UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>SEYFORTH ROOFING CO., INC.,<br>Respondent. | OSHRC DOCKET NO. 05-1108 |

## ***ORDER***

This matter is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"), for the sole purpose of determining whether Respondent, Seyforth Roofing Co., Inc. ("Respondent" or "Seyforth") is entitled to relief under Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"). The Secretary opposes the granting of such relief. For the reasons that follow, I find that Respondent is not entitled to Rule 60(b) relief in this case.

## ***Background***

The Occupational Safety and Health Administration ("OSHA") inspected a work site of Seyforth on March 25, 2005; as a result, OSHA issued to Seyforth a citation alleging one serious violation and one repeat violation. Seyforth filed a timely notice of contest, bringing this matter before the Commission. On July 19, 2005, the Secretary filed her complaint. After Seyforth failed to file an answer to the complaint, on September 9, 2005, I issued an order to show cause as to why Seyforth should not be declared in default and the citation and proposed penalties affirmed. Seyforth did not respond to the order to show cause by the required date, and on September 23, 2005, I issued a decision and order dismissing Seyforth's notice of contest and affirming the citation and proposed penalties. On September 29, 2005, F. Ross Beedle, Seyforth's safety director and designated representative in this matter, filed a letter explaining that he had been attempting to settle the matter with OSHA, that the OSHA representative with whom he had been speaking had not gotten back to

him as promised, and that he had heard nothing more about the case until the decision and order was received. Based upon the letter, I reinstated the case on October 6, 2005.[1]

On November 21, 2005, the case was assigned to another Commission administrative law judge, James H. Barkley. On December 14, 2005, the Secretary served on Seyforth requests for admissions, interrogatories and production of documents. Seyforth did not respond to the requests in a timely fashion, and on January 23, 2006, the Secretary sent a letter to Seyforth stating that if the discovery requests were not received by January 30, 2006, a motion to compel would be filed. Again, Seyforth did not respond. On February 8, 2006, the Secretary filed a motion to compel, and on February 22, 2006, after Seyforth's counsel made an oral motion for continuance and represented that the discovery responses would be filed immediately, Judge Barkley continued the hearing in this case until May 10, 2006. Once more, however, no responses were filed to the discovery requests.

On March 13, 2006, Judge Barkley issued an order to show cause as to why the citation and penalties should not be affirmed for Seyforth's failure to respond to the discovery requests. Seyforth did not respond to the order. On March 28, 2006, Judge Barkley issued a second order to show cause as to why the citation and penalties should not be affirmed, and Seyforth did not respond to this order, either. The Secretary filed a motion for default judgment on April 28, 2006, after which, on May 10, 2006, Judge Barkley issued a decision and order affirming the citation and penalties. The decision and order became a final order of the Commission on June 12, 2006.

On October 4, 2006, Seyforth, through its new attorney, filed a Rule 60(b) motion for relief from judgment, and on October 18, 2006, the Secretary filed her opposition to the motion. On October 23, 2006, Seyforth filed an amended motion for Rule 60(b) relief. On October 26, the Secretary filed her opposition to the amended motion. On November 29, 2006, the Commission referred the matter to the undersigned for assignment or further proceedings.

***Discussion***

The Commission has long held that, pursuant to Rule 60(b), it has the authority to reinstate a case that has become a final order; Rule 60(b) provides relief if the final order was entered as a

[1]At this point, Mr. Beedle evidently arranged for an attorney, Alan Owen, to represent Seyforth. However, there is no letter in the record stating that Mr. Owen was representing the company; consequently, filings in this matter continued to be sent to Mr. Beedle at Seyforth.

result of "mistake, inadvertence, surprise, or excusable neglect" or "any other reason justifying relief," including circumstances such as absence, illness or a similar disability that would prevent a party from protecting its interests.[2] *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2116-17 (No. 80-1920, 1981.). The party seeking relief has the burden of proving it is entitled to relief.

In its initial motion, Seyforth contends it is entitled to relief under Rule 60(b)(1), which provides relief from a final judgment, order or proceeding for "mistake, inadvertence, surprise, or excusable neglect." Seyforth notes that the Commission follows the meaning of "excusable neglect" set out by the Supreme Court in *Pioneer Inv. Serv. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380 (1993) ("*Pioneer*"). *See Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1950 (No.97-851, 1999). Seyforth also notes that in *Pioneer*, the Court stated as follows:

> With regard to [whether] a party's neglect of a deadline is excusable, ... we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

507 U.S. at 395 (footnote omitted).

In its first motion, Seyforth asserts that it is "innocent" with respect to the failures to file, that its attorney, Mr. Owen, misled it in regard to his actions in the case, and that the reasons for the default judgment entered against it should be deemed excusable neglect. In support of its assertion, Seyforth relies on an affidavit of Candice Ennis, the secretary/treasurer of Seyforth.

In its amended motion, Seyforth contends it is also entitled to relief under Rule 60(b)(6), which provides relief from a final judgment, order or proceeding for "any other reason justifying relief." In this regard, Seyforth cites to a Ninth Circuit case, *Community Dental Serv. v. Tani*, 282

---

[2]The Secretary contends the Commission does not have such authority, especially in this case, which arose in the Fifth Circuit. She notes that in *Brennan v. OSHRC*, 502 F.2d 30, 32-33 (5th Cir. 1974), the Fifth Circuit explicitly held the Commission does not have the authority to reinstate a case after it has become a final order. However, as Seyforth points out, in *Monroe & Sons, Inc.*, 4 BNA OSHC 2016 (No. 6031, 1977), the Commission specifically declined to follow the Fifth Circuit holding, believing it was wrongly decided, and held that Rule 60(b) does in fact allow relief from a final order of the Commission. The Sixth Circuit upheld the Commission's decision in *Marshall v. Monroe & Sons, Inc.*, 615 F.2d 1156 (6th Cir. 1980).

F.3d 1164 (9th Cir. 2002) ("*Tani*"), which held the attorney's gross negligence in that case warranted relief under Rule 60(b)(6); in *Tani*, the attorney failed to file and serve pleadings, while representing to his client he was performing his responsibilities, which resulted in a default judgment. Seyforth asserts that as in *Tani*, Mr. Owen was grossly negligent, such that Rule 60(b)(6) relief is warranted; in support of its assertion, Seyforth again relies on the affidavit of Candice Ennis.

The Secretary disputes Seyforth is entitled to relief under Rule 60(b)(1). She also cites to *Pioneer* and notes that the "proper focus is upon whether the neglect of respondents *and their counsel* was excusable." 507 U.S. at 397 (emphasis in original). She further notes this is so because "clients must be held accountable for the acts and omissions of their attorneys." *Id*. at 396. She goes on to quote the following from *Pioneer*:

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omission of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be changed upon the attorney.

*Id*. at 397, *quoting Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962) ("*Link*").

The Secretary points out that Seyforth has provided no explanation for its attorney's failures to comply with the discovery orders and the show cause orders; she notes that although the affidavit states that Mr. Owen told Ms. Ennis he had been sick and conceded the default was his fault, there is no direct evidence or argument on this point. The Secretary also points out that even if Mr. Owen did mislead Seyforth, Seyforth's remedy in that case is a malpractice suit against Mr. Owen. *Link*, 370 U.S. at 634 n.10. Finally, the Secretary points out that Seyforth's own actions do not constitute reasonable diligence. She notes that, by its own account, it was aware that both Mr. Beedle and Mr. Owen were misinforming it, and it nonetheless continued to rely on its representatives. For example, Mr. Beedle advised Seyforth early on that the case had settled, yet the Secretary filed a complaint and the case was dismissed after Mr. Beedle failed to file an answer, despite the alleged settlement. After the case was reinstated, the Secretary filed discovery requests and then a letter requesting compliance with the requests; these facts should have alerted Seyforth that the statements of its representatives that OSHA was going to dismiss the citation was untrue, as it knew of the discovery requests and also knew, after the letter requesting compliance, that neither Mr. Beedle nor Mr. Owen

had responded. Seyforth nonetheless continued to rely on the assurances of Mr. Beedle and Mr. Owen, despite two show cause orders and Judge Barkley's dismissal of the case; even after the dismissal, Seyforth relied on Mr. Owen's statement that he would appeal the matter and waited until several months after the dismissal to obtain the services of a new attorney. The Secretary concludes that, under these circumstances, Seyforth has not demonstrated excusable neglect.

The Secretary further disputes Seyforth is entitled to relief under Rule 60(b)(6). She notes that according to *Pioneer*, "excusable neglect" under 60(b)(1) encompasses situations like the one here, where the failure to meet a filing deadline is attributable to negligence. 507 U.S. at 394. She also notes that 60(b)(6) applies to "extraordinary circumstances" suggesting the party is faultless in the delay; the movant must have been "effectively prevented" from filing on time for reasons beyond his or her control. *Id*. at 393-94. For example, in *Klapprott v. United States*, 335 U.S. 601, 613-15 (1949) ("*Klapprott*"), the Court allowed reopening under 60(b)(6) where the petitioner could not appeal a judgment because of incarceration, ill health, and other factors beyond his reasonable control. *Id*. Finally, the Secretary notes that, as the Court stated in *Pioneer*, the language and structure of Rule 60(b) render 60(b)(1) and 60(b)(6) "mutually exclusive." 507 U.S. at 393.

Turning to *Tani*, the case cited by Seyforth, *supra*, the Secretary asserts that the Ninth Circuit there simply ignored the Supreme Court's reasoning in *Pioneer* and *Klapprott*.[3] She further asserts that *Tani* is bad law and should not be followed but that even following *Tani* does not justify relief in this case. She notes that under the facts of *Tani*, the client's "first inkling" of its counsel's "egregious performance and ... failure [of] representation" came when it received the default judgment. 282 F.3d at 1171. Here, on the other hand, Seyforth knew almost from the beginning that its representatives were not telling it the truth; this is evidenced by the fact that the various filings, including the discovery requests, the orders to show cause and the default judgment, went to Seyforth's place of business and Ms. Ennis was aware of the filings.

---

[3]The Secretary points out that, according to 12 James Wm. Moore *et al*., Moore's Federal Practice ¶ 60.48[4][b] (3d ed. 1977) the *Tani* decision is illogical and inconsistent with *Pioneer*.

Based on the foregoing, I conclude that the Secretary is correct and that *Tani* should not be followed here.[4] Rule 60(b)(6) is consequently not available to Seyforth. I also conclude that, following the Supreme Court's decision in *Pioneer*, and under the facts of this case, Rule 60(b)(1) is likewise not available to Seyforth. As the Secretary notes, there is no direct evidence or argument as to the reasons for Mr. Owen's negligence in this case, other than the statement of Ms. Ennis in her affidavit that he told her he was sick and that the default was his fault. As the Secretary also notes, Seyforth's own actions do not establish excusable neglect. Ms. Ennis states in her affidavit that she was the "point person" for dealing with consultants and attorneys handling OSHA citations. Further, her affidavit and the record indicate she received and was aware of the filings in this case.[5] She knew, therefore, of the initial order to show cause and default judgment, the discovery requests and the further request to comply with those requests; she also knew of the orders to show cause and the decision and order issued by Judge Barkley. Ms. Ennis maintains that whenever she received a filing, she immediately faxed it to Mr. Owen; she also maintains that during these months, she spoke to Mr. Owen and Mr. Beedle on several occasions, whereupon she was told OSHA was going to dismiss the case. Ms. Ennis states that she was "dumbfounded" to learn that Judge Barkley had issued a default judgment. Yet, despite the fact that it was apparent by this time that Mr. Owen was not meeting his responsibilities, she accepted his statement that he would seek an appeal of the default. Ms. Ennis evidently made no attempt to remedy the situation by finding a new attorney until sometime in September, which was about four months from the date of the default judgment and about three months from the date the default judgment became final. I find that, in these circumstances, Seyforth's conduct was not excusable neglect.

---

[4]Moore's Federal Practice does indeed indicate that *Tani* and other like decisions that distinguish between the negligence of the attorney and the negligence of the party and permit relief under 60(b)(6) do not comport with *Pioneer*. *See* footnote 3, *supra*.

[5]The affidavit of Ms. Ennis indicates she was not aware of all the filings. *See, e.g.*, ¶¶ 5 and 9. However, with two exceptions, I find she was. The filings were sent to Mr. Beedle, the company's designated representative, at Seyforth's address, and it is clear from her affidavit that Ms. Ennis, the "point person" for OSHA matters, received the filings. The two exceptions would appear to be the Secretary's motion to compel responses to discovery and her motion for default judgment; these were served on Mr. Owen on February 8 and April 28, 2006, respectively.

Turning to *Pioneer*, the excerpt from that decision set out above on page 3 states that all of the circumstances should be taken into account when considering whether to grant relief, including 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. The Secretary does not assert prejudice, and I find none. I further find no impact on judicial proceedings and no bad faith on the part of Seyforth. Regardless, the reasons for the delay here simply do not constitute excusable neglect, and I find that the delay was significantly within the reasonable control of Seyforth. In addition, I find the delay of several months between the time Seyforth learned of the default judgment and the time it hired new counsel to be particularly telling. Under the facts of this case, and based upon the Supreme Court's decision in *Pioneer*, Respondent has not shown that it is entitled to Rule 60(b) relief. Respondent's motions are accordingly DENIED.

So ORDERED.

/s/________________
Irving Sommer
Chief Judge

Dated: January 2, 2007
Washington, D.C.