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. PRIME ROOFING CORPORATION, Respondent.	OSHRC Docket No. 07-1409

APPEARANCES:

Christine T. Eskilson, OSHA Counsel; Frank V. McDermott, Regional Solicitor; Jonathan L. Snare, Acting Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

William A. Seppala, *pro se*; Prime Roofing Corporation, New Ipswich, NH
For the Respondent

REMAND ORDER

Before: THOMPSON, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

By decision and order dated October 25, 2007 and docketed by the Executive Secretary on October 29, 2007, Chief Administrative Law Judge Irving Sommer denied Prime Roofing Corporation ("PRC") relief under Federal Rule of Civil Procedure 60(b)[1] from a final order that

[1] Rule 60(b) provides, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> . . . .
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]

resulted from PRC's failure to file a timely notice of contest ("NOC") to a citation and notice of proposed penalty issued to the company by the Occupational Safety and Health Administration ("OSHA"). *See* section 10(a) of the Occupational Safety and Health Act, 29 U.S.C. § 659(a) (deeming citation and proposed penalty a final order of the Commission if employer fails to notify the Secretary of its intent to contest within fifteen working days of receipt). PRC, appearing *pro se*, petitioned the Commission for review of the judge's decision, claiming the judge erroneously denied relief. On November 28, 2007, Chairman Horace A. Thompson III directed this case for review. For the following reasons, we remand this case to the judge for further proceedings consistent with this opinion.

Background

This case arises from OSHA's February 1, 2006 inspection of a PRC worksite located in Hanover, New Hampshire. Based on the inspection, OSHA issued PRC a one-item serious citation on April 3, 2006, alleging a violation of 29 C.F.R. § 1926.501(b)(10) for a lack of fall protection on a low-slope roof and proposing a penalty of $2,000. PRC received the citation on April 4, 2006, and thus had until April 25, 2006 to timely file its NOC.

OSHA held an informal conference with PRC on April 13, 2006. At the conference, PRC asserted that the exposed workers were independent contractors and not employees of PRC. In response, OSHA asked PRC to provide supporting information. On April 24, 2006, the Assistant Area Director for the Concord OSHA Area Office received a letter from PRC's vice president dated April 21, 2006, providing the address of the claimed contractor and various billings associated with the worksite. On May 1, 2006, the Assistant Area Director received another letter from PRC's vice president dated April 28, 2006, stating that the company had provided OSHA with all the necessary information and requesting that OSHA provide "the settlement agreement." On June 19, 2006, the Concord OSHA Area Office received a third letter from PRC dated June 16, 2006. In this letter, PRC's president stated that OSHA had "mistakenly cited" the company "for an alleged violation by a subcontractor" and that PRC was led to believe the "violation was to be rescinded." PRC's president also requested that OSHA "rescind this violation immediately and live up to [its] verbal agreement."

During the ensuing fourteen months, PRC's president corresponded with OSHA four more times—primarily with the agency's delinquent accounts office—until, on September 5, 2007, he

sent a letter to the Commission requesting that PRC's case be "reopened" to allow the company an "impartial hearing[.]" According to PRC's president, the company had "left [the OSHA informal conference] meeting with every indication that this matter was resolved." Based on this letter, the Executive Secretary docketed the case on September 14, 2007. On October 3, 2007, the Secretary filed a motion opposing PRC's request as unjustified under Rule 60(b).

On October 25, 2007, without holding a hearing, the judge issued his decision denying PRC relief. In that decision, the judge determined that the Secretary "did not act improperly in not rescinding the Citation" given PRC's failure to supply all of the supporting information requested by OSHA at the informal conference. Moreover, applying the Supreme Court's test for "excusable neglect" under *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993) ("*Pioneer*"),[2] the judge found that: (1) PRC's sixteen-month delay in filing its NOC on September 5, 2007 was "patently unreasonable"; (2) PRC showed a lack of good faith, given the length of the delay and its claim that it had provided all the information requested by OSHA; and (3) PRC gave no reason for its delay in filing the NOC, which was within PRC's control.

Discussion

In denying PRC relief under Rule 60(b), the judge placed particular reliance on PRC's sixteen-month delay in filing its NOC. The record, however, is unclear as to whether PRC's delay in filing was in fact sixteen months. During the sixteen-month period, PRC sent letters to the Concord OSHA Area Office. Under Commission precedent, it is possible one of these letters could be considered PRC's NOC. *See Herasco Contractors, Inc.*, 16 BNA OSHC 1401, 1993 CCH OSHD ¶ 30,229 (No. 93-1412, 1993) (finding that letters to OSHA are to be liberally construed in accordance with long-standing Commission precedent and appellate court case law); *Acrom Constr. Servs., Inc.*, 15 BNA OSHC 1123, 1125, 1991 CCH OSHD ¶ 29,393, p. 39,652 (No. 88-2291, 1991) (holding that a NOC has to be in writing); *see also Barretto Granite Corp*., 830 F.2d 396, 397 (1st Cir. 1987) (upholding requirement that an intent to contest "be made in writing to the OSHA area director within 15 working days of the employer's receipt of the notice of proposed penalty").

[2] The Commission uses the test set forth in *Pioneer* to evaluate excusable neglect under Rule 60(b), taking into account "'all relevant circumstances,'" including "'the danger or prejudice to [the non-moving 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.'" *Nw. Conduit Corp.*, 18 BNA OSHC 1948, 1950, 1999 CCH OSHD ¶ 31,949, p. 47,458 (No. 97-851, 1999) (quoting *Pioneer*, 507 U.S. at 395).

Under these circumstances, we remand this case to allow the judge an opportunity to examine PRC's letters to the Concord OSHA Area Office, as well as the circumstances surrounding their filing, and upon consideration determine whether this affects his decision to deny PRC relief under Rule 60(b).

SO ORDERED.

_/s/_____
Horace A. Thompson III
Chairman

_/s/_____
Thomasina V. Rogers
Commissioner

Dated: December 6, 2007

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.	:	OSHRC DOCKET NO. 07-1409
	:	
PRIME ROOFING CORPORATION,	:	
	:	
Respondent.	:	

Before: Chief Judge Irving Sommer

DECISION AND 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 purpose of determining whether Respondent's request for relief under Federal Rule of Civil Procedure 60(b) ("Rule 60(b)") should be granted and its late-filed notice of contest ("NOC") accepted. The Secretary has filed her opposition to the granting of relief.

Background[1]

The Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent, Prime Roofing Corporation ("Respondent" or "Prime"), in Hanover, New Hampshire, on February 1, 2006.[2] As a result, OSHA issued to Prime a Citation and Notification of Penalty ("Citation") on April 3. On that same day, OSHA mailed the Citation to Prime's address by certified mail, return receipt requested, and on April 4, William Seppala, Prime's president, signed for the Citation. The Act requires an employer to notify the Secretary of its intent to contest a citation within

[1]The background that follows is based upon an affidavit of the OSHA assistant area director who was involved in this case and upon letters that Respondent sent to OSHA and the Commission in this matter.

[2]All dates hereafter will refer to the year 2006, unless otherwise indicated.

15 working days of receipt, and the failure to file a timely NOC results in the citation becoming a final order of the Commission by operation of law. Based upon the date that Mr. Seppala received the Citation, Prime was required to file an NOC on or before April 25. However, Prime did not file an NOC by that date.

On April 5, Prime phoned the OSHA office that had issued the Citation to schedule an informal conference. On April 13, Michael Goen, Prime's vice-president of operations, met with the OSHA office's assistant area director ("AAD") and the compliance officer ("CO") who had inspected the site. At the conference, Mr. Goen claimed that the exposed employees at the site were independent contractors and not employees of Prime. This claim was contrary to what employees at the site had told the CO, and the AAD asked Mr. Goen to provide additional documents, including the work site contract, any contracts Prime had with the claimed subcontractor, the subcontractor's address, and a listing of the employees at the site and the number of days at the site. At both the beginning and the end of the conference, the AAD informed Mr. Goen that the last day to contest the Citation was April 25.

On April 24, the OSHA office received a letter from Mr. Goen dated April 21; in the letter, Mr. Goen provided a post office box address of the claimed subcontractor and billings related to the work site. On April 25, the AAD phoned Prime. Mr. Goen was not available, and the AAD advised the company secretary that Mr. Goen needed to act in a timely manner; the AAD also left a voice mail message for Mr. Goen, advising him he had not provided all the requested documents and that April 25 was the last date to contest the Citation. Mr. Goen called the AAD on April 26 and stated that the secretary had called him the day before to tell him of the AAD's phone call but that he had not listened to the voice mail message until April 26. The AAD informed Mr. Goen that the Citation had become a final order and that he could contact the Commission about filing a late NOC; Mr. Goen noted that in a previous case, his company had not been successful in filing a late NOC.

On May 1, the OSHA office received a letter dated April 28, in which Mr. Goen stated that he had provided the necessary information; he also requested a settlement agreement. The AAD called Prime the next day, and, as Mr. Goen was not available, the AAD left a message with the company secretary. On June 19, the OSHA office received a letter dated June 16 from Mr. Seppala. Mr. Seppala stated that OSHA had mistakenly cited Prime for a violation committed by a subcontractor, that Prime had had no employees at the site, and that Mr. Goen had provided the information OSHA had requested; Mr. Seppala also requested that OSHA rescind the Citation, as agreed. On July 24, 2006, the

OSHA office referred this matter for debt collection. On August 7, Mr. Seppala sent two different letters to OSHA's Delinquent Accounts and Collections office; in these, he repeated his prior claims and stated that he had been led to believe the matter would settle if further information was provided and that that information had been provided. Mr. Seppala sent two more letters to the Delinquent Accounts and Collections office. In the first, dated April 2, 2007, Mr. Seppala reiterated his previous claims and attached copies of various documents, including the contract with the claimed subcontractor, billings from that individual, and a letter from that individual stating that he was a subcontractor and that he and his employees had worked at the site. In the second, dated September 5, 2007, Mr. Seppala made the same claims as before and stated that he would "take this case up with the [Commission]." On that same day, Mr. Seppala sent a letter to the Commission in which he summarized his position and requested that Prime's case be "reopened" and that his company receive an "impartial hearing."

This matter was docketed with the Commission on September 14, 2007, and on October 3, 2007, the Secretary filed her opposition to relief under Rule 60(b).

Discussion

The record in this case plainly shows that Respondent did not file its NOC within the requisite 15-day period set out in the Act. However, an otherwise untimely NOC may be accepted where the delay in filing was caused by deception on the part of the Secretary or her failure to follow proper procedures. A late filing may also be excused, pursuant to Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"), if the final order was entered as a 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 acting to protect its interests." *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981) (citations omitted). The moving party has the burden of proving that it is entitled to Rule 60(b) relief.

In view of Respondent's various letters, Prime's contentions will be deemed to be assertions that (1) the Secretary acted improperly in not rescinding the Citation after additional information was provided about the claimed subcontractor at the site and (2) its late-filed NOC was due to excusable neglect. In regard to (1), the affidavit of the OSHA AAD who was involved in this case, and who was present at the informal conference, makes it clear that Mr. Goen did not in fact provide all of the requested information; according to the affidavit, and Mr. Goen's own letter of April 21, 2006, Mr. Goen provided only a post office box address for the claimed subcontractor and billings related to the work site. I find, accordingly, that the Secretary did not act improperly in not rescinding the Citation.

In regard to (2), in determining whether an employer's failure to file a timely NOC was due to excusable neglect, the Commission follows the Supreme Court's test in *Pioneer Inv. Serv. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380 (1993). *See Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1950 (No. 97-851, 1999). Under that test, the Commission takes into account all relevant circumstances, 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. *Id*. at 1950, quoting 507 U.S. at 395. The Commission has held that the "reason for the delay, including whether it was within the reasonable control of the movant," is a "key factor" and, in appropriate circumstances, the dispositive factor. *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148 (No. 99-0945, 2000); *Calhar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-0367, 2000).

As to the length of the delay, I find Respondent's filing of its NOC on September 5, 2007, which was over 16 months after the NOC was due, to be patently unreasonable; this is particularly so in view of the fact that the AAD specifically advised Mr. Goen on April 26, 2006, that Prime could file a late NOC with the Commission. I further find that the length of the delay here would prejudice the Secretary and that it could also adversely affect judicial proceedings. Moreover, I question Respondent's good faith in this matter, given the length of the delay in filing its NOC and its claim that it had provided all of the information that OSHA had requested.

As to the reason for the delay, and whether it was within the reasonable control of the movant, Respondent has provided no reason for its delay in filing the NOC. In addition, I find that the failure to file a timely NOC in this matter was within the control of Respondent. The AAD explicitly told Mr. Goen at the informal conference, which took place on April 13, 2006, that the last day to file an NOC was April 25, 2006. In addition, the AAD phoned Mr. Goen on April 25, 2006, after receiving Mr. Goen's letter of April 21, 2006, to tell him not only that he had not provided all of the information requested but also that April 25, 2006 was the last day of the contest period. The record shows that although the company secretary informed Mr. Goen on April 25 of the AAD's call, Mr. Goen did not listen to the voice mail message the AAD left until the following day, April 26. Under the circumstances of this case, I conclude that the delay in filing was not due to excusable neglect and that Respondent is not entitled to Rule 60(b) relief.

There are other reasons for concluding that Rule 60(b) relief is not justified here. First, as the Secretary points out, Respondent has been inspected and has received citations a number of times since 2001.[3] Second, as the Secretary also points out, Respondent had a prior case before the Commission that involved a late-filed NOC. There, a Commission judge held a hearing on the issue of whether Prime was entitled to Rule 60(b) relief. In his decision, the judge noted relevant Commission precedent and found that, based on that precedent and the circumstances of the case, Rule 60(b) relief was not justified. *Prime Roofing Corp.*, No. 04-0004, July 12, 2004.[4] Third, even if Respondent had not been cited before, the Commission has specifically held that the OSHA citation clearly states the requirement to file an NOC within the prescribed period and that an employer "must bear the burden of its own lack of diligence in failing to carefully read and act upon the information contained in the citations." *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989); *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). The Commission has also held that ignorance of procedural rules does not constitute "excusable neglect" and that mere carelessness or negligence does not justify relief. *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991).

Based upon the foregoing precedent and the circumstances of this case, Respondent has not demonstrated that it is entitled to Rule 60(b) relief in this matter. Respondent's request for relief is according DENIED, and the Citation is AFFIRMED in all respects.

SO ORDERED.

/s/

Irving Sommer
Chief Judge

Dated: October 25, 2007
Washington, D.C.

[3] *See* page 4 of the affidavit of the AAD, which is attached to the Secretary's opposition.

[4] A digest of this decision appears at 20 BNA OSHC 2060 (No. 04-0004, 2004).