. By letter dated March 4, 1998, CalHar asked the Commission to "reconsider [its] request for a hearing," which we construe as a late-filed notice of contest.

The Secretary filed a motion to dismiss CalHar's notice of contest, arguing that the fifteen-day contest period specified in section 10(a) of the OSH Act had expired.[1] After a hearing on the issue of whether CalHar's notice of contest was timely, the judge held: "[t]hough in receipt of written instructions, CalHar believed that its telephone calls to OSHA

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[1]Section 10(a) states:

> If, after an inspection or investigation, the Secretary issues a citation under section 9(a), 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 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 an employee or representative of employees under subsection (c) 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.

29 U.S.C. § 659(a). The Secretary asserts that the contest period expired on February 19, 1998.

were enough to fulfill its obligations. CalHar made no effort to pursue the course required by the citation and notice of proposed penalty." He denied relief from the final order under Federal Rule of Civil Procedure 60(b)[2] and dismissed CalHar's notice of contest. The judge relied on *Craig Mechanical, Inc.,* 16 BNA OSHC 1763, 1766, 1993-95 CCH OSHD ¶ 30,442, pp. 42,030-31 (No. 92-0372-S, 1994), *aff'd without opinion,* 55 F.3d 633 (5th Cir. 1995), where the Commission held that neither an employer's ignorance of procedural rules nor OSHA's failure to return phone calls constitutes grounds for relief.

II. DISCUSSION

Under longstanding Commission 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.[3] *Northwest Conduit Corp.,* 18 BNA OSHC 1948, 1949-50, 1999 CCH

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[2]The Rule provides in relevant part:

> **Rule 60. Relief from Judgment or Order.**
> * * *
> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** 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; . . . (3) fraud . . . , misrepresentation, or other misconduct of an adverse party[.]

[3]The Secretary argues that Federal Rule of Civil Procedure 60(b) relief is not available for untimely notices of contest because section 10(a) is "in the nature of a statute of limitations," citing *Irwin v. Dept. Of Veterans Affairs,* 498 U.S. 89 (1990) and the language of sections 10(a) and 12(g) of the OSH Act. While Chairman Rogers believes, for the reasons stated in *Northwest Conduit Corp.,* 18 BNA OSHC 1948, 1949-50, 1999 CCH OSHD ¶ 31,949, p. 47,457 (No. 97-851, 1999), that the Secretary raises a substantial argument, she believes that as a practical matter it is not necessary to address the Secretary's argument here.

Commissioner Weisberg notes that in 1997 and 1998 he directed review in six different cases involving requests for relief under Rule 60(b) from a final orderbased on a failure to file a timely notice of contest: *Northwest Conduit,* 18 BNA OSHC 1948; *Adanlock Office Envirs.,* 1999 CCH OSHD ¶ 31,936 (No. 98-1134, 1999); *NYNEX,* 18 BNA

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OSHD ¶ 31,949, p. 47,457 (No. 97-851, 1999); *Jackson Assocs. Of Nassau,* 16 BNA OSHC 1261, 1264-65, 1993-95 CCH OSHD ¶ 30,140, pp. 41,451-52 (No. 91-438, 1993); *Branciforte Builders, Inc.,* 9 BNA OSHC 2113, 2116-17, 1981 CCH OSHD ¶ 25,591, p. 31,922 (No. 80-1920, 1981). Rule 60(b)(1) provides that relief may be granted from a final order entered due to the party's "mistake, inadvertence, surprise, or excusable neglect." As recently stated by the Commission in *Northwest Conduit,*[4] 18 BNA OSHC at 1950, 1999

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[3](...continued)
OSHC 1967, 1999 CCH OSHD ¶ 31,942 (No. 95-1671, 1999); *Russell B. Le Frois Builder, Inc.,* 18 BNA OSHC 1978, 1999 CCH OSHD ¶ 31,950 (No. 98-1099, 1999), *petition for review filed,* No. 00-4057 (2d Cir. March 13, 2000); *CalHar Constr., Inc.,* No. 98-0367 (April 27, 2000); and *Montgomery Sec. Doors & Ornamental Iron, Inc.,* No. 97-1906 (April 27, 2000). In March 1999, the Commission voted to hold oral argument in two of those cases, *Northwest Conduit* and *NYNEX,* to resolve specific questions such as: (1) whether based on *Irwin* the Commission should reexamine its position concerning Rule 60(b) relief; (2) whether, as the Secretary argues, under the OSH Act Section 10(a) final orders are not subject to Rule 60(b) relief; and (3) whether the Supreme Court's interpretation of "excusable neglect" in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership,* 507 U.S. 380 (1993), a 1993 decision which involved a Bankruptcy Act rule, significantly lowered the bar for relief under Rule 60(b) in Commission proceedings. Those two cases were selected for oral argument, an interactive means for exploring and focusing on significant issues, because the parties in those cases were not small companies and were represented by experienced counsel. Commissioner Weisberg notes that during his eight-month absence from the Commission, his colleagues chose not to hold oral argument and issued decisions in four of those cases without resolving some of these issues. Commissioner Weisberg notes with disappointment that with the Commission's decision in this case and its decision today in *Montgomery Sec. Doors,* neither of which were conducive to oral argument or necessitated addressing these unresolved issues, the Commission will have disposed of all six cases without resolving several important and recurring issues. Moreover, it appears that the statutory issue of whether Rule 60(b) does not apply to Section 10(a) final orders will be resolved by the circuit court in *Russell B. Le Frois Builder* (petition for review was filed by the Secretary in the Second Circuit on March 13, 2000), without any timely input from the Commission. *See Northwest Conduit Corp.,* 18 BNA OSHC 2072, 2076 n.4, 1999 CCH OSHD ¶ 32,027, p. 47,856 n.3 (No. 97-851, 2000) (Weisberg, Commissioner, dissenting).

[4]Commissioner Weisberg was not a member of the Commission at the time *Northwest Conduit* was decided.

CCH OSHD at p. 47,458, the Commission 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), to Rule 60(b)(1).[5]

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[5]Commissioner Weisberg agrees that under *Pioneer* a determination of whether a party's neglect of a deadline is excusable under Rule 60(b)(1) is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." 507 U.S. at 395. However, he believes that many of the circumstances noted by the Court in *Pioneer* are inapplicable or have little relevance to Commission proceedings under the Occupational Safety and Health Act. For example, in cases involving requests for relief under Rule 60(b) from a final order based on a failure to file a timely notice of contest, it would be extremely rare to find that the Secretary suffered prejudice (was deprived of a fair opportunity to present her case) as a result of a late filing. Similarly, it is unlikely that a late filing in an individual case would have an adverse impact on or disrupt Commission judicial proceedings. Also, it would be hard to imagine a late filing case where an employer willfully acts in bad faith, such as where a company delays filing a notice of contest in order to somehow gain an advantage. Thus, in almost all 60(b) late filing cases before the Commission, it is 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. These 60(b) cases involve neglect, and a determination as to whether that neglect is excusable must focus principally on the reason for the delay, including whether it was within the control of the employer.

Commissioner Weisberg does not fault his dissenting colleague, Commissioner Visscher, for expressing the principled view that CalHar should have its "day in court," that CalHar should have an opportunity to contest the citations issued by OSHA and have the issues in the case decided on the merits. However, Commissioner Weisberg is concerned about the factors that his colleague relies on to support granting 60(b) relief in this case. In addition, he believes that according relief here based on an application of those factors is inconsistent with Commissioner Visscher's position in *NYNEX*, 18 BNA OSHC at 1971-72 (Visscher, Commissioner, concurring), where the Commission declined to grant relief under 60(b). The general policy "in favor of allowing employers an opportunity for a full hearing on the merits" seemingly applies equally to both cases. In *NYNEX*, at the closing conference following OSHA's inspection of the NYNEX local office in Braintree, Massachusetts, the company representative specifically requested that OSHA send the citation to the attention of a particular named individual at the Braintree office. OSHA mailed the citation to NYNEX at its Braintree office, *without addressing it to the requested individual.* As a result, the citation was forwarded to the branch office in New York City, rather than to NYNEX's corporate headquarters, apparently at the direction of a NYNEX employee in

(continued...)

A key factor in evaluating whether a party's delay in filing was due to excusable neglect is "the reason for the delay, including whether it was within the reasonable control of the movant." *Id.* at 395. The reasons CalHar gave for the delay here do not withstand close scrutiny. It relies on its employees' belief they had done what they were "supposed to do" by calling OSHA, even though the citation itself informs CalHar that the only way to contest the citation is to notify OSHA in writing within fifteen days that it wants to contest the citation. *See Craig Mechanical,* 16 BNA OSHC at 1766, 1993-95 CCH OSHD at p. 42,030. Indeed, CalHar's employees admit that they "put [the citation] aside" because they were busy. CalHar's approach in meeting the time deadline for filing a notice of contest is further reflected in the fact that even after OSHA's regional office informed CalHar on February 25, 1998 that the contest period had expired, it waited until March 4, 1998 to draft and file a notice of contest, a delay for which it has provided no explanation. Clearly, CalHar's delay in filing its notice of contest was within its reasonable control. In these circumstances, we find that CalHar's neglect of an important business matter was not

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[5](...continued)
Braintree. The notice of contest was filed 20 days late.

In *NYNEX* there was no suggestion that the company acted in bad faith or that it attempted to avoid its obligations to respond to the citation. In fact, the company took steps pre-citation to assure that the citation was timely and properly handled by asking OSHA to mail the citation to the attention of a particular individual, something which OSHA failed to do. This was a far more significant omission by OSHA than its failure to return a single phone call here. Thus, in many ways *NYNEX* is a stronger case for 60(b) relief than *CalHar.* There was also no evidence in *NYNEX* that the Secretary was prejudiced by the late filing or that it impeded efficient judicial administration. Yet the Commission denied NYNEX its "day in court" simply because the company had failed to provide evidence as to its procedures for handling important documents in its New York City branch office, the location to which the citation was incorrectly forwarded *solely* as a result of OSHA's failure to address the citation *in the manner specifically requested by the company. Compare Russell B. LeFrois Builder,* 18 BNA OSHC at 1980, 1999 CCH OSHD at p. 47,462 (Commission granted 60(b) relief notwithstanding flawed mail procedure, finding highly unusual, inadvertent error by company employee who picked up mail to be excusable neglect).

excusable under Rule 60(b)(1). *See id.* at 1765 (employers must exercise some degree of diligence); *E.K. Constr. Co.,* 15 BNA OSHC 1165, 1166, 1991-93 CCH OSHD ¶ 29,412, p. 39,637 (No. 90-2460, 1991) (delay due to deficient office procedures does not merit relief). Rule 60(b)(3) provides that relief may be granted from a final order entered due to "fraud . . . , misrepresentation, or other conduct of an adverse party." *See Craig Mechanical,* 16 BNA OSHC at 1766, 1993-95 CCH OSHD at p. 42,030 (equating Rule 60(b)(3) with equitable tolling as described in *Atlantic Marine, Inc. v. OSHRC,* 524 F.2d 476 (5th Cir. 1975)). Relief may be granted under this provision where an OSHA representative conveys information that contradicts or misrepresents the citation. *Id.;* 1993-95 CCH OSHD at p. 42,030-31(and cases cited therein). Here, we note that OSHA only took a message regarding a return call and provided no substantive information regarding a procedural requirement. As the Commission held in *Craig Mechanical,* OSHA's failure to return a phone call does not rise to a level of conduct sufficient to warrant relief under

Rule 60(b)(3).[6] *See id.*, 1993-95 CCH at pp. 42,030-31.

III. ORDER

[6]Commissioner Weisberg notes that Judge Schwartz stated in his decision that the facts in this case are virtually identical to those in *Craig Mechanical*, and the judge made specific reference to then Chairman Weisberg's footnote in *Craig Mechanical Inc.,* 16 BNA OSHC 1763, 1766 n.9, 1993-95 CCH OSHD ¶ 30,442, p. 42,030 n.9. (No. 92-0372-S, 1994). In that footnote he expressed his hope and expectation that the conduct experienced by Craig would not occur in the future, and he noted that "while the customer is not always right, the customer does have a right to have phone calls to OSHA responded to promptly and courteously." Commissioner Weisberg is deeply disappointed by OSHA's apparent failure to return CalHar's phone call, particularly in light of ongoing reinvention efforts at OSHA. Nevertheless, noting that it involved but *one* apparently unreturned phone call and that this is the first such incident to come to the Commission's attention since *Craig Mechanical* issued in 1994, Commissioner Weisberg does not believe that this failure by OSHA to return a phone call constitutes grounds for relief under Rule 60(b)(3). Finally, Commissioner Weisberg shares the judge's concern and wonderment as to how many other employers may have found themselves in the same position as a result of OSHA's failure to return phone calls, but when presented with a debt collection letter from OSHA, decided to throw in the towel. Accordingly, he would support efforts to determine the answer to this question posed by the judge.

Accordingly, we find that CalHar's notice of contest was not timely filed, and we affirm the judge's finding that CalHar is not entitled to relief.

/s/
Thomasina V. Rogers
Chairman

/s/
Stuart E. Weisberg
Commissioner

Dated: April 27, 2000

VISSCHER, Commissioner, dissenting:

The issue in this case is simply whether CalHar will be allowed to have its "day in court" -- the opportunity to contest and have decided on the merits the citations that it received from OSHA. I believe that we can and should give CalHar that opportunity.

The long-standing precedent of the Commission is that Federal Rule of Civil Procedure 60(b) applies to section 10(a) final orders. Thus I agree with the majority's decision to apply rule 60(b)(1) to CalHar's motion. I also agree with the majority that the applicable guidelines for what constitutes "excusable neglect" under Rule 60(b)(1) are those stated in *Pioneer,* 507 U.S. at 395:

> 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 circumstance 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.

See also United States v. Clark, 51 F.3d 42, 43 (5th Cir. 1995) ("the concept of excusable neglect is 'somewhat elastic' and may include 'inadvertent delays'").

In this case, CalHar received the citation by certified mail on January 29. Office employee Rhonda Ferguson called OSHA's Dallas area office for advice the next day because she found the requirements as stated in the citation materials "very confusing." After being put on hold and disconnected twice, an OSHA receptionist took her name and number and said that someone would call her back. Ms. Ferguson testified that she temporarily put the citation aside while awaiting the return call from OSHA. However, no call came from OSHA. On February 23, after the fifteen-day notice of contest period had expired, Ms. Ferguson and her co-worker Callaham thought of the OSHA citations again and began making more calls to find out "what we were supposed to do." At that time she spoke to Mr. Villarreal, who informed her that it was now too late to contest the citation. CalHar then filed a notice of contest on March 4, which was still less than three weeks after

the fifteen-day working day period provided for in section 10(a) of the OSH Act.

CalHar neither attempted to avoid its obligation to respond to the citations, nor did it ignore the citations. Instead it contacted the local OSHA office for assistance. OSHA promised to return CalHar's phone calls, but failed to do so. It was certainly reasonable for CalHar to expect that OSHA would return its phone call, as was promised. By the time CalHar again called for assistance, the statutory time for contesting the citations had expired. I therefore see no lack of good faith here, at least on the part of CalHar.[7] Indeed, Judge Schwartz specifically found that the explanation of these events provided by CalHar's witnesses was credible.

The judge found that *Craig Mechanical* was controlling and so denied CalHar's motion for relief. I agree with Judge Schwartz that there are similarities between the two cases, but I would distinguish *Craig Mechanical* on two grounds. First, the *Craig Mechanical* decision failed to consider the more flexible interpretation of "excusable neglect" initiated by the Supreme Court in *Pioneer*, an interpretation that was recently followed by the Commission in *Russell B. Le Frois Builder,* 18 BNA OSHC 1978, 1979-80, 1999 CCH OSHD ¶ 31,950, and *Northwest Conduit*, 18 BNA OSHC at 1950, 1999 CCH OSHD at p. 47,458. Second, in *Craig Mechanical*, the employer apparently waited until he received a penalty collection notice from OSHA before following up its previously unreturned phone calls, and therefore did not file a notice of contest until after he received several such penalty collection notices, five months after receiving the citations. The Commission noted the significance of that fact in denying relief to Craig Mechanical. In contrast, CalHar did not wait to receive a penalty collection notice before contacting OSHA, and the lateness of its notice of contest was a matter of days rather than months.

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[7]As Commissioner Weisberg notes, CalHar's treatment by the Dallas OSHA office in not having its phone calls returned bears unfortunate similarity to the actions by the Houston Area office's failure to return a similar phone call that led to the late-filing in *Craig Mechanical*.

In the past the Commission has stated that its policy is "in favor of allowing employers an opportunity for a full hearing on the merits." *Elmer Constr. Corp.*, 12 BNA OSHC 1002, 1003, 1984-85 CCH OSHD 27,050, p. 34,845 (No. 83-40, 1984) (rationale for accepting a late-filed notice of contest). Similarly, both the Commission and the Fifth Circuit Court of Appeals, to which this case is appealable, have shown an antagonism toward the dismissal of our cases on procedural grounds, because such dismissal deprives the parties of a resolution of contested citations on the merits. *See, e.g., Stephenson Enterprises Inc. v. Marshall*, 578 F.2d 1021, 1023 (5th Cir. 1978) (Secretary's failure to issue citations with reasonable promptness); *Atlantic Marine, Inc. v. OSHRC,* 524 F.2d 476, 478 (5th Cir. 1975) (employer's failure to file timely notice of contest); *Arkansas Abatement Services Corp*., 17 BNA OSHC 1163, 1164, 1995 CCH OSHD ¶ 30,729, p. 42,659 (No. 94-2210, 1995) (preference for a hearing on the merits rather than procedural dismissal of a *pro se* employer's notice of contest); *Better Baked Foods, Inc.*, 10 BNA OSHC 1382, 1383, 1982 CCH OSHD ¶ 25,873, p. 32,366 (No. 80-3089, 1982) ("a decision on the merits rather than on a procedural flaw is favored").

Since the law clearly permits us to do so,[8] I would grant CalHar's motion for relief from its late filed notice of contest in accordance with the Commission's preference for allowing cases to be considered on the merits.

/s/
Gary L. Visscher
Commissioner

Date: April 27, 2000

[8]The Secretary argues that CalHar failed to state a meritorious defense, citing *Pease v. Pakhoed Corp.,* 980 F.2d 995, 998 (5th Cir. 1993) for the proposition that such a failure is fatal to CalHar's motion for relief. However, *Pease* was decided before *Pioneer* and the Court in *Pioneer* did not emphasize this requirement. Furthermore, when the parties were before Judge Schwartz, CalHar's witness denied the allegation that the truck in question was not equipped with a back-up alarm. Particularly considering CalHar's *pro se* status, I would find that this general denial did state a meritorious defense.

SECRETARY OF LABOR, Complainant, v. CALHAR CONSTRUCTION, INC and its successors, Respondent.	OSHRC DOCKET NO. 98-0367

APPEARANCES:

For the Complainant:
Suzanne F. Dunne, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:
Margrete A. Callaham, Rhonda G. Ferguson, CalHar Construction, Inc., Richardson, Texas

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, CalHar Construction Company (CalHar), at all times relevant to this action maintained a place of business at 901 Legacy Drive, Plano, Texas. On November 6, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of CalHar's Plano work site. As a result of that inspection, on January 28, 1998, CalHar was issued citations alleging violations of the Act together with proposed penalties. The citations were served on CalHar, by certified mail, on January 29, 1998 (Tr. 8-9; Exh. G-1). On March 4, 1998, CalHar filed a notice of contest. Complainant moves to dismiss the notice of contest, arguing that the notice was not filed within the 15 day period allowed under §10(a) of the Act, thus depriving the Commission of jurisdiction over the matter.

Commission precedent allows for the consideration of CalHar's late notice of contest as a motion for relief from judgment under F.R.C.P. 60(b). *Keefe Earth Boring Company, Inc*., 14 BNA OSHC 2187, 1991-93 CCH OSHD ¶29,277 (No. 88-2521, 1991). Rule 60(b)(1) allows for such relief in cases of mistake, inadvertence, surprise, or excusable neglect; Rule 60(b)(3) allows for the equitable tolling of filing dates in cases where the late filing is caused by an adverse party's misconduct or misrepresentation.

On May 18, 1998, a hearing was held in Dallas, Texas, on the issues raised by CalHar's late notice of contest. This matter is now ready for disposition.

Facts

The Citation and Notification of Penalty states:

> . . .You must abate the violations referred to in this Citation by the dates listed and pay the penalties proposed, unless within 15 working days (excluding weekends and Federal holidays) from your receipt of this Citation and Notification of Penalty you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above.. . .
>
> * * *
>
> **Right to Contest** - You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates without contesting the underlying violations. **Unless you inform the Area Director in writing that you intend to contest the citation(s) and/or proposed penalty(ies) within 15 working days after receipt, the citation(s) and the proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.**

Rhonda Ferguson testified that she read the OSHA citation when she received it, but found it confusing (Tr. 30). Ferguson testified that she telephoned OSHA's offices to ask for information on how to proceed in the matter (Tr. 14, 20). Ferguson stated that she was put on hold, and then disconnected; she called back and was disconnected a second time (Tr. 20-21). When Ferguson called back a third time, the receptionist took her name and number and told her that someone would call her back (Tr. 21). OSHA did not return Ferguson's call (Tr. 21). On February 25, 1998, Ferguson called again, and spoke with a Mr. Villarreal, in the Dallas regional office, who told her that it was too late to contest the citations (Tr. 21-22).

Ferguson admitted that CalHar retains a corporate attorney, who was aware of the inspection, which was initiated as the result of a fatality, and the citation (Tr. 31-32). Ferguson stated that the citation was not referred to the attorney, however, because "that's not what he does" (Tr. 33). Ferguson testified that she thought she was doing the right thing in contacting the OSHA office for guidance (Tr. 33).

Margrete Callaham testified that CalHar has a four-girl office, and that they are very busy (Tr. 33). They believed that in calling OSHA they were adequately pursuing the matter (Tr. 33).

Discussion

The question of the timeliness of a Respondent's notice of contest arose in a strikingly similar, if not identical, fact situation in *Craig Mechanical, Inc.* (Craig) 16 BNA OSHC 1763 (No. 92-0372-S, 1994) In Craig, this judge granted relief to the employer concluding that the failure to timely file a written notice of contest within the 15 day statutory period resulted from excusable neglect under Rule 60(b)(1). The Commission majority reversed my decision specifically holding that OSHA's failure to call back an employer who repeatedly called the area office to contest an OSHA citation, did not constitute a basis to grant relief under Rule 60(b). The Commission found that OSHA's carelessness did not rise to the level of misconduct required by Rule 60(b)(3). *Id*. at 1766. The Commission further found that the employer's failure to submit the required written notice of conduct was not excusable because the citation form itself contained all the information the employer needed to contest the alleged violations. *Id.* at 1765. The United States Court of Appeals for the 5th Circuit, which also has jurisdiction over CalHar, affirmed the Commission's disposition in an unpublished decision.

The facts in this case are virtually identical to those in Craig. Though in receipt of written instructions, CalHar believed that its telephone calls to OSHA were enough to fulfill its obligations. CalHar made no effort to pursue the course required by the citation and notice of proposed penalty. The Commission's opinion in Craig is directly on point. As a trial judge, I must adhere to Commission precedent, unless the case is distinguishable on other grounds. Such is not the case here, and therefore CalHar's 60(b) motion must be denied.

Normally my discussion would end here. However, it is noted that Chairman Weisberg in Craig, specifically referred to OSHA's "careless and unresponsive treatment" of employers. He expressed his hope and expectation that the conduct experienced by Craig would not occur in the future. He noted that while the customer is not always right, the customer does have a right to have phone calls to OSHA responded to promptly and courteously.

This concern by the Commission for fairness to all parties is exemplified by the very proceeding under which this case was heard, i.e. E-Z Trial Rules. This procedure has been well received by all parties before the Commission. In my view this case is a perfect opportunity for the Commission to reexamine its holding in Craig. The failure of OSHA to return phone calls has occurred again and like Craig, CalHar has been denied an opportunity to be heard on the merits of its case. The undersigned judge wonders how many other employers may have found themselves in the same position but when presented with a debt collection letter from OSHA, decided to throw in the towel.

Regardless, as noted above, the undersigned judge is powerless to provide CalHar a hearing. The Respondent, as noted in the cover letter to this initial decision, may appeal to the Commission. The petition for review may be as simple as stating that "CalHar seeks review of the trial judge's decision denying its motion for relief under Rule 60(b) and dismissing its notice of contest."

ORDER

1. CalHar's motion for relief from judgment is DENIED, and its notice of contest is DISMISSED.

Stanley M. Schwartz
Judge, OSHRC

Dated: