



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.

MISSION CONSTRUCTORS, INC.,

Respondent

OSHRC DOCKET NO. 06-2050<sup>1</sup>

Appearances:

Leslie P. Brody, Esquire  
U.S. Department of Labor  
Dallas, Texas  
For the Complainant.

Thomas H. Scott, CSP  
W.C. Blayney & Associates  
Humble, Texas  
For the Respondent.

Before: G. Marvin Bober  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding 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 the late-filed notice of contest (“NOC”) of Respondent, Mission Constructors, Inc., should be accepted pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (“Rule 60(b”).

**Background**

The Occupational Safety and Health Administration (“OSHA”) inspected a construction work site in Tampa, Florida, on August 31, 2006. As a result, OSHA issued a Citation and Notification

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<sup>1</sup>The companion case to this matter, which was heard on the same day as this case, is captioned *Secretary of Labor v. J. Clark Framing*; the docket number in that case is 06-2049.

of Penalty (“Citation”) to Respondent on September 21, 2006. The Citation was sent by certified mail, return receipt requested, and Respondent received and signed for the Citation on September 25, 2006. Section 10(a) of the Act requires an employer to notify the Secretary of its intent to contest a citation within 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 on the date it received the Citation, Respondent was required to file an NOC by October 17, 2006. However, Respondent did not file an NOC by that date. Rather, on October 24, 2006, Respondent’s representative sent a letter to OSHA requesting a “late conference due to mis-communications;” attached to the letter was an NOC dated October 10, 2006. On November 10, 2006, OSHA sent a letter to Respondent’s representative, stating that because the NOC letter was not received by October 17, 2006, the Citation had become a final order of the Commission; the letter also stated that to pursue the matter further, Respondent would need to contact the Commission directly. On December 21, 2006, Respondent’s representative sent a letter to the Commission. The letter explained that Respondent had attempted to have an informal conference with OSHA but “ran out of time” because the required OSHA personnel were not available for a conference. The letter also requested a hearing before the Commission to determine the merits of the Citation. *See* ALJ Exhibits 1-5. On January 25, 2007, the Secretary filed her opposition to Respondent’s request for relief under Rule 60(b). The administrative trial in this matter was held on March 16, 2007, in Houston, Texas.

### **The Relevant Testimony**

Thomas Scott, Respondent’s representative, testified his office had called OSHA several times to set up an informal conference. He explained that his office’s practice, when a client receives a citation, is to have an informal conference with OSHA within the 15-day period; his office tries to settle the citation at the conference but has an NOC prepared to present at the conference if the case does not settle. He also explained that Commission judges had told him an informal conference must be held before an NOC can be filed, and he said that in cases where that had not been done the judge would not allow the case to proceed until the parties went back and had the informal conference. As to the phone calls that were made, Mr. Scott discussed R-1, a diary of the actions his company had

taken in this matter.<sup>2</sup> Mr. W. C. Blayney called OSHA on October 10, 2006,<sup>3</sup> but was evidently unable to talk to the person who could schedule a conference. Mr. Scott called OSHA on October 11 and attempted to set up an informal conference; he was told an OSHA official would return his call. On October 13, Mr. Blayney spoke to Karen Stone at OSHA and was told that October 13 was the last day to contest the Citation; Mr. Scott agreed that date was incorrect and did not know why R-1 showed it as the final day to file an NOC. On October 17, Mr. Blayney spoke to Ms. Stone again; Mr. Scott agreed the note for that date referenced the NOC dated October 10. Mr. Scott further agreed that R-1 had an entry in bold type stating the 15-day period for contesting the Citation ended on October 17; he explained that the NOC was not filed on that date because no informal conference had taken place. Mr. Scott indicated that the October 24 letter stated that his company's safety department had all gone out of town and had just returned; the thrust of the letter was the hope that his company could still settle the case in an informal conference. Mr. Scott also indicated that the December 21 letter to the Commission stated his office had requested an informal conference with OSHA and that Ms. Stone had told Mr. Blayney October 17 was the final day to contest the citation. (Tr. 6-21).

Karen Stone, the assistant area director ("AAD") who supervised the compliance officer who issued the Citation, testified that she was the person in charge of the Mission Constructors case. Ms. Stone identified C-1 as the OSHA diary sheet relating to the subject case. She noted that R-1 showed that Mr. Blayney had called her office on October 10 and had left a message that he would call her back on October 11; however, there was no indication on R-1 that he called again on October 11, and, to her knowledge, Mr. Scott had not called on that day. The next record of any call regarding Mission Constructors was on October 23; an individual named Joan from W.C. Blayney & Associates called and asked what the last date to contest the Citation was; the AAD responded that the date was October 17, that no changes could be made to the Citation, and that she could establish a payment plan. On October 24, Mr. Blayney called and asked the AAD to give him an additional 15 days to settle the case; the AAD advised him that she had no authority to do so. Mr. Blayney stated that he

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<sup>2</sup>The phone records Mr. Scott discussed in Docket No. 06-2049, which show the dates that he and Mr. Blayney had called the OSHA office, were admitted as R-2 and R-3 in that case. For ease of reference, those records are also admitted as R-2 and R-3 in this case. (Tr. 35).

<sup>3</sup>All dates hereinafter will refer to the year 2006 unless otherwise indicated.

had been on the road and had been busy and had missed the date to resolve the case; the AAD advised Mr. Blayney to file a late NOC. (Tr. 21-24, 28-30).

### 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. Despite the language of section 10(a) of the Act, however, the Commission has recognized under Rule 60(b) situations where noncompliance with the 15-day filing requirement will not preclude it from exercising jurisdiction to excuse some inadvertent late filings. *Jackson Assoc. of Nassau*, 16 BNA OSHC 1261, 1264 (No. 91-438, 1993) (Section 10(a) of the Act does not preclude the Commission from deciding whether to grant relief under Rule 60(b)).

Rule 60(b) provides, in pertinent part, that “[o]n motion or upon such terms as are just, the court may relieve a party or a party’s legal representative from final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) ... ; (3) fraud (...), misrepresentation, or other misconduct of an adverse party;<sup>4</sup> (4) ... ; (5) ... ; or (6) any other reason justifying relief from the operation of the judgment.”<sup>5</sup> The party seeking relief has the burden of proving it is entitled to relief.

There is no contention, and no evidence, that the delay in filing in this case was due either to deception on the part of the Secretary or her failure to follow her own procedures. However, in its January 29, 2007 letter to the undersigned, Respondent’s representative stated that the company was “specifically claiming ‘**Excusable Neglect**’” in this matter. *See* ALJ Exhibit 7 (emphasis in original).

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<sup>4</sup>Relief is appropriate under Rule 60(b)(3) where the Secretary has engaged in deceptive practices or has failed to follow her own required procedures. *See, e.g., Louisiana-Pacific Corp.*, 15 BNA OSHC 2020 (No. 86-1266, 1989); *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991).

<sup>5</sup>A respondent may be entitled to relief under Rule 60(b)(6) for “any other reason justifying relief from the operation of the judgment.” “Rules 60(b)(1) and 60(b)(6) are mutually exclusive, however, meaning that appellants are not entitled to relief under (b)(6) for claims of excusable neglect.” *Davila-Alvarez v. Escuela de Medicina Universidad del Caribe*, 257 F.3d 58, 67 (1st Cir. 2001), citing to *Pioneer Inv. Serv. v. Brunswick Assoc. Ltd. P’ship*, 507 U.S. 380, 393 (1993). “Moreover, to justify relief under Rule 60(b)(6), ‘a party must show “extraordinary circumstances” suggesting that the party is faultless in the delay.’” *Id.*

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 set out in *Pioneer Inv. Serv. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380 (1993) ("*Pioneer*").<sup>6</sup> See *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1950 (No. 97-851, 1999). 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).

The Court also stated in *Pioneer* that the "proper focus is upon whether the neglect of respondents *and their counsel* was excusable." *Id.* at 397 (emphasis in original). This is so because "clients must be held accountable for the acts and omissions of their attorneys." *Id.* at 396. The Court made the further statement that:

Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions 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 charged upon the attorney.

*Id.* at 397 (citation omitted).

Turning to the factors set out in *Pioneer*, I find that the late filing in this case has resulted in little prejudice to the Secretary. I further find that the length of the delay, which was seven days after the NOC period ended, is not substantial and that the impact on judicial proceedings is likewise insubstantial.<sup>7</sup> Finally, I find that Respondent itself has not acted in bad faith in this matter.

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<sup>6</sup>While *Pioneer* discussed the term "excusable neglect" under Bankruptcy Rule 9006(b)(1), the Court stated that this rule was patterned after Rule 60(b)(1). In *Pratt v. Philbrook*, 109 F.3d 18, 19 (1<sup>st</sup> Cir. 1997), it was noted that the *Pioneer* decision is understood to provide guidance outside of the bankruptcy rules.

<sup>7</sup>Although the NOC letter to OSHA was only seven days late, I note that Respondent's letter to the Commission was not sent until December 21, which was more than a month after

In my opinion, the reason for the delay, and whether it was in the reasonable control of the movant, is the most significant factor. As a preliminary matter, I note that the testimony Mr. Scott gave as to the reason for the delay conflicts significantly with the testimony of Ms. Stone. Thus, credibility becomes an issue.<sup>8</sup> However, even assuming *arguendo* that the essential facts are as he gave them, that is, that the delay was due to his inability to have an informal conference with OSHA before the NOC filing period ended, that reason is no basis for finding that the late filing was caused by excusable neglect. First, the Citation itself stated on page 1, in bold and underlined text, as follows:

**Unless you inform the Area Director in writing that you intend to contest the citation(s) and/or proposed penalty(ies) within 15 working days after receipt, the citation(s) and the proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.**

Second, the Commission has held that the 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).

Third, W.C. Blaney & Associates, the company for which Mr. Scott works, provides consulting and representation in OSHA matters and presumably should be well aware of the 15-day period within which an employer must file its NOC. This is particularly so in light of Mr. Scott’s

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OSHA had advised Respondent to contact the Commission.

<sup>8</sup>I also note that Mr. Scott’s testimony concerning the reason why he could not file an NOC without first attending an informal conference was misplaced. The NOC filing period occurs before the Commission ever has jurisdiction, and the Commission obtains jurisdiction only upon the filing of an NOC. Apparently, Mr. Scott was confusing the OSHA informal conference procedure with a Commission judge’s pretrial instructions to the parties to try to settle the case. (Tr. 10-11, 17-18).

testimony that he had represented approximately 40 employers in OSHA cases in the past eight years. (Tr. 11).

Based on the foregoing, I find that the reason for the delay in this case constituted simple negligence, and not “excusable neglect,” especially since Respondent was represented by a company that provides consulting and representation in OSHA matters.<sup>9</sup> I also find that the reason for the delay was wholly within the control of Respondent’s representative. Finally, I find that Respondent is bound by the acts of its representative in this matter, in light of the Supreme Court’s decision in *Pioneer, supra*. Under the circumstances of this case, I conclude that Respondent has not met its burden of showing that it is entitled to relief pursuant to Rule 60(b).

For all of the reasons set forth above, the Citation and Notification of Penalty issued on September 21, 2006, is AFFIRMED in its entirety.

So ORDERED.

/s/  
G. MARVIN BOBER  
Judge, OSHRC

Dated: May 10, 2007  
Washington, D.C.

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<sup>9</sup>My finding is supported by either Mr. Scott’s or Ms. Stone’s version of the facts.