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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.

KNOCK OUT HOMES INCORPORATED,

Respondent.

OSHR DOCKET NO. 21-0281

Appearances:

Seema Nanda, Solicitor of Labor
Christine Z. Heri, Regional Solicitor
Evert H. Van Wijk, Associate Regional Solicitor
Laura O'Reilly, Attorney
U.S. Department of Labor, Office of the Regional Solicitor, Kansas City, MO
For the Complainant

Kevin Long, *pro se*
Troy, IL
For the Respondent

Before: Covette Rooney, Chief Administrative Law Judge

ORDER DENYING RESPONDENT'S REQUEST FOR RELIEF FROM

DEFAULT JUDGMENT

This matter is before the undersigned on remand from the Occupational Safety and Health Review Commission (Commission). Following a series of events spanning nearly a year, detailed more fully below, the Commission remanded this matter to "provide Respondent with an opportunity to present evidence supporting its claim that it attempted in good faith to participate in the Commission's

proceedings and put forth a meritorious defense” and for the undersigned to determine whether relief is warranted under Federal Rule of Civil Procedure 60(b)(1). Pursuant to the Commission’s directive, a remote hearing was held on February 23, 2022, to provide Respondent the opportunity to present evidence in support of its request for relief.

Based on the evidence adduced at the hearing, Respondent is not entitled relief under Rule 60(b)(1), and its request for relief is therefore DENIED.

PROCEDURAL & FACTUAL BACKGROUND

Respondent, Knock Out Homes, Inc., is owned by Kevin Long. (Joint Stipulations of Fact ¶ 1). “Kevin Long’s email address is [redacted], and this has been his email address at all relevant times. Kevin Long is able to and regularly receives emails at this email address.” (*Id.* at ¶ 2). Respondent’s mailing address is “[redacted].” (*Id.* at ¶ 3). Mr. Long regularly receives mail related to Respondent’s business at this address. (Tr. 65).

On October 16, 2020, the United States Occupational Safety and Health Administration (OSHA) inspected a worksite “Next to (Right Side), 817 Nottingham Ave, Waterloo, IL 62298” under inspection number 1498015. (Citation at 6-13).

On February 18, 2021, OSHA issued three Citations and Notifications of Penalty (Citations) to Respondent for alleged violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act). The Citations consisted of a five-item citation alleging serious violations of 29 C.F.R. §§ 1926.25(a), 1926.302(b)(6), 1926.403(b)(1) & (b)(2), 1926.416(e)(1), and 1926.1053(b)(13); a second one-item citation alleging a “willful-serious” violation of 29 C.F.R. § 1926.501(b)(13); and a third one-item citation alleging an other-than-serious violation of 29 C.F.R. § 1926.503(b)(1). The Citations proposed a total penalty of \$41,349.

The Citations were mailed to Respondent at its address in Troy, Illinois.¹ (Citation at 1). On March 15, 2021, Mr. Long filed a Notice of Contest with OSHA challenging the Citations on behalf of Respondent and bringing this matter before the Commission.

On March 22, 2021, “Brittne Snyder, Legal Assistant for U.S. Department of Labor, Office of the Solicitor, sent an email to Kevin Long at [redacted], attaching the Secretary’s Entry of Appearance and Designation of Authorized Individual for Electronic Filing System” for Laura O’Reilly, an attorney with the U.S. Department of Labor, Office of the Solicitor. (Joint Stipulations of Fact ¶ 4; Tr. 13-16; Ex. 1).² Mr. Long received this email. (Joint Stipulations of Fact ¶ 4; Tr. 13, 31).

The Secretary filed his Complaint on March 29, 2021. On the same day, “Janessa Hurst, Legal Assistant for the U.S. Department of Labor, Office of the Solicitor, sent an email to Kevin Long at [redacted] attaching the Secretary’s Complaint, and Appendices A, B, and C to the Complaint.” (Joint Stipulations of Fact ¶ 5; Tr. 16-18; Ex. 2). Mr. Long received this email. (Joint Stipulations of Fact ¶ 5; Tr. 16, 31)

Respondent was required to file an Answer to the Complaint within 21 days of service, i.e., April 19, 2021. *See* 29 C.F.R. § 2200.34(b)(1). On April 19, 2021, the date Respondent’s Answer was due,

¹ The Certified Mail receipt was filed along with the Citations in the Commission’s e-filing system. The history for tracking number on this receipt (7018 1130 0002 2228 4160) indicates that it was delivered to Respondent’s address in Troy, Illinois on February 20, 2021. The receipt contains the notation “C19 229404.” The undersigned takes judicial notice that the entry of this notation was one procedure employed by postal workers in lieu of obtaining a recipient’s signature on a Certified Mail receipt to limit social interaction during the COVID-19 pandemic. *See* FED. R. CIV. P. 201(b)(2) (“The court may judicially notice a fact that is not subject to reasonable dispute because it: ... (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.); *see also In re USPS Civil Rule 4.1 Certified Mail Serv. of Process during the COVID-19 Pandemic*, JOURNAL ENTRY, <https://www.npmunicipalcourt.org/pdf/usps-20201117.pdf>, (New Phila., Oh. Mun. Ct., Nov. 17, 2020) (referencing a USPS document directing carriers to write their “route number and notate C19 in the ‘Receive By’ or ‘Printed Name’ section” of Certified Mail receipts and finding that “USPS Carriers are writing ‘COVID-19’ or ‘CV-19’ or similar notations” on Certified Mail receipts during the pandemic); *In re Certified Mail Serv. & Process during the COVID-19 Pandemic*, JOURNAL ENTRY, <https://www.co.wood.oh.us/juvenilecourt/MiscPDF/CertifiedMailC19.pdf>, (Oh. C.P., Wood Cty., Oct. 14, 2020) (same). Such procedure was only employed in the presence of a recipient at the delivery address; if there was no response at the delivery address, carriers were instructed to “follow the normal Notice Left” procedures. *Id.*

² The Joint Stipulations of Fact and its attached exhibits were admitted as Exhibit A. These exhibits will be referenced by their numeric labels within Exhibit A.

Mr. Long responded to Ms. Hurst's March 29th email, stating: "I found this email in my junk box sorry haven't responded sooner. In regard to the citations. I will be protesting them do the fact that the couple guys that were on that job were actually partners of the business." (Joint Stipulations of Fact ¶ 6; Tr. 19; Ex. 3, at 6). Ms. O'Reilly responded to this email and the following exchange occurred on April 19, 2021, in relevant part:³

Ms. O'Reilly:

Mr. Long,

I am the attorney for the Secretary of Labor in this matter. This matter has been filed with the Court with the Occupational Safety and Health Review Commission. As set forth in the Complaint, you will need to file an Answer with the Court. Your Answer is due today and that is a deadline with the Court.

All filings are now required to be made by e-filing and here is a link to the Court's website which contains information about how to e-file and the Court's procedural rules and other information.

<https://www.oshrc.gov/>

I have also re-attached a copy of the Complaint for your convenience. If you have any questions, please let me know.

(*Id.* at 5-6).

Mr. Long: "Sorry to bother you but it's asking for a username and password. I don't have this. Am I doing something wrong"

(*Id.* at 5).

Ms. O'Reilly:

Kevin,

You may need to create an account. This is the link to the Court's website which contains the instructions for electronic filing.

<https://www.oshrc.gov/guides/electronic-case-file-guide/>

(*Id.* at 4).

³ As an email chain, the exchange between Ms. O'Reilly and Mr. Long on April 19th is represented in reverse order in the exhibit submitted at the hearing. (Ex. 3). The exchange has been reproduced in this decision in the correct order. Any errors in grammar or spelling in the emails have not been corrected.

Mr. Long: “Ugh I really hate bothering you. I have everything done but all the sites just keep running saying checking username. I’m in Florida on family emergency and gotta be on plane by 3. So kinda freaking out to get this done before it’s to late.”

(*Id.*)

Ms. O’Reilly:

Kevin,

I do not work for the Court so do not know what the issue is. I am the attorney for the Secretary of Labor in this matter. On the Court’s website, they do have an email address for support questions regarding the online filing. That email address is mp.support@oshrc.gov

(*Id.* at 3).

Mr. Long: “I understand sorry not trying to be a pain. Just kinda freaking out since last day and of course things not wrkn right”

(*Id.* at 2).

Mr. Long: “Just FYI I have no idea what else to do. I did support thing and it sent me a new password and still will not let me in. All it’s doing is running with code saying checking for username.”

(*Id.* at 2).

Ms. O’Reilly:

Kevin, The Court may be able to help with the technical issues and they may have a phone number, to reach someone to talk to about whatever is going on. I do not have that number but you may be able to find out via the email address I sent you previously.

(*Id.* at 1-2).

Mr. Long: “Ugh I’m sorry Really. I know this is not your issue but it’s saying contact judges office directly. Know where on anything do I see a judge name or office contacts. Do you know anything” (Joint Stipulations of Fact ¶ 6; Tr. 22; Ex. 3, p.1).

Ms. O’Reilly: I believe this case is with Chief Judge Rooney right now. I believe the legal assistant for Judge Rooney can be contacted at 202-606-5405. If that does not work, the general court number is 202-606-5400 and someone there might be able to direct you to the clerk or person who could help.

(*Id.* at 1).

Also on April 19, 2021, Mr. Long created an account in the Commission’s e-filing system, inputting his name (Kevin Rodger Long), the name of his company (Knock out homes), his mailing

address ([redacted]), a phone number ([redacted]), and his email address ([redacted]). (Tr. 51-53; Court Ex. A). However, thereafter and to date, Respondent has not filed an Answer to the Secretary's Complaint in the Commission's e-filing system.

On May 12, 2021, the undersigned issued an Order to Show Cause Why Notice of Contest Should Not Be Dismissed (Show Cause Order) for failure to file an Answer. The Show Cause Order directed Respondent to show cause, on or before May 26, 2021, as to why it should not be declared in default for not filing an Answer to the Complaint. The Show Cause Order explained that if there was no response, all of the alleged violations set out in the Citations would be affirmed and the proposed penalties would be assessed without a hearing. Two copies of the Show Cause Order were mailed to Respondent's office in Troy, Illinois, one by First-Class Mail and one by Certified Mail with return receipt requested. The return receipt for the copy of the Show Cause Order sent via Certified Mail was returned to the Commission on May 26, 2021, and indicates it was served on an agent of Respondent on May 17, 2021.⁴ The copy of the Show Cause Order sent by First-Class Mail was not returned to the Commission's office.

On the same date the Show Cause Order was issued, May 12, 2021, "Brittne Snyder, Legal Assistant for the U.S. Department of Labor, Office of the Solicitor, sent Kevin Long an email at [redacted] attaching an Entry of Additional Appearance and Designation of Authorized Individual for Electronic Filing System" for Megan McGinnis, an attorney with the Department of Labor, Office of the Solicitor. (Joint Stipulations of Fact ¶ 7; Tr. 23; Ex. 4). Mr. Long received this email. (Joint Stipulations of Fact ¶ 7; Tr. 23, 31).

On May 26, 2021, the deadline for a response set forth in the Show Cause Order, Mr. Long responded to Ms. Snyder's May 12th email: "I left a message on phone. I have been trying to get e-file to

⁴ The tracking number (7020 1810 0002 2835 3611) confirms this date of delivery. The signature block of the return receipt reads "229404 C19" in accordance with USPS's COVID-19 policy for Certified Mail at the time. See Note 1, *supra*.

w[or]k and it will not. Can we please try a different way to get what information you need from us. We hav[e] no employees we are owners of business that was on jobsite and can provide proof if we can come up with another way to do so.” (Joint Stipulations of Fact ¶ 8; Tr. 24; Ex. 5, at 2). Mr. Long did not attach any documents to this email. (Joint Stipulations of Fact ¶ 8; Tr. 24). On the same date,

Megan McGinnis responded to Long’s email providing him with information about filing documents with OSHRC. ... On this date Megan McGinnis and Kevin Long also spoke by telephone after Kevin Long left a voicemail with the Office of the Solicitor. Megan McGinnis and Kevin Long discussed e-filing with the Court, and Megan McGinnis followed up after this phone call” in an email as follows:

Mr. Long,

Thank for speaking with me. It’s unclear what the technical issue might be that is preventing you from e-filing. In the meantime, here is the contact information for the judge’s administrative assistant:

T.B. Dillard
(202) 606-5405
FAX (202) 606-5409

The administrative assistant may be able to assist you with submitting the filing that is due today in case No. 21-0281.

Also, for future reference, I believe that you can direct questions or seek technical assistance and troubleshooting with the OSHRC e-filing system, to mp.support@oshrc.gov.

(Joint Stipulations of Fact ¶ 8; Tr. 25-26; Ex. 5, at 1).

On or before June 2, 2021, the undersigned’s Administrative Assistant, Tia Dillard, received a phone call from Mr. Long regarding assistance with filing an answer for this matter. (Tr. 41-43; 54-55). In response to that phone call, she sent an email to Mr. Long, dated June 2, 2021, with the subject line “Instructions to File Answer,” Ms. Dillard quoted the Commission’s rule for the filing of an Answer and provided a sample Answer. (Tr. 54-55; Court Ex. B; *see also* 29 C.F.R. § 2200.34(b)). Ms. Dillard never received a response to this email, and Respondent did not file an Answer after receiving this email. (Tr. 45-46, 56). Until after the Commission issued its remand order on December 29, 2021, neither Ms.

Dillard, nor Ms. O'Reilly, nor Ms. McGinnis had any further contact with Mr. Long regarding this case or the filing of an Answer. (Joint Stipulations of Fact ¶ 11-14; Tr. 56).

On August 3, 2021, the Secretary filed a Motion for Default Judgment, seeking dismissal of the Notice of Contest based on Respondent's continued failure to file an Answer. This Motion was served on Respondent by mailing a copy to its address in Troy, Illinois. (Ex. 6, at 4).

In an Order of Default for Failure to File an Answer (Order of Default), dated September 27, 2021, the undersigned dismissed Respondent's Notice of Contest based on Respondent's failure to make any responsive filings, either an Answer, a response to the Show Cause Order or a response to the Secretary's Motion for Default Judgment. The Order of Default noted that Respondent had multiple months from the time the Show Cause Order was issued to respond, but Respondent had failed to do so. In dismissing Respondent's Notice of Contest, the Order of Default effectively granted the Secretary's Motion for Default Judgment. The Order of Default became a final order of the Commission on November 1, 2021.

Thereafter, on November 18, 2021, Respondent, proceeding pro se by its owner Mr. Long, filed a letter with the Commission (November 18th Letter). This Letter, which was addressed "To Osha," was labeled as a "Late Notice of Contest."⁵ In this letter, Mr. Long stated that he was unable to access the "Osha Portal" despite multiple calls to the "Kansas City Office and Washington Office." Mr. Long went on to state that he has emails with Laura O'Reilly, who first entered an appearance on behalf of the Secretary for this matter, which show Ms. O'Reilly's attempts to help Mr. Long gain access to the Portal with "no success." Mr. Long further stated that Respondent is an "[e]mployee owned company" that has "no employees" and that he wishes to submit proof of such but has so far been unable to do so due to lack of the access to the Portal. Mr. Long requested "help on this matter" because he is "not a computer person"

⁵ The undersigned notes that Respondent had already filed a Notice of Contest for this matter, and the Secretary has never alleged that it was untimely.

but had been “trying to do everything in my power to get help with this matter.”

In a Remand Order dated December 29, 2021, the Commission granted Respondent’s request and remanded this matter for further proceedings. Construing Respondent’s November 18th Letter as a request for relief from a final order under Rule 60(b)(1), the Commission found that: 1) Respondent appeared to mistakenly believe the Commission and OSHA were one and the same; 2) the inspection number in Respondent’s letter relates to a different set of Citations from years ago and “if Respondent had attempted to file its letter as a notice of contest using information associated with that prior case, an error message would be generated” by the Commission’s e-filing system; and 3) it was not clear what filings Respondent had actually received because the return receipt for the Show Cause Order did not show who signed for it on the company’s behalf and the Secretary’s counsel had failed to indicate whether she had conferred with Respondent prior to filing the Motion for Default Judgment. Based on these considerations, the Commission set aside the Order of Default and remanded this matter to the undersigned to “provide Respondent with an opportunity to present evidence supporting its claim that it attempted in good faith to participate in the Commission’s proceedings and put forth a meritorious defense” and thereafter determine whether relief is warranted under Rule 60(b)(1).

On February 23, 2022, an evidentiary hearing was held by way of remote videoconferencing technology. The Secretary’s attorney, Ms. O’Reilly, read the Joint Stipulations of Fact and the contents of some of the attached exhibits into the record. (Tr. 13-30). All of the attached exhibits were admitted into the record. (Tr. 29-30; Exs. 1-7). Respondent briefly testified but did not submit any further documents in support of its request for relief. (Tr. 10-12, 31-47, 59, 63-65). The undersigned called Ms. Dillard as a witness (Tr. 48-57) and entered two documents into the record: 1) a copy of a printout from the Commission’s e-filing system indicating Mr. Long created a profile on April 19, 2021 (Tr. 51-53; Court Ex. A); and 2) a copy of the email Ms. Dillard sent to Mr. Long on June 2, 2021, with instructions

on how to file an Answer (Tr. 53-56; Court Ex. B).

Based on the evidence presented in this matter, Respondent's request for relief from the Order of Default under Rule 60(b)(1) is DENIED.

ANALYSIS

I. Applicable Law

Federal Rule of Civil Procedure 60(b)(1) states: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect ..." "Relief under 60(b) is an extraordinary remedy to be granted only in exceptional circumstances." *Buchanan v. Illinois Dep't of Hum. Servs.*, 15 F. App'x 366, 368 (7th Cir. 2001) (unpublished).⁶ Respondent bears the burden of demonstrating that it is entitled to relief under Rule 60(b)(1). *In re Canopy Fin., Inc.*, 708 F.3d 934, 937 (7th Cir. 2013); *La.-Pac. Corp.*, No. 86-1266, 1989 WL 223297, at * 2 (O.S.H.R.C., Jan. 27, 1989) ("The burden is on the employer to show sufficient basis for relief under the rule").

Here, the final order from which Respondent is seeking relief is the Order of Default issued on September 27, 2021, which dismissed Respondent's Notice of Contest, affirmed the violations in the Citations, and assessed the \$41,349 penalty set forth in the Citations. (Order of Default at 4). On the evidence presented, there is no basis for finding that the Order of Default was based on a "mistake," which "typically involves a misunderstanding of the surrounding facts and circumstances." *Eskridge v. Cook Cty.*, 577 F.3d 806, 809 (7th Cir. 2009). Nor is there any evidence of inadvertence in the Order of Default, which would require that the Order overlooked a crucial aspect of the case that existed when the Order

⁶ "Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96- 1719, 2000). The alleged violation here took place in Illinois, in the Seventh Circuit.

was issued.⁷ See, e.g., *Mendez v. Republic Bank*, 725 F.3d 651, 660–61 (7th Cir. 2013) (finding no error where the district court vacated its order under Rule 60(b)(1) after it failed to consider a magistrate’s report in recommendation in reaching its original decision). Finally, this is not a case where Respondent could have been surprised by the evidence relied on in the Order of Default, and thereby entitled to relief therefrom. Cf. e.g., *Sadowski v. Bombardier Ltd.*, 539 F.2d 615, 619 (7th Cir. 1976) (finding no abuse of discretion in the trial court denying a 60(b) motion on the basis of “surprise” expert witness testimony at trial). Rather, the only apparent potential basis for relief would be Respondent’s “excusable neglect” in failing to file any responsive pleadings in this matter.⁸

In considering requests for relief for “excusable neglect” under Rule 60(b)(1),⁹ the Commission applies the framework set out in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993) (*Pioneer*),¹⁰ where the Court 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 . . . the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial

⁷ Except for the email sent by Ms. Dillard on June 2, 2021 (Tr. 54-55; Court Ex. B), no additional, relevant evidence was available when the Order of Default was issued. In any event, Ms. Dillard’s email would have only bolstered the Order of Default’s conclusion that Respondent had engaged in “a pattern of disregard for these proceedings” (see Order of Default at 4), given that, despite receiving this email, Respondent never replied to it nor filed an Answer in response. (Tr. 45-46, 56).

⁸ Indeed, this was the main focus of the Commission’s Remand Order. See Remand Order 2-3 (discussing factors relevant to excusable neglect).

⁹ The Order of Default against Respondent was a sanction imposed under Commission Rule 101(a) for failing to file or an Answer or otherwise respond to the Show Cause Order. See 29 C.F.R. § 2200.101(a) (“When any party has failed to plead or otherwise proceed as provided by these rules or as required by ... the Judge, the party may be declared to be in default ...”). Commission Rule 101(b) provides the vehicle for relief from such a sanction. See 29 C.F.R. § 2200.101(b) (“For reasons deemed sufficient by ... the Judge ... the Judge may set aside a sanction imposed under paragraph (a) of this section.”). As the Commission noted in *Architectural Glass & Metal Co.*, however, the factors to be considered under Rule 101(b) are the same as those considered for “excusable neglect” under Rule 60(b)(1). See *Architectural Glass & Metal Co.*, No. 00-0389, 2001 WL 1041005, at *2 (O.S.H.R.C., Sept. 6, 2001) (“In considering whether to reinstate a case under [the predecessor rule to Rule 101(b)], the Commission has also looked at the criteria under [Rule] 60(b), particularly whether the sanctioned party has shown ‘excusable neglect.’”).

¹⁰ The Seventh Circuit also applies the *Pioneer* framework. See, e.g., *Moje v. Fed. Hockey League, LLC*, 792 F.3d 756, 758-59 (7th Cir. 2015).

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.

Nw. Conduit Corp., No. 97-0851, 1999 WL 820636, at *3 (O.S.H.R.C., Sept. 30, 1999), quoting *Pioneer*, 380 U.S. at 395. The moving party must also allege a meritorious defense to prevail under Rule 60(b)(1). *Nw. Conduit*, 1999 WL 820636, at *5.

A. Meritorious Defense Established

As to the second criterion, Mr. Long’s proffered defense to all of the violations was that Respondent had no employees at the time the Citations were issued and that the workers who were the subject of the Citations were subcontractors. (Tr. 12, 37-39)¹¹. In this regard, generally the Act only “imposes a duty on an ‘employer’ to provide for the on-the-job safety and health of its ‘employees.’ ” *Van Buren-Madawaska Corp.*, No. 87-214, 1989 WL 223348, at *1(O.S.H.R.C., Apr. 21, 1989) (consolidated). “Therefore, a business organization is generally only liable under the Act for violations that affect the safety or health of persons with whom it has entered into an employment relationship.”¹² *Id.* Thus, Respondent’s proffered defense, if proven would constitute a meritorious defense to the violations. *See, e.g., FreightCar Am., Inc.*, No. 18-0970, 2021 WL 2311871, at *2-3, (O.S.H.R.C. Mar. 3, 2021) (no liability where employer-employee relationship was not established).

B. Excusable Neglect not Established under Pioneer

On this record, however, Respondent has not demonstrated excusable neglect for failing to file an

¹¹ Mr. Long provided sworn testimony on behalf of the Respondent.

¹² In some instances, multiple employers can be responsible for the health and safety of workers on a worksite under OSHA’s multi-employer worksite theory of liability even if no direct employment relationship exists. *See* Multi-Employer Citation Policy, OSHA Instruction (Dec. 10, 1999); *see also U.S. v. Pitts-Des Moines*, 168 F.3d 976, 985 (7th Cir. 1999); *Summit Contractors, Inc.*, No. 03-1622, 2009 WL 2857148, at *6 (O.S.H.R.C., July 27, 2009). The Citations do not appear to allege this type of liability in this case. In any event, at this stage of the proceeding, Respondent’s defense, if proven, satisfies the meritorious defense prong of its request for relief under Rule 60(b)(1). *See Jones v. Phipps*, 39 F.3d 158, 165 (7th Cir. 1994) (“A meritorious defense is not necessarily one which must, beyond a doubt, succeed in defeating a default judgment, but rather one which at least raises a serious question regarding the propriety of a default judgment and which is supported by a developed legal and factual basis.”)

Answer or any responsive pleadings at all. Although all the *Pioneer* factors weigh against granting Respondent relief, “the reason for the delay, including whether it was within the reasonable control of [Respondent]” and “whether [Respondent] acted in good faith” weigh most heavily against Respondent here. *Pioneer*, 380 U.S. at 395.

Mr. Long’s principal excuse for failing to file any responsive pleading in this matter since it was brought before the Commission in March of 2021, both in his November 18th Letter to the Commission and at the hearing, was that he was unable to access the Commission’s e-filing system and that he did the “best [he] could” to respond despite not being computer savvy. (Tr. 11, 41-42, 46, 59). However, other than the emails presented in the Joint Stipulations of Fact,¹³ Mr. Long presented no other evidence of his efforts to access the Commission’s e-filing system or comply with the filing deadlines under the Commission’s rules. What the stipulated emails show is that twice, first on the due date for the filing of the Answer and again on the due date for a filing of the response to the Show Cause Order, Mr. Long attempted to gain access to the Commission’s e-filing system. (Joint Stipulations of Fact ¶¶ 6, 8; Tr. 19-22, 24, 51-53; Exs. 3 & 5; Court Ex. A). While he apparently did gain some access to the e-filing system on April 19, 2021,¹⁴ he never filed anything and no reasons were elucidated at the hearing for this lack of filing or any other efforts to comply with the required filings. In both email exchanges with the OSHA attorneys, Mr. Long was given the email address for the Commission’s technical support as well as the phone number of the undersigned’s legal assistant, Ms. Dillard. (Joint Stipulations of Fact ¶¶ 6, 8; Tr. 21, 25-26; Ex. 3, at 1, 3, Ex. 5, at 1). Ms. O’Reilly also sent Respondent a link to the Commission’s website with information on e-filing and the Commission’s main number. (Joint Stipulations of Fact ¶ 6; Tr. 20;

¹³ This refers to emails which the undersigned ordered to be produced at the February 23rd hearing. *See* Order to Schedule a Remote Hearing at 5, OSHRC Docket No. 21-0281 (Jan. 4, 2022).

¹⁴ Court’s Exhibit A, as explained by Ms. Dillard, establishes that Mr. Long *was* able to enter the Commission’s e-filing system in some way, create a profile, and input Respondent’s identifying information. (Tr. 51-53; Court Ex. A).

Ex. 3, at 1, 4).

Respondent presented no evidence that he attempted to contact Ms. Dillard following his exchange with Ms. O'Reilly or to call the Commission's main number provided by her. While the email exchange with Ms. O'Reilly suggests Mr. Long may have contacted the Commission's technical support once on April 19, 2021,¹⁵ he produced no email evidence of this exchange and no evidence that he ever followed up on this exchange when he was still unable to access the e-filing system. Then, from April 19, 2021, the due date for the filing of Respondent's Answer, until May 26, 2021, the due date for a response to the Show Cause Order, the record is devoid of *any* evidence suggesting Mr. Long attempted to make the required filings or resolve his technical issue with the Commission's e-filing system. On May 26, 2021, Mr. Long did contact Ms. McGinnis, which resulted in him yet again being directed to the Commission's technical support and Ms. Dillard for assistance. (Joint Stipulations of Fact ¶ 8; Tr. 24; Ex. 5, at 2). Respondent again produced no evidence that he attempted to contact the Commission's technical support after contacting Ms. McGinnis.

The only further evidence of Mr. Long's attempts to access the Commission's e-filing system and make the required filings is his exchange with Ms. Dillard on June 2, 2021. In response to a phone conversation, Mr. Long received an email from Ms. Dillard regarding the Commission's rules for filing an Answer. (Tr. 39-41, 53-56; Court Ex. B). Ms. Dillard never received a response to this email. (Tr. 56). Although Mr. Long testified he remembered responding to this email by admitting or denying the allegations in the Complaint, he produced no evidence of any such response ever being sent.¹⁶ (Tr. 41, 45-

¹⁵ See Ex. 3, at 2 ("I did support thing and it sent me a new password and still will not let me in.").

¹⁶ In fact, Mr. Long was able to locate Ms. Dillard's email on his phone at the hearing but admitted there was no response sent thereto as he testified. He explained at the hearing that he was positive his answer was in an email; however, when given the opportunity to provide such proof at the hearing, he responded that he could not find the answer in his emails and he could go back and look some more, but he would have to do it on his computer. The undersigned finds this a poor explanation in light

46).

Thus, on the whole, the record evidence demonstrates that Mr. Long was aware of his obligations for responding to filings and orders issued in this matter. He made at most a minimal effort to comply with those obligations by waiting until the due dates for filing an Answer to the Complaint and for filing a response to the Show Cause Order. When Mr. Long was allegedly met with an alleged technological obstacle, the record reveals a pattern of conduct wherein Mr. Long chose to shut down rather than ramp up any efforts to meet his obligations. After he failed to file anything on the due dates, he made only one more attempt, by contacting Ms. Dillard, to comply with his obligations and ultimately never filed anything after receiving the email from Ms. Dillard. Furthermore, his ability to respond via email at critical moments throughout the course of this proceeding reveals that he was not completely ignorant of technological tools. Such conduct demonstrates, at best, “inexcusable inattentiveness or neglect, rather than excusable carelessness,” *Cato v. Thompson*, 118 F. App’x 93, 97 (7th Cir. 2004) (unpublished), if not outright disregard for Respondent’s obligations in this matter. *See Sealtite Corp.*, No. 88-1431, 1991 WL 132733, at *6 (O.S.H.R.C., June 28, 1991) (contumacious conduct established where party engaged in a “consistent pattern” of failure to respond to judge’s orders). Moreover, Mr. Long’s status as a pro se representative for Respondent does not excuse his failure to at least attempt to comply with his obligations in this matter. *See Casimir v. Sunrise Fin., Inc.*, 299 F. App’x 591, 593 (7th Cir. 2008) (unpublished) (“[A]ll litigants, including pro se litigants, are responsible for maintaining communication with the court and monitoring the status of their lawsuit as necessary.”); *Casio Computer Co. v. Noren*, 35 F. App’x 247, 250 (7th Cir. 2002) (unpublished) (“Pro se litigants are entitled to a limited degree of procedural protections as provided by statutes and case law, but they are not entitled to claim complete dispensation

of the fact that the purpose of the hearing was to provide Respondent the opportunity to produce all evidence of its attempts to comply with the Show Cause Order. (Tr. 45-46).

of procedural rules.”).

Neither of the remaining *Pioneer* factors, “the danger of prejudice to the [opposing party]” and “the length of the delay and its potential impact on judicial proceedings” weighs in favor of granting Respondent’s request for relief. As the Secretary’s counsel pointed out at the hearing, it has been nearly a year since the Citations were issued and the matter has yet to even proceed to discovery. (Tr. 59-60). This length of delay tilts in favor of denying Respondent’s request for relief under both of these factors. See *U.S. v. Cates*, 716 F.3d 445, 449 (7th Cir. 2013).

C. Commission’s Factors on Remand

As to the factors the Commission relied on in remanding this matter, the evidence adduced at the hearing demonstrated the following.

First, although Mr. Long did appear to conflate the Commission and OSHA in his November 18th Letter and continued to do so at the hearing (Tr. 31-32), such belief was not reasonable by that point in time. In her email exchange with Mr. Long, Ms. O’Reilly made it clear in multiple emails that she was the attorney for the Secretary of Labor and that the matter of filing a response was to be handled “with the Court[,] with the Occupational Safety and Health Review Commission.” (Joint Stipulations of Fact ¶ 6; Tr. 19-22; Ex. 3, at 5-6). In her final email on April 29, Ms. O’Reilly made it clear that she was providing the phone number for the Chief Judge’s legal assistant and that any further technical issues would have to be handled with the “court.”¹⁷ (Joint Stipulations of Fact ¶ 6, Tr. 22, Ex. 3, at 1). It is further noted that

¹⁷ Both Ms. O’Reilly and Ms. McGinnis provided Mr. Long with the email address for the Commission’s technical support as well as Ms. Dillard’s phone number. (Joint Stipulations of Fact ¶¶ 6, 8; Tr. 21, 25-26; Ex. 3, at 1, 3, Ex. 5, at 1). Ms. O’Reilly also sent Mr. Long a link to the Commission’s website as well as the Commission’s main phone number. (Joint Stipulations of Fact ¶ 6; Tr. 20; Ex. 3, at 1, 4). Mr. Long in fact emailed technical support and spoke with Ms. Dillard pursuant to some of the information sent to him. (Joint Stipulations of Fact ¶ 6; Tr. 21, 54-55; Ex. 3, at 2, Court Ex. B). Thus, unlike the Remand Order in *Arch-Tech Constr.*, No. 19-1922, 2020 WL 5880240 (O.S.H.R.C., Sept. 25, 2020), cited in the Commission’s Remand Order, Respondent was given ample information as to whom to contact regarding Commission proceedings.

Commission records for the incorrect inspection number listed on Respondent's November 18th Letter, Inspection No. 1217791 which corresponds to Docket No. 17-1488, reveal a prior Citation issued to Respondent in 2017. Mr. Long also represented Respondent in that matter. Thus, not only was Mr. Long directly told the Commission and OSHA were two different entities, it is also apparent that Mr. Long had some familiarity with the difference between the Commission and OSHA.

Second, with regard to the incorrect inspection number included in the November 18th Letter, Mr. Long acknowledged receiving a previous citation, but stated that his sister, who helped him prepare the Letter, was responsible for including the incorrect inspection number. (Tr. 34-36).¹⁸ Mr. Long provided no evidence to show that he received an error message when he put this information in the Commission's e-filing system or that the reason he was unable to file any responsive pleadings was the result of inputting the wrong inspection number, as the Commission speculated may have occurred. *See* Remand Order at Third, indeed, as noted above, Mr. Long provided little evidence of any actual efforts to access the Commission's e-filing system.

Finally, with regard to what documents Respondent had or had not received at the time the Order of Default was issued, the record demonstrates that Respondent had received all relevant documents. To start, Mr. Long never denied receipt of any documents for this matter, including the Complaint or the Show Cause Order. Instead, he acknowledged that he regularly received mail at the Troy, Illinois address where all the documents were sent. (Tr. 65). Based on the Joint Stipulations of Fact, it is conceded that Mr. Long twice received the Complaint via email. (Joint Stipulations of Fact ¶¶ 5-6; Tr. 16-20; Ex. 2, Ex. 3, at 5-6).

¹⁸ The undersigned notes with interest that Respondent testified that his sister assisted him with the preparation of his letter sent to the Executive Secretary dated October 28, 2021, and that the source of the erroneous inspection number on that letter was not known to him. (Tr. 34-35). This testimony certainly shows the ability to solicit help when responding to the Commission. The undersigned also notes that Respondent had been given contact information for the Commission at multiple times and in multiple forms, *i.e.* email and phone numbers.

As to the Show Cause Order, the notation of “229404 C19” made on the Certified Mailing Receipt was in accordance with USPS’s practice during the COVID-19 pandemic. *See* Note 1, *supra*. In accordance with the USPS’s practice, such notation would only have been made if someone was present at the delivery address to receive the mailing. *Id.* Further evidence supports the conclusion that Respondent in fact received the Show Cause Order. First, the tracking number for the Show Cause Order corroborates that it was in fact delivered in Troy, Illinois on May 17, 2021. *See* Note 4, *supra*. Second, as noted in the Order of Default, the First-Class mailing of the Show Cause Order was never returned to the Commission’s office and is therefore presumed to have been delivered by the Postal Service. *See Nimz Transp., Inc.*, 505 F.2d 177, 179 (7th Cir. 1974). Third, the timing of Mr. Long’s email to Ms. McGinnis on May 26, 2021, the exact date a response to the Show Cause Order was due, strongly suggests he had received the Order and was attempting to file a response before the deadline. (Ex. 5, at 2). The content of this email confirms as much in that Mr. Long stated he was “trying to get e-file to w[o]rk and it will not.” (Joint Stipulations of Fact ¶ 8; Tr. 24; Ex. 5, at 2).

Thus, to the extent the *Pioneer* factors did not already weigh in favor of denying Respondent’s request for relief under Rule 60(b)(1), none of the factors identified by the Commission weigh in favor of granting Respondent such “extraordinary” relief. *See Buchanan*, 15 F. App’x at 368.

CONCLUSION

Respondent has produced no “essential evidence” and failed to carry its burden of demonstrating excusable neglect such that it is entitled to relief under Rule 60(b)(1). *See In re Canopy Fin., Inc.*, 708 F.3d at 937 (“Whenever the judiciary adopts an ‘all the facts and circumstances’ approach, as [*Pioneer*] did, litigants need to supply ... details” to justify relief under Rule 60(b)). Accordingly, its request for relief is DENIED.

ORDER

For these reasons, it is hereby ORDERED that:

1. Respondent's request for relief from the Order of Default, dated September 27, 2021, under Federal Rule of Civil Procedure 60(b)(1) is DENIED.

2. The Order of Default is REINSTATED, Respondent is in DEFAULT, its Notice of Contest is DISMISSED, and the Citations issued to Respondent on February 18, 2021, as a result of OSHA inspection number 1498015 are AFFIRMED in their entirety and \$41,349 in penalties are ASSESSED.

SO ORDERED.

/s/
Covette Rooney
Chief Judge, OSHRC

Dated: April 1, 2022
Washington, D.C.