



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor,

Complainant,

v.

L & C General Contractors, Inc.,

Respondent.

OSHRC Docket No. **19-1929**

Attorney and Law Firm:

Joseph Luckett, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee,
for Complainant

Scott Hunt, Esq., The Hunt Law Firm, for Respondent

JUDGE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER OF DISMISSAL

This matter is before the court on L & C General Contractors, Inc.'s (L & C) notice of contest. A citation issued to L & C following Inspection No. 1386080 became a final order of the Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (the Act) on September 12, 2019. On December 2, 2019, L & C attempted to contest that citation by filing a notice of contest with the Commission. On June 19, 2020, the Secretary filed a motion to dismiss L & C's notice of contest as untimely. The question before the court is whether L & C has established it is entitled to relief from a final order of the Commission pursuant to Federal Rule of Civil Procedure 60(b) or whether the Secretary's motion to dismiss should be granted. For the foregoing reasons, the Secretary's motion to dismiss is **GRANTED**.

BACKGROUND

The facts of this case as set out in the Secretary's motion are uncontested. The Birmingham Area Office of the Occupational Safety and Health Administration (OSHA)

conducted an inspection of an L & C worksite in Irondale, Alabama, on March 18, 2019. On August 13, 2019, the Secretary issued L & C a citation alleging three serious violations of regulations issued under the Act. The citation was issued via certified mail and was received by L & C on August 21, 2019 (Exhibit B to the Secretary's Motion to Dismiss).

Five days after receiving the citation, Ronald Jackson, the owner of L & C, sent a letter to the Birmingham Area Office requesting "a conference to discuss the alleged safety violations." (Exhibit C to the Secretary's Motion to Dismiss). That letter was received by the Birmingham Area Office on August 30, 2019. On September 4, 2019, after failed attempts to contact Mr. Jackson, Ramona Morris, the Area Director of the Birmingham Area Office, left voicemail messages on two separate phone numbers for Mr. Jackson. The next day, Mr. Jackson called Ms. Morris back and left a voicemail message stating he would call again on September 9, 2019. Mr. Jackson did not call Ms. Morris back. L & C did not send any other documents to the Area Office and the citation became a final order of the Commission on September 12, 2019.

On October 16, 2019, the Secretary sent a demand letter to L & C for the unpaid penalties assessed for the violations alleged in the citation. The letter was returned by the United States Postal Service as unclaimed. Ms. Morris then called Mr. Jackson on October 28, 2019, leaving a voicemail message telling him to contact the Area Office. Later that day, Mr. Jackson left Ms. Morris a voicemail message stating he was out of town and would contact her the following Monday, November 4, 2019. Mr. Jackson did not call Ms. Morris back on November 4, 2019.

On November 26, 2019, Mr. Jackson left a voicemail message for Ms. Morris stating he was having health issues. Ms. Morris returned Mr. Jackson's call and they spoke. Mr. Jackson expressed to Ms. Morris he did not believe the violations were valid and wanted to contest them. She explained the process by which a citation can be contested. Ms. Morris provided Mr. Jackson with the address of the Commission. L & C filed its notice of contest with the Commission on December 2, 2019. It was received by the Commission on December 9 and docketed on December 12, 2019.

On June 19, 2020, the Secretary filed his motion to dismiss L & C's notice of contest as untimely. On June 23, 2020, Chief Judge Covette Rooney assigned the matter to the undersigned. The undersigned issued an order on July 23, 2020, requiring L & C to file a response to the Secretary's motion by August 14, 2020, stating its reason for the delay in filing

and setting out a meritorious defense. That order was not returned to the Commission as undeliverable. L & C did not file a response to that order.

On August 21, 2020, the court issued an order to show cause to L & C requiring it to show cause why its notice of contest should not be dismissed. That order was sent via Federal Express but returned to the court as undeliverable. According to Federal Express tracking, no business resides at the address. The address used was that to which the citation had been successfully delivered and which is on L & C's notice of contest. The court issued a second order to show cause to two other addresses listed with the Alabama Secretary of State for L & C's business on September 4, 2020.¹ The second order gave L & C until October 2, 2020, to respond. Federal Express tracking shows both copies of the order were delivered.

On October 2, 2020, L & C filed, through newly designated counsel, a response to the court's order to show cause.² In it, L & C contends it did contact the Secretary in writing within the 15-day period to request an informal settlement conference and believed that was sufficient to meet its obligations to contest the citation. Mr. Jackson attested he had been called out of town on August 21, 2019, the day he received the citation, due to the death of a close relative. L & C asked for relief from the final order of the Commission pursuant to Rule 60(b).

The undersigned found L & C's filing a sufficient response to the court's order to show cause and issued an order and briefing schedule requiring L & C to file a formal request for relief under Fed. R. Civ. Pro. 60(b) and a response to the Secretary's motion to dismiss.³ L & C's request and response were due on or before October 30, 2020. The order specifically noted L & C's obligation to set out a meritorious defense. The order allowed the Secretary to file a reply by November 13, 2020. L & C filed neither a request for relief nor a response to the Secretary's motion.

DISCUSSION

Pursuant to § 10(a) of the Act, an employer must notify the Secretary of its intent to contest a citation within 15 working days of receipt of the citation. The Secretary's regulation

¹ Commission Rule 6(a) requires parties to Commission proceedings to promptly notify the Commission of any change in address. L & C has never notified the Commission the address on its notice of contest is no longer valid or of any change of address.

² Counsel for L & C filed his notice of appearance on October 2, 2020, and registered to receive service through the Commission's e-filing system.

³ The court's order was served on all parties via the Commission's e-filing system.

addressing the requirements for a valid notice of contest states such notice must be in writing and “postmarked within 15 working days of the receipt by the employer of the notice of proposed penalty. Every notice of intention to contest shall specify whether it is directed to the citation or to the proposed penalty, or both.” 29 C.F.R. § 1903.17(a).⁴

Failure to timely file a notice of contest results in the citation becoming a final order of the Commission by operation of law. A late notice of contest may be accepted, however, where the employer establishes the delay in filing was due to deception by the Secretary, or where the delay was caused by the Secretary’s failure to follow proper procedures. A late notice of contest also may be excused under Rule 60(b), if the final order was entered as a result of “mistake, inadvertence, surprise or excusable neglect.” *See Branciforte Builders, Inc.*, No. 80-1920, 1981 WL 18814, at *4 (OSHRC July 31, 1981) (citations omitted). The moving party has the burden of proving it is entitled to relief under Rule 60(b).⁵

An employer must also establish the presence of a meritorious defense for Rule 60(b)(1) relief. *Northwest Conduit Corp.*, No. 97-851, 1999 WL 820636, at *5 (OSHRC September 30, 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*, No. 91-0438, 1993 WL 230102, at *7 (OSHRC June 18, 1993).

In cases involving a request for relief from a final order, the Commission has long applied the Supreme Court’s analysis stated in *Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380 (1993). The determination of excusable neglect pursuant to Rule 60(b)(1)⁶ is an equitable one, taking into account all relevant circumstances surrounding L & C’s failure to file a timely notice of contest, including the danger of prejudice to the Secretary, the length of delay and its potential impact on the judicial proceedings, the reason for the delay and

⁴ The Commission and courts have upheld the validity of this regulation’s requirements. *See Prime Roofing Corporation*, No. 07-1409, 2009 WL 7196644, at *5 (OSHRC September 16, 2009) citing *Acrom Construction Services, Inc.*, No. 88-2291, 1991 WL 132730, at *4 (OSHRC June 28, 1991); *Martin V. Pav-Saver Mfg. Co.*, 933 F.2d 528, 530 (7th Cir. 1991); and *Sec’y of Labor v. Barretto Granite Corp.*, 830 F.2d 396, 397 (1st Cir. 1987).

⁵ The Secretary has the burden to establish he properly served the employer. The record contains sufficient evidence the Secretary served L & C with the citation consistent with the requirements of § 10(a) the Act (Exhibit B to the Secretary’s Motion to Dismiss). L & C does not dispute of the Secretary’s evidence of valid service of the citations.

⁶ L & C does not contend its failure to timely contest the citations was the result of deception on the part of the Secretary or the Secretary’s failure to follow proper procedures.

whether L & C acted in good faith. *Pioneer Investment Serv.*, 507 U.S. at 395; *Craig Mechanical, Inc.*, No. 92-0372, 1994 WL 197728, at *3 (OSHRC May 18, 1994). The Supreme Court stated that “inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute ‘excusable’ neglect.” *Pioneer*, 507 U.S. at 392. The Court found “excusable neglect” to be, in part, an “elastic concept” not restricted to “omissions caused by circumstances beyond the control of the movant.” *Id.* Regarding relief sought pursuant to Rule 60(b), the Court stated that “‘excusable neglect’ is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” *Id.* at 394.

When evaluating claims of excusable neglect, many circuit courts focus on the third factor in the *Pioneer* equitable analysis, “the reason for the delay, including whether it was within the reasonable control of the movant.” *Id.* at 395.

The four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry . . . [A]t the end of the day, the focus must be upon the nature of the neglect.

Hospital del Maestro v. NLRB, 263 F.3d 173, 175 (1st Cir. 2001) (per curium) (quoting *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000)). See *Cohen v. Bd. of Trs. of Univ. of D. C.*, 819 F.3d 476, 479-80 (D.C. Cir. 2016) (same); *Dimmitt v. Ockenfels*, 407 F.3d 21, 24-25 (1st Cir. 2005) (same); *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366, 366 n.7 (2d Cir. 2003) (same); *Graphic Communications Int'l Union v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5-6 (1st Cir. 2001) (same); *David E. Harvey Builders, Inc. v. Sec'y of Labor*, 724 Fed. Appx. 7, 9 (D.C. Cir. 2018) (same).

Other circuit courts emphasize that the *Pioneer* equitable analysis requires consideration of “all relevant circumstances” surrounding a party’s request for relief due to excusable neglect. Therefore, the “control” factor must not be weighted too heavily at the expense of the other relevant *Pioneer* factors. *Avon Contractors, Inc. v. Sec'y of Labor*, 372 F.3d 171, 174 (3d Cir. 2004). See *Coleman Hammons Constr. Co. v. OSHRC*, 2019 WL 5782425, at *3 (5th Cir. 2019) (same); *George Harms Constr.*, 371 F.3d 157, 164 (3rd Cir. 2004)(same).

Long-settled Commission precedent focuses on the third factor in the *Pioneer* equitable analysis. Evaluating a request for relief for a late filed notice of contest due to excusable neglect, Commission precedent states that a “key factor” is “the reason for the delay, including whether it was within the reasonable control of the movant.” *CalHar Constr., Inc.*, No. 98-0367, 2000 WL

362466, at *2 (OSHRC April 27, 2000). In appropriate circumstances, the Commission finds this to be the dispositive factor. 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.*, No. 88-2291, 1991 WL 132730, at *6 (OSHRC June 28, 1991).

The Eleventh Circuit, the circuit in which this case arose, has applied a three-part equitable analysis. *In re Worldwide Web Systems, Inc.*, 328 F.3d 1291 (11th Cir. 2003). To establish excusable neglect entitling it to relief from a default judgment, a party must show “(1) it had a meritorious defense that might have affected the outcome; (2) granting the motion would not result in prejudice to the non-defaulting party; and (3) a good reason existed for failing to reply to the complaint.” *Worldwide Web*, 328 F. 3d at 1295 quoting *Florida Physician’s Ins. Co., v. Ehlers*, 8 F.3d 780, 783 (11th Cir. 1993) (*citing E.E.O.C. v. Mike Smith Pontiac GMC, Inc.*, 896 F.2d 524, 528 (11th Cir. 1990)). An equitable analysis under *Pioneer* “necessarily involves consideration of all three elements.” *Worldwide Web*, 328 F. 3d at 1297.

Did L & C File a Timely Notice of Contest?

In its response to the court’s show cause order, L & C contends it believed its letter dated August 26, 2019, requesting an informal conference, was sufficient to meet its obligation to file a written notice of contest (Affidavit of Ronald E. Jackson). In that letter, Mr. Jackson wrote,

We are in receipt of the OSHA citation notifications dated August 13, 2019. We are hereby requesting a conference to discuss the alleged safety violations outlined in the citation. We await your reply regarding the time and location for the meeting.

(Exhibit C to the Secretary’s Motion to Dismiss). After receiving the letter, AD Morris attempted to contact Mr. Jackson via phone prior to the expiration of the 15-day contest period, but she and Mr. Jackson never spoke directly. L & C never filed another letter with the Area Office.

The Commission has long held the language of letters of contest be liberally construed to determine whether they exhibit a “clear intent to dispute” the citation. *Herasco Contractors, Inc.*, No. 93-1412, 1993 WL 378931, at *1 (OSHRC September 22, 1993), *citing Brennan v. OSHRC (Bill Echols Trucking Co.)*, 487 F.2d 230 (5th Cir. 1973); *see also Prime Roofing Corporation*, No. 07-1409, 2009 WL 7196644, at *5 (OSHRC September 16, 2009). The Commission has expressly rejected as notices of contest letters that “simply request[] an informal

conference.” *All Phase Electric & Maintenance, Inc.*, No. 90-0505, 1991 WL 205285, at *3 (OSHRC October 4, 1991).

L & C’s letter of August 26, 2019, does not comply with the requirements of 29 C.F.R. § 1903.17(a) nor does not contain an explicit intent to contest the citation. It fairs no better when given a more liberal reading. The letter makes no mention of objections or defenses to the alleged violations. It simply asks to “discuss” them. For that reason, it is not a valid notice of contest.⁷ It was not until December 2, 2019, that L & C filed a letter expressing an intent to contest the citation. L & C did not file a timely notice of contest.

Is L & C’s Entitled to Equitable Relief?

The Commission requires an employer to exercise due diligence before it will find excusable neglect. *Keefe Earth Boring Company, Inc.*, No. 88-2521, 1991 WL 73223, at *6 (OSHRC March 25, 1991); *Craig Mechanical*, 1994 WL 197728, at *3. The Commission has consistently held “[e]mployers must maintain orderly procedures for handling important documents,” and that when the lack of such procedures results in the untimely filing of a notice of contest, relief under Rule 60(b) is not warranted. *Villa Marina Yacht Harbor, Inc.*, No. 01-0830, 2003 WL 716983, at *2 (OSHRC March 3, 2003) (company messenger mishandled mail); *A.W. Ross, Inc.*, No. 99-0945, 2000 WL 34235993, at *4 (OSHRC September 25, 2000) (employer's president failed to carefully read and act upon information contained in citation); *Montgomery Security Doors & Ornamental Iron, Inc.*, No. 97-1906, 2000 WL 33738376, at *3 (OSHRC April 27, 2000) (record showed a breakdown of business procedures such that relief was not warranted even assuming employee sabotage); *Louisiana-Pacific Corp.*, No. 86-1266, 1989 WL 223297, at *2 (OSHRC January 27, 1989) (notice of contest was overlooked due to personnel change in operations manager position).

L & C did not avail itself of the opportunity given by the court to provide an explanation why it failed to timely contest the citation. The court has only the affidavit of Mr. Jackson filed in response to the court’s show cause order. In that affidavit, Mr. Jackson indicates he was notified of his aunt’s imminent death the same day he received the citation or August 21, 2019. Unfortunately, his aunt passed away that night. Although the court is sympathetic to Mr. Jackson’s loss, he provides no further explanation as to how his aunt’s passing may have

⁷ The issue of Mr. Jackson’s good faith belief he was filing a valid notice of contest on August 26, 2019, is a consideration in the court’s analysis of whether L & C is entitled to equitable relief from the final order.

impacted his ability to see to his business obligations. Within a few days, Mr. Jackson filed a letter asking for an informal conference. He was in contact, through a series of voicemail messages, with the Area Office but apparently did not fully understand the information provided. Mr. Jackson's affidavit also contains the somewhat confusing statement at paragraph 4: "L & C Contractors requested a change of date and then was under the impression that a meeting was refused." The affidavit provides no context to this request and it is unclear to what date it is referring since no informal conference had been scheduled. Despite promising to do so, Mr. Jackson did not contact AD Morris on September 9, 2019, for which his affidavit provides no excuse.

After AD Morris contacted Mr. Jackson regarding the unpaid penalties and lack of abatement verification on October 28, 2019, Mr. Jackson again contacted the Area Office, leaving a voicemail promising to call back. In his affidavit, Mr. Jackson suggests his failure to contact the Area Office between September 9 and October 28 was due to the mistaken belief his original letter was sufficient to contest the citation. After being put on notice on October 28 that penalties were owed, Mr. Jackson again failed to follow up as promised. His affidavit provides no explanation for his failure to act again until November 25, 2019. During that conversation, AD Morris provided Mr. Jackson with the information necessary to file a notice of contest directly with the Commission. After being explicitly informed his August 26 letter was not a valid notice of contest, Mr. Jackson waited another week without explanation to file with the Commission.

L & C has provided no evidence of how it handles business mail. As such it has failed to meet its burden to establish it had orderly procedures for doing so. The court is left to speculate whether L & C lacks such procedures or some deviation from those procedures explains L & C's late filing. Absent evidence or explanation, the court is left to conclude L & C failed to exercise due diligence in its handling of the citation.

L & C did not address prejudice to the Secretary or the impact of the delay on efficient judicial administration. The Secretary argues there is potential for loss of evidence and delay, but its argument is based largely on speculation. The Commission has held neither a lack of prejudice to the Secretary nor good faith on the part of the employer in attempting to comply with the statutory filing requirement alone will excuse a late filing. *Fitchburg Foundry, Inc.*, Nos. 77-520 and 1073, 1979 WL 8463, at *3 (OSHRC June 29, 1979).

Although the lack of prejudice may weigh in L & C’s favor, consideration of good faith does not. The citation received by L & C contained explicit and distinct instructions on requesting an informal conference and filing of a notice of contest. Even assuming Mr. Jackson misunderstood the distinction and reasonably believed his August 26, 2019, letter requesting an informal conference constituted a written notice of contest, the Area Office’s contact on October 28, 2019, put Mr. Jackson on notice it did not. Mr. Jackson failed to act again until November 25. Since its filing of its notice of contest with the Commission, L & C has repeatedly ignored orders of the court and provided scant evidence in support of its request for relief. Rather than evidencing good faith, L & C’s pursuit of its contest can fairly be characterized as dilatory.

Commission precedent states “to be eligible for relief under Rule 60(b)(1), the moving party [] must allege a meritorious defense.” *Northwest Conduit*, 1999 WL 820636, at *5. L & C has not met that burden. When given the opportunity to articulate a defense, L & C remained silent.⁸ In failing to even articulate a defense, L & C has not met this threshold requirement for equitable relief.

The evidence, taken as a whole, does not support L & C’s request for relief. L & C provided no evidence it had adequate procedures that were not followed. It identified an intervening event but failed to explain how it interfered with its timely processing of the citation. The undisputed evidence establishes the company was exclusively to blame for the failure to timely file its notice of contest. L & C has failed to articulate a defense to the citations. It has not demonstrated good faith or diligence before the Commission. L & C has not met its burden to show its failure to timely file its notice of contest was the result of excusable neglect.

The Secretary has demonstrated the citation became a final order of the Commission on September 12, 2019. L & C seeks relief from that final order under Fed. R. Civ. Pro. 60(b) but has not met its burden to establish it is entitled to that relief. Accordingly, the Secretary’s motion to dismiss L & C’s notice of contest as untimely is granted.

ORDER

Based upon the foregoing decision, it is **HEREBY ORDERED** that the Secretary’s Motion to Dismiss Respondent’s Late Notice of Contest is **GRANTED**.

⁸ Following Eleventh Circuit three-part equitable analysis, L & C’s failure to articulate a defense to the allegations in the citation weighs against a finding of excusable neglect.

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.

Dated: December 31, 2020
Washington, DC

/s/
Heather A. Joys
Administrative Law Judge, OSHRC