



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
U.S. CUSTOM HOUSE
721 19TH STREET, ROOM 407
DENVER, COLORADO 80202-2517

SECRETARY OF LABOR,

Complainant,

v.

MERITAGE HOMES OF COLORADO, INC.,

Respondent.

OSHRC Docket No. 23-0938

**DECISION & ORDER DENYING RESPONDENT'S MOTION FOR RELIEF FROM A
FINAL ORDER PURSUANT TO RULE 60(B)(1), FEDERAL
RULES OF CIVIL PROCEDURE**

This matter comes before the Court on Respondent's *Motion for Relief from a Final Order Pursuant to Rule 60(b)(1), Federal Rules of Civil Procedure*. Respondent asks the Court to accept its untimely notice of contest to the Citation and Notification of Penalty issued by the Occupational Safety and Health Administration (OSHA). Respondent contends it never received the original Citation and that its failure, if any, was the result of excusable neglect. Complainant argues the Citation was delivered to, and signed for, at Respondent's office and that Respondent failed to meet its burden to prove the near-five-month delay in filing the notice of contest was the product of excusable neglect.

On November 9, 2023, the Court held a hearing on the motion via Zoom, permitting the parties to present evidence in support of their respective positions. Because this was a hearing on a motion, additional briefing was not permitted. Based on the following findings of fact and conclusions of law, the Court finds Respondent failed to establish it is entitled to relief under

Federal Rule of Civil Procedure 60(b). Accordingly, the Court **DENIES** the motion and **VACATES** the untimely notice of contest.

I. Background

On June 13, 2022, OSHA conducted an inspection of Respondent's worksite in Aurora, Colorado. (Ex. J-3 at 7). On November 29, 2022, OSHA issued a two-item Citation and Notification of Penalty. (Ex. J-3 at 12-13). OSHA mailed the Citation via certified mail to Respondent's office at 8400 E. Crescent Pkwy, Suite 200, Greenwood Village, CO 80111. (Tr. 31-32, 38, 106; Exs. J-4, R-4). The United States Post Office delivered the Citation on December 2, 2022, around 10:49 AM. (Tr. 33; Exs. J-4, R-4).

On or about February 2, 2023, Angela Eyraud, the Administrative Services Manager for Respondent's Denver division, received a delinquency letter from OSHA referencing the Citation issued on November 29, 2022. (Tr. 65, 67; Ex. J-5). Ms. Eyraud forwarded the letter to Matthew Meehan, Respondent's in-house counsel, asking whether he was aware of the referenced Citation. (Tr. 111; Ex. J-5). Both Ms. Eyraud and Mr. Meehan contend this was the first time they learned of the Citation. (Tr. 67, 109).

At some point between February 2 and February 12, 2023,¹ Mr. Meehan spoke with Amanda Kupper, the Area Director for the Denver OSHA office, and the CSHO who performed the inspection, Clarissa Romero. Mr. Meehan explained he had just received the delinquency letter and expressed interest in engaging in an informal settlement conference. (Tr. 70). He also asked

1. The exact timing of the call or calls is not entirely clear. In Mr. Meehan's affidavit, he says he discovered the existence of the Citation on January 30 and "immediately contacted" the OSHA office. (Motion for Relief, Ex. 3 at 4). At trial, however, Ms. Eyraud testified she contacted Mr. Meehan on February 2, alerting him to the letter, and Mr. Meehan testified this was the first time he learned of the existence of the Citation. (Tr. 67, 111). Mr. Meehan confirmed he contacted OSHA the week prior to February 13, when he sent a follow up email. (Tr. 71). The email chain also references Mr. Meehan speaking with the OSHA office the week prior. (Ex. R-3). Exhibit R-3 indicates Mr. Meehan called OSHA and left a message with the CSHO. On February 7, the CSHO reminded AD Kupper about the call, and AD Kupper responded "I'll call him." (Ex. R-3 at 8).

for tracking information for the Citation. (Tr. 72). On February 13, 2023, Mr. Meehan emailed AD Kupper and CSHO Romero, again asking for tracking information and requesting an informal conference. (Tr. 74; J-6). The next day, CSHO Romero provided the tracking information. (Ex. J-6). On February 23, 2023, AD Kupper advised Mr. Meehan that “[b]ased on the delivery information, the citations are [sic] final order.” (Tr. 74; Ex. J-6).

Mr. Meehan testified that between February 14 and May 10, 2023, the company was deciding how to address the final order and engaged outside counsel. (Tr. 82). On May 10, 2023, outside counsel sent a letter via facsimile to AD Kupper advising her that Respondent contested the Citation. (Ex. J-1; Tr. 89-90). On June 9, 2023, outside counsel filed the instant motion with the Court. (*See* Ex. 4, Motion for Relief from Final Order).

Mr. Meehan conducted an internal investigation to determine why regular protocol for handling OSHA citations was not followed. (Tr. 92). Ms. Eyraud was responsible for handling mail for the Colorado office, because she had access to the locked mailbox. (Tr. 110, 112-13). If a particular piece of mail required a signature, the postal employee could access Respondent’s suite during regular business hours. (Tr. 113). If an OSHA citation was received in the mail, Ms. Eyraud’s practice was to forward it to Mr. Meehan. (Tr. 118). If Ms. Eyraud was absent from the office, she made arrangements for someone else to handle the mail. (Tr. 115).

On December 2, 2022, however, Ms. Eyraud was in the office and testified she did not receive the OSHA citation or sign for it that day. (Tr. 115-16). Respondent obtained a copy of the signature from the United States Postal Service, and Ms. Eyraud testified she did not recognize the signature. (Tr. 117-18). She expressed confidence in the way mail is handled by her office, and both Ms. Eyraud and Mr. Meehan testified they were not aware of lost or misplaced mail during their employment with Respondent. (Tr. 84, 117-20).

II. Legal Standard

Pursuant to section 10(a) of the Act, after receipt of a citation, an employer has “fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.” If the employer fails to file a notice of contest within the fifteen working day period, “the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.” 29 U.S.C. § 659(a).

However, an employer who has filed an untimely notice of contest may be granted relief under Fed. R. Civ. P. 60(b) in certain circumstances. *George Harms Constr. Co. v. Chao*, 371 F.3d 156 (3d Cir. 2004). The moving party bears the burden of showing it is entitled to Rule 60(b) relief. *Burrows Paper Corp.*, No. 09-1559, 2010 WL 1715388, at *1 (OSHRC, Apr. 19, 2010); *NYNEX*, No. 95-1671, 1999 WL 820638 (OSHRC, Sept. 30, 1999). Rule 60(b) provides that the judge may grant relief for reasons including “mistake, inadvertence, surprise, or excusable neglect.” In determining excusable neglect, the Commission considers “all relevant circumstances surrounding the party’s omission,” 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.” *Knock Out Homes Incorporated*, No. 21-0281, 2021 WL 6550844, at *2 (OSHRC, Dec. 29, 2021) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993)). In addition, the Commission requires a party seeking relief under Rule 60(b)(1) to show it had a meritorious defense that might have affected the outcome. *Northwest Conduit*, No. 97-851, 1999 WL 820636, at *5 (OSHRC, Sept. 30, 1999). However, the Court will not reach this issue because Respondent has not met its burden to establish excusable neglect. See *Jackson Associates of Nassau*, No. 91-0438, 1993 WL 230102, at *7 (OSHRC, June 18, 1993) (opining the Commission

rarely reaches the meritorious-defense requirement because it rarely finds the party has first established excusable neglect).

III. Discussion

OSHA sent the Citation via certified mail to Respondent's office in Greenwood Village, Colorado. The tracking information offered into evidence by OSHA was unrefuted by Respondent and demonstrates the Citation was delivered, and signed for, on December 2, 2022. Thus, Respondent was required to file any notice of contest on or before December 23, 2022. It failed to do so.

Respondent argues it never received the Citation and does not know what happened to it after delivery. This failure would generally weigh against a finding of excusable neglect. *See Villa Marina Yacht Harbor, Inc.*, No. 01-0830, 2003 WL 716983, at *2 (OSHRC, Mar. 3, 2003) (excusable neglect not established when employer's failure to maintain orderly procedures for handling important documents results in untimely notice of contest); *NYNEX*, 1999 WL 820638, at *3 (finding no excusable neglect where employer failed to explain what happened to the citation after it was received or what procedures the employer had at the office to ensure timely responses to important documents). However, Respondent had a procedure for receiving, opening, and responding to mail that typically did not result in mail getting lost or being mishandled. Ms. Eyraud—who was responsible for collecting the mail unless on leave—was working in the office on December 2, 2022, and should have received the Citation, but she claims she did not. *See Coleman Hammons Constr. Co., Inc. v. Occupational Safety & Health Rev. Comm'n*, 942 F.3d 279, 284 (5th Cir. 2019) (finding excusable neglect where the employer had a mail processing procedure sufficient to respond to OSHA matters and the missed deadline was attributable to a single instance of unforeseen human error). The record does not give the Court any reason to doubt

Ms. Eyraud or Mr. Meehan.

Moreover, when Ms. Eyraud learned of the existence of the Citation, she immediately notified Mr. Meeham, who contacted OSHA. This was, in the Court's view, an action made in good faith and weighs in favor of finding excusable neglect. *Id.* (good faith found where company responded to citations as soon as project superintendent saw them). The Court finds Respondent demonstrated good faith by contacting the Secretary as soon as it received the delinquency and finds Respondent's failure to respond to the initial notice of contest was the result of excusable neglect.

However, the Court's finding of good faith and excusable neglect does not extend to the three months it took Respondent to file the notice of contest once it received the delinquency notice. Although there is no evidence the delay caused prejudice to the Secretary, the other *Pioneer* factors weigh against Respondent. *See Marcus Food Co. v. DiPanfilo*, 671 F.3d 1159, 1173 (10th Cir. 2011) (finding district court did not abuse discretion when it found party's lack of diligence outweighed other factors, including prejudice). "A key factor in evaluating whether a party's delay in filing was due to excusable neglect is "the reason for the delay, including whether it was within the reasonable control of the movant." *Calhar Construction, Inc.*, No. 98-0367, 2000 WL 36692466, at *2 (OSHRC, Apr. 27, 2000) (citing *Pioneer*). The Court also considers the length of the delay. *Knock Out Homes Incorporated*, 2021 WL 6550844, at *2 (citing *Pioneer*). Where a timely response was within the employer's reasonable control, the Commission has denied relief even to petitions filed one or two days late. *See Villa Marina Yacht Harbor, Inc.*, No. 01-0830, 2003 WL 716983, at *1 (OSHRC, Mar. 3, 2003) (one day late); *see also A.W. Ross, Inc.*, No. 99-0945, 2000 WL 34235993, at *4 (OSHRC, Sept. 25, 2000) (11 days late).

Once Respondent became aware of the Citation, the subsequent three-month delay in filing the notice of contest was within its reasonable control. *See Craig Mechanical Inc.*, No. 92-0372, 1994 WL 197728, at *4 (OSHRC, May 18, 1994) (citing *Pioneer*) (employers must exercise some degree of diligence to obtain Rule 60(b) relief). Although Respondent expressed surprise at the existence of the Citation, Mr. Meehan testified that he knew about the underlying OSHA inspection because he provided documents subsequently requested by OSHA. (Tr. 78). In addition, Respondent was well aware of the simple procedure for contesting a citation, which requires little more than a sentence, and it could have filed the notice of contest while the internal investigation and retention of counsel was ongoing. Instead, Respondent waited almost three months to file a notice of contest and accompanying motion. Neither the testimony presented on behalf of Respondent nor the motion itself provide additional insight into or sufficient grounds justifying the delay. *See D.R.T.G. Builders, L.L.C. v. Occupational Safety & Health Rev. Comm'n*, 26 F.4th 306, 312 (5th Cir. 2022) (affirming the ALJ's conclusion that Rule 60(b)(1) relief was not warranted where the employer was aware of the citation but waited 90 days to file its untimely notice of contest).

Lastly, the Court notes that Respondent's delay in filing this motion was not reasonable. *See City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir.1994) ("We have observed that the four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import." (internal quotation marks and bracket omitted)). According to FRCP 60(b), "A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of judgment or order or the date of the proceeding." Respondent contends the three-month delay in filing the present motion after Respondent contacted Complainant, and during which time counsel was retained, is irrelevant to

this question. The Court disagrees. While FRCP 60 has a one-year limitation, this represents the jurisdictional limit for such motions, but it does not dictate what is reasonable under the circumstances of a particular case. *See White v. Am. Airlines, Inc.*, 915 F.2d 1414, 1425 (10th Cir.1990) (“A motion is not timely merely because it has been filed within one year of the judgment.”). The 10th Circuit is particularly strict when it comes to the issue of timeliness. *See, e.g., U.S. v. Torres*, 372 F.3d 1159, 1163 (10th Cir. 2004) (applying 60(b) *Pioneer* analysis to equivalent criminal rule of procedure and holding notice of appeal filed 8 days late due to counsel confusing the deadlines not reasonable); *Security Mut. Casualty Co. v. Century Casualty Co.*, 621 F.2d 1062, 1068 (10th Cir. 1980) (motion under Rule 60(b)(1) was untimely because there was an unexplained delay of 115 days between the date of the judgment and the date that the motion was filed).

Commission Rule 40(g) requires motions to “be made as soon as the grounds for the motion are known.” 29 C.F.R. § 2200.40(g). Compliance with Commission Rule 40(g), when read together with Rule 60(b)’s requirement that motions be filed within a “reasonable time,” requires employers to file any Rule 60(b) motion for relief at the earliest possible opportunity. Here, Respondent waited three months after it became aware of the Citation to file the instant motion. Further, Respondent failed to provide any explanation for the delay in filing other than its initial contacts with Complainant and its subsequent procurement of counsel. To the extent the delay is attributable to counsel, the Tenth Circuit has held such is not a sufficient excuse to justify relief under FRCP 60(b). *See Pelican Production Corp. v. Marino*, 893 F.2d 1143 (10th Cir. 1990) (finding carelessness of counsel insufficient basis to grant extraordinary relief under 60(b)).

Accordingly, the Court concludes Respondent failed to establish excusable neglect justifying relief from a final order of the Commission. The notice of contest and the accompanying

motion were untimely, and Respondent failed to articulate a reasonable basis for the length of time it took to file the documents once it received notice of the Citation.

IV. Conclusion

Based on the Court's review of the parties' respective briefs, evidence in the record, and relevant case law, Respondent's *Motion from a Final Order Pursuant to Rule 60(b)(1), Federal Rules of Civil Procedure* is DENIED, and the untimely notice of contest VACATED.

SO ORDERED.

Dated: December 27, 2023

/s/ Joshua R. Patrick

Joshua R. Patrick
Judge, OSHRC