



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

Secretary of Labor,
Complainant

v.

Elmer Julio Perez Mendez dba Julio Perez,
Respondent.

OSHRC Docket No.: **20-1083**

On Pleadings:

Lydia J. Chastain, Esq.
Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Patrick J. Miller and Dana M. Svendsen,
Sherman & Howard LLC., Denver, Colorado
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission (Commission) on a Late Notice of Contest dated July 15, 2020, from Respondent Elmer Julio Perez Mendez dba Julio Perez (Perez), which was received and docketed by the Commission on July 22, 2020. On August 28, 2020, Complainant, Secretary of Labor, United States Department of Labor (Secretary) filed a Motion to Dismiss Respondent's Untimely Notice of Contest Pursuant to Rule § 2200.40 of the Commission's Rules of Procedure and Rule 60(b) of the Federal Rules of Civil Procedure. On September 8, 2020, Perez filed a Response to the Secretary's Motion to Dismiss.

For the reasons set forth herein Perez's request for relief pursuant to Rule 60(b)(1) is **DENIED.**

BACKGROUND

This matter arises out of an Occupational Safety and Health Administration (OSHA) inspection during the period February 27, 2020 through April 17, 2020. The inspection was initiated in response to a fatality on the jobsite located at 775 Willow Springs Drive, Mobile, Alabama, due to an employee falling approximately 8 feet from the eave of the roof to the ground.

On June 2, 2020, OSHA issued a Citation and Notification of Penalty (Citation) for one willful violation of the standard found at 1926.501(b)(13), alleging employees engaged in residential construction activities at least six feet from the lower level were not protected by guardrail systems, safety net systems, personal fall arrest systems, or alternative fall protection measures on or about December 4, 2019, and times prior thereto. OSHA also issued a grouped other-than-serious Citation alleging that on or about December 11, 2019, Perez failed to report a work-related fatality within 8 hours of the death of an employee resulting from a work related incident; and that on or about December 4, 2019, Perez failed to report within 24 hours a work related incident resulting in the hospitalization of the employee who fell from the roof. A penalty in the total amount of \$138,118.00 was proposed for the alleged violations.

OSHA's inspection process was changed due to the ongoing COVID-19 pandemic. As a result of those changes, the inspection conducted by the Compliance Safety and Health Officer (CSHO) was changed. He did not meet with or present his credentials to Perez and conducted the opening and closing conferences by telephone on April 17, 2020 (Response, pps. 11-14; Exhs. F, unnumbered p. 2 and G, unnumbered pps. 2, 4).

The Secretary mailed the Citation by Certified Mail/Return Receipt and the UPS next day delivery to Perez at 5404 Forest Park Drive, Mobile, Alabama (Secretary's Motion, p. 2, Gonzalez Aff. ¶ 8, and Exh. A thereto). Pursuant to the requirements of the Act, an employer is required to notify the Secretary of its intent to contest (Notice of Contest or NOC) a Citation within 15 working days of receipt. Failure to timely file a NOC results in the Citation becoming a final order of the Commission by operation of law. The Citation provided Perez had 15 working days from the date of receipt to contest. The return receipt shows Perez received the Citation on June 3, 2020. Therefore, any contest by Perez was to be filed within the contest period, no later than June 24, 2020. Perez, however, did not file a contest within the 15-day contest period. Instead, five days later, on June 29, 2020, Perez called the OSHA Area Office requesting an informal conference. Perez was advised the contest date had passed (Gonzalez Aff. ¶ 9). Due to Perez's failure to timely contest, the Citation became a final order of the Commission under § 10(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act), on June 25, 2020.

On July 15, 2020, approximately three weeks after the final contest date, Perez filed the late NOC at issue in this proceeding.

DISCUSSION

Perez alleges the NOC was not late because he did not become aware of the Citation until June 19, 2020, at the earliest, when he returned from a trip (NOC). According to Perez, the contest period did not begin to run until he became aware of the Citation. Perez also argues the Commission lacks jurisdiction because Perez is not an employer within the meaning of the Act (NOC, Response, pp. 4-7). For the reasons set forth herein, the Court finds Perez's contest on July 15, 2020, is a late NOC, and the Commission has jurisdiction to address the late NOC issue.

Sufficiency of Service

It is the Secretary's burden to establish service of the Citation. Perez contends its contest was not untimely because the Citation was delivered to his home address, was signed for by a temporary house guest, and was not received by him until he returned from California where he had traveled to drive his wife home. According to Perez his wife was uncomfortable flying due to the ongoing COVID-19 pandemic (Response, p. 3). Perez argues the temporary house guest who signed for the Citation does not work for him, does not reside at his residence, and therefore did not have the authority to accept service of the Citation on his behalf. Perez further argues he is a sole proprietor, and does not maintain a business address, therefore, service of the Citation at his home address was improper. Basically Perez argues that because of these circumstances he should not be held responsible for not knowing he had important mail which required timely action in order to protect his interests, either as a sole proprietor allegedly not subject to the jurisdiction of the Commission, or as employer of the employees at the worksite, in which case the Commission would have jurisdiction.

Although the Act refers only to the penalty, the Commission has consistently held § 10(a) of the Act governs service of citations. *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474 n. 6 (No. 76-2165, 1979). It requires the Secretary to "notify the employer by certified mail of the penalty..." In *B.J. Hughes*, the Commission addressed the Secretary's obligation under § 10(a), holding,

The test to be applied in determining whether service is proper is whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest.

7 BNA OSHC at 1474. Further, the Commission's holding in *B. J. Hughes* that "[t]he test to be applied in determining whether service is proper is whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest" satisfies the due process requirements set

forth by the United States Supreme Court that notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mulane v. Cent. Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950).

The Secretary’s service of the Citation on Perez meets the test set out in *B.J. Hughes*. The test is one of reasonableness. In his affidavit, Area Director Gonzalez states the Citation was mailed to the mailing address provided by Perez (Gonzalez Aff. ¶ 8). By mailing the Citation certified mail addressed to Perez at the address he provided, and having received confirmation the Citation was received at that address, the service was reasonably calculated to provide the employer with the required notification and opportunity to determine whether to abate or contest. Perez’s assertion that the Citation delivered to his residence was insufficient fails.

Rule 60(b) Relief

An employer who has filed an untimely NOC 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 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). 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 at 2117. The moving party has the burden of proving it is entitled to relief under Rule 60(b). Perez has failed to provide sufficient proof that it is entitled to relief.

In determining whether the late filing of a NOC 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. Services Co. v. Brunswick Associates Ltd. Partnership* 507 U.S. 380 (1993) is applicable. *George Harms Constr. Co., supra*. 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; *see also Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1951 (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). 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 Investment Serv.*, 507 U.S. at 393. The Commission requires an employer to exercise due diligence before it will find excusable neglect. *Keefe Earth Boring Company, Inc.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991); *Craig Mechanical*, 16 BNA OSHC 1763 (No. 92-0372, 1994).

Perez contends he is entitled to relief under Rules 60(b)(1), 60(b)(4) and 60(b)(6) of the Federal Rules of Civil Procedure. For relief pursuant to Rule 60(b)(4), Perez asserts the Citation was improperly served and he did not receive notice of the Citation until June 19, 2020 at the earliest. As shown above, however, the Court finds service of the Citation was proper. Further, the Court finds the Commission has jurisdiction to address the late NOC issue presented in this case, contrary to Perez’s assertion it does not. As set forth by longstanding Commission precedent, the Court has the authority under § 10(a) to determine whether Perez is entitled to relief from the final order. *Gulf & W. Food Prods. Co.*, 4 BNA OSHC 1436, 1439 (No. 6804, 1976) (consolidated).

Perez should have had adequate mail handling procedures to ensure important items were received. The Secretary was under no obligation to request signature by a specific person at Perez’s business location. Nor is it the Secretary’s responsibility to identify the person who signed the return receipt. Relief pursuant to Rule 60(b)(4) is not warranted.

In seeking relief pursuant to Rule 60(b)(6), which provides for relief for any reason that justifies it, Perez again relies on its claim that the Citation was improperly served. As the Court has determined the service was proper, relief pursuant to Rule 60(b)(6) fails. Relief is not warranted under 60(b)(6) where, as here, Perez’s mail handling procedures are such that the mail

was not properly routed to ensure he would be made aware of important mail so that it could be handled timely.

In addition to contending the service of the Citation was improper, Perez asserts the ongoing COVID-19 pandemic resulted in circumstances beyond his reasonable control which warrant a finding of excusable neglect under Rule 60(b)(6). He asserts that due to the COVID-19 pandemic he was away from his residence when the Citation was received. He seeks consideration for this since OSHA changed its inspection procedures due to the pandemic. Changes which obviously were to protect both the CSHO and the employer. Perez asserts due to OSHA's changed procedures OSHA did not follow procedural and statutory requirements of providing in person opening and closing conferences and producing the CSHO's credentials during the inspection. Although the pandemic may have caused Perez to be away from his residence, the pandemic does not justify his failure to establish mail handling procedures which would ensure he had been apprised of receipt of the Citation. A conversation before his trip to California, or a simple telephone call, text or email to his temporary house guest could easily have taken place to discuss how to handle mail and to find out about any mail that had been received. Perez's claim provides insufficient basis for the Court to conclude the reason for the delay was not under his control. Perez has not shown "extraordinary circumstances" suggesting it is faultless in the delay" as required for relief under Rule 60(b)(6).

The Court finds Perez failed to exercise due diligence and was simply negligent in failing to file the contest before the expiration of the contest period. The Commission has long held 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). Neither the record evidence nor Perez's explanations for its late filing show deception or a failure to follow proper procedures on behalf of the Secretary. Instead, the record shows Perez had inadequate mail handling procedures. The record does not demonstrate Perez had any procedures in place regarding what was to be done when certified mail was received. The delay was within Perez's control. Commission precedent for denying relief where untimely filings were due to faulty mail handling procedures have been upheld by the D.C. Circuit in *David E. Harvey Builders, Inc. v. Sec'y of Labor*, 724 F. App'x 7, 9 (D.C. Cir. 2018) (unpublished) (citations omitted).

Where timely response was within the employer's reasonable control, the Commission has denied relief even to petitions filed only one or two days late, *see Sec'y of Labor v. Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185, 2186-87 (2003) (one day late); *see also Sec'y of Labor v. A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148-49 (2000) (11 days late). The Commission "has consistently denied relief" under Rule 60(b)(1) "to employers whose procedures for handling documents were to blame for untimely filings." *Sec'y of Labor v. NYNEX*, 18 BNA OSHC 1944, 1946-47 (1999) (citation omitted).

David E. Harvey Builders, Inc. v. Sec'y of Labor, 724 F. App'x 7, 9 (D.C. Cir. 2018) (unpublished). Here, the NOC was nearly 3 weeks late, and was entirely to blame on Perez's ineffective or absent mail-handling procedures. Because Perez was to blame for the delayed filing and he has not established his neglect is excusable, relief pursuant to Rule 60(b)(1) also is not warranted.

As set forth above, in addition to control, the Court must also consider the danger of prejudice to the opposing party; the length of the delay and its potential impact on the proceedings; and whether the party seeking relief acted in good faith.

Danger of Prejudice

The Secretary does not assert it would be prejudiced because of the delay. Therefore, the Court finds the Secretary is not prejudiced by the late filing. However, a lack of prejudice to the Secretary, alone, will not excuse a late filing. *Prime Roofing Corp.*, 23 BNA OSHC 1329 (No. 07-1409, 2010).

Length of Delay and Impact on Proceedings

The nearly 3-week delay in contesting would not adversely impact the Commission's proceedings.

Good Faith

Perez asserts he acted in good faith by filing his contest within fifteen working days of his becoming aware of the Citation. The Act requires fifteen working days of receipt, not awareness. Nonetheless the Court finds Perez did make a good faith effort to comply. However, as noted above, good faith in attempting to comply with the statutory filing requirement alone will not excuse a late filing. *Prime Roofing Corp.*, 23 BNA OSHC 1329 (No. 07-1409, 2010).

The Court has considered the factors required by *Pioneer*. Despite the lack of prejudice to the Secretary and that the delay would not adversely affect the Commission proceedings, Perez's control of the delay in timely filing the NOC is determinative in that it was in control of its mail handling procedures which resulted in the NOC not being timely filed.

Meritorious Defense

In addition to the factors set forth in *Pioneer*, an employer also must establish the presence of a meritorious defense for Rule 60(b)(1) relief. *Northwest Conduit Corp.*, 18 BNA OSHC 1948 (No. 97-851, 1999). A meritorious defense is one that is valid at law with respect to the underlying action. *Park Nursing Center, Inc., v. Samuels*, 766 F.2d 261, 264 (6th Cir. 1985). The presence of a meritorious defense 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).

As a meritorious defense, Perez alleges that as a sole proprietor with no employees it was not an employer on the jobsite. The Court finds Perez has established the minimum requirement necessary for a meritorious defense. Perez asserts the Commission lacks jurisdiction because it is not an employer. The Court does not address here the issue of whether Perez is an employer under the Act, as the Commission’s jurisdiction in a late NOC proceeding is limited under § 10(a) to determining whether Perez is entitled to relief from the final order. *Gulf & W. Food Prods. Co.*, *supra*. Perez has not established a basis for Rule 60(b) relief.

Having considered all factors enunciated in *Pioneer*, relief from the Final Order in this matter is not warranted. Perez’s control over the delay is determinative.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the Findings of Fact and Conclusion of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Therefore, for the reasons set forth herein, Perez’s request for relief pursuant to Rules 60(b)(1), 60(b)(4) and 60(b)(6) is **HEREBY DENIED**. The final order for the Citation remains in effect and is hereby **AFFIRMED**. Further, the Secretary’s Motion to Dismiss Perez’s NOC as untimely is hereby **GRANTED**.

SO ORDERED.

/s/ _____
Sharon D. Calhoun
Administrative Law Judge, OSHRC

Dated: September 30, 2020
Washington, DC