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. ROY'S CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 04-1409

APPEARANCES:

Ronald Gottlieb, Attorney; Charles F. James, Counsel for Appellate Litigation; Daniel J. Mick, Counsel for Regional Trial Litigation; Joseph M. Woodward, Associate Solicitor; Howard M. Radzely, Solicitor; U.S. Department of Labor, Washington, DC

For the Complainant

Charles S. Russell, Jr., Esq.; Moore, Dodson & Russell, P.C.; St. Thomas, VI

For the Respondent

DECISION

Before: RAILTON, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

In April 2004, the Occupational Safety and Health Administration issued three citations to Roy's Construction, Inc. (Roy's Construction) alleging that it violated the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act), at its workplace in St. Thomas, U.S. Virgin Islands. Roy's Construction filed its notice of contest (NOC) to the citations outside the fifteen working day period specified by the Act, and sought relief from final judgment under Federal Rule of Civil Procedure 60(b). After a hearing, Chief Administrative Law Judge Irving Sommer granted the company's request for relief and ordered the Secretary to file a complaint within twenty days.

In a letter to the judge, the Secretary refused to file her complaint, explaining that she believed the judge's decision granting relief under Rule 60(b) was clearly erroneous and that her decision not to file a complaint preserved her right to appeal. After a show cause order brought no change in the Secretary's position, the judge vacated the citations issued to Roy's Construction. For the reasons discussed below, we find that the judge's sanction of dismissal was appropriate and affirm his order.

DISCUSSION

Under Commission Rule 101(a), 29 C.F.R. § 2200.101(a), when a party fails to proceed "as provided by [the Commission] rules or as required by the Commission or Judge, he may be declared to be in default either on the initiative of the Commission or Judge," after being afforded an opportunity to show cause why he should not be held in default. Here, by refusing to file a complaint, the Secretary failed to comply with Commission Rule 34(a)(1), 29 C.F.R. § 2200.34(a)(1),[1] and the judge's order. Even though the Secretary was warned that her refusal to file a complaint would result in a dismissal, the Secretary refused to proceed. The Secretary's decision left the judge with only two choices: either bend to the will of the Secretary and dismiss the NOC, or vacate the citations. Rather than reversing the Rule 60(b) order, the judge chose the latter option. Under these circumstances, we find that the judge did not abuse his discretion under Commission Rule 101(a) by vacating the citations.[2] *See generally Chartwell Corp.*, 15

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[1] Commission Rule 34(a)(1), 29 C.F.R. § 2200.34(a)(1), states:

> (a) *Complaint.*
>
> > (1) The Secretary shall file a complaint with the Commission no later than 20 days after receipt of the notice of contest.

[2] The Secretary relies on *Donald Braasch Construction Inc. (Braasch)*, 17 BNA OSHC 2082, 1995-97 CCH OSHD ¶ 31,259 (No. 94-2615, 1997), a case that arose in the context of a discovery dispute, to justify her refusal to file a complaint. In *Braasch*, the Commission recognized that "failure to comply with an order is not, by itself, an indication of bad faith or contumacious conduct where the party's reason for refusing to comply has a substantial legal basis and its conduct did not indicate disrespect towards the Commission or the issuing judge." *Id.* at 2086, 1995-97 CCH OSHD at p. 43,868. Our review of Commission precedent, however, indicates that this rule of law has only been applied to cases where a party has refused to comply with a discovery order, and is thus not applicable to the case before us. *See St. Lawrence Food*

BNA OSHC 1881, 1883-84, 1992 CCH OSHD ¶ 29,817, pp. 40,626-27 (No. 91-2097, 1992) (while "[p]rejudice and contumacy are factors to be considered in determining whether a severe sanction is warranted," other factors are also relevant).

Under Commission Rule 101(b), 29 C.F.R. § 2200.101(b), a sanction imposed under subsection (a) may be set aside "[f]or reasons deemed sufficient by the Commission or Judge and upon motion expeditiously made." In asking the Commission for relief from the judge's order, the Secretary argues that she would have had no way of recouping litigation costs had she filed a complaint and ultimately prevailed on the merits. However, the costs associated with litigation do not provide the Secretary with a legal basis for refusing to file a complaint in defiance of a judge's order. *Cf. Hallstrom v. Tillamook County*, 493 U.S. 20, 32-33 (1989) (while sympathetic to argument that "dismissal would unnecessarily waste judicial resources," Court gave retroactive effect to its decision which resulted in dismissal of action after nearly 4 years of litigation and a determination on merits by the district court).

The Secretary also argues that the procedure she utilized here is "the same procedure the Commission has previously used to review grants of Rule 60(b) relief." In support of this proposition, she cites primarily to *Northwest Conduit Corp.* (*Northwest Conduit)*, 18 BNA OSHC 2072, 1999 CCH OSHD ¶ 32,027 (No. 97-851, 2000), and *Jackson Associates of Nassau*, 16 BNA OSHC 1261, 1993 CCH OSHD ¶ 30,140 (No. 91-0438, 1993). Although these cases demonstrate that the Commission has not always treated the Secretary's failure to file a complaint as a barrier to reaching the merits of the Rule 60(b) issue, the Commission has never affirmatively stated that the Secretary may refuse to file a complaint in order to obtain Commission review.

Indeed, only *Northwest Conduit* was analyzed through the lens of Commission Rule 101(b).[3] 18 BNA OSHC at 2073, 1999 CCH OSHD at p. 47,853. While the Commission in that

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Corp., 21 BNA OSHC 1467, 1472, 2005 CCH OSHD ¶ 32,801, p. 52,480 (No. 04-1734, 2006) (consolidated); *Trinity Indus. Inc.*, 15 BNA OSHC 1579, 1582-83, 1992 CCH OSHD ¶ 29,662, pp. 40,184-85 (No. 88-1547, 1993), *rev'd on other grounds*, 16 F.3d 1149 (11th Cir. 1994)). *Newport News Shipping & Drydock Co.*, 9 BNA OSHC 1085, 1089-90, 1980 CCH OSHD ¶ 25,003, p. 30,891 (No. 76-171, 1980).

[3] The Commission relied upon former Commission Rule 41, 29 C.F.R. § 2200.41 (2000), which is now Commission Rule 101, 29 C.F.R. § 2200.101.

case set aside the judge's vacatur order, excusing the Secretary's failure to file a complaint, the case before us differs from *Northwest Conduit* in two key respects. First, in *Northwest Conduit*, the Secretary could not have successfully petitioned for interlocutory review under Commission Rule 73, 29 C.F.R. § 2200.73, because there was only one Commissioner when the judge ordered the Secretary to file a complaint. *Id.* Here, the Secretary could have petitioned for such review because there were two Commissioners at the relevant time. Second, in contrast to *Northwest Conduit*, the Secretary has foreclosed the possibility of litigating the merits of this case: if we were to reach the Rule 60(b) issue and decide in favor of the Secretary, the NOC would be dismissed and Roy's Construction would be required to pay the penalty without the benefit of a hearing on the merits; if, upon reaching the Rule 60(b) issue, we were to decide in favor of Roy's Construction, there would still be no such hearing because the Secretary has waived her right to litigate the merits of the case. In addition to these factual distinctions, we emphasize that the Commission in *Northwest Conduit* warned the Secretary that "'any party who fails to comply with a Commission order, does so at its peril.'" *Id.* (quoting *Trinity Indus. Inc.*, 15 BNA OSHC 1579, 1583 n.6, 1992 CCH OSHD ¶ 29,662, p. 40,185 n.6 (No. 88-1547, 1993), *rev'd on other grounds*, 16 F.3d 1149 (11th Cir. 1994)). In light of this warning and the two distinguishing factors, we find that *Northwest Conduit* does not compel us to set aside the vacatur order. Because we see no other reason sufficient to justify setting aside this sanction, we refuse to exercise our discretionary authority under Rule 101(b).

Accordingly, we affirm the judge's vacatur order.

SO ORDERED.

_/s/_____
W. Scott Railton, Chairman

_/s/_____
Dated: June 1, 2006 Thomasina V. Rogers, Commissioner

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. ROY'S CONSTRUCTION, INC., Respondent.	Docket No. 04-1409

DECISION AND ORDER

The Secretary failed to file a complaint in the instant case, as ordered.

Accordingly, the citations issued to the Respondent on April 15, 2004 are VACATED in their entirety.

SO ORDERED.

IRVING SOMMER
Chief Judge

DATED: OCT 13, 2005
Washington, D.C.

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. 04-1409
	:	
ROY'S CONSTRUCTION, INC.,	:	
	:	
Respondent.	:	

Appearances:

Terrence Duncan, Esquire U.S. Department of Labor New York, New York For the Complainant.	Charles S. Russell, Jr., Esquire Moore, Dodson & Russell, P.C. St. Thomas, Virgin Islands For the 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 sole purpose of determining whether the Secretary's motion to dismiss Respondent's notice of contest ("NOC") should be granted.

The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's work site on December 10, 2003; the work site was the Charles Harwood Medical Complex project ("the Project") on St. Croix in the Virgin Islands. As a result of the inspection, OSHA issued to Respondent a Citation and Notification of Penalty ("Citation") that alleged serious, willful and "other" violations of OSHA standards and proposed a total penalty of $40,600.00. On April 15, 2004, OSHA mailed the Citation by certified mail, return receipt requested, to Respon-

dent's mailing address on St. Thomas in the Virgin Islands, and the Citation was received and signed for on April 17, 2004. 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. In light of the date of receipt of the Citation, Respondent should have filed its NOC by May 7, 2004. Respondent did not file an NOC by that date; however, it did file one on August 17, 2004. The Secretary filed a motion to dismiss the NOC as untimely, and the hearing in this matter was held on April 13, 2005. Both parties have filed post-hearings briefs.

The Secretary's Evidence

Jose Carpena, the area director ("AD") for the Puerto Rico office of OSHA, testified in regard to the circumstances surrounding the subject Citation.[1] His office mailed the Citation on April 15, 2004, by certified mail, return receipt requested, to Respondent's mailing address on St. Thomas in the Virgin Islands, and the Citation was received and signed for on April 17.[2] When no NOC was received, a debt collection letter was sent to Respondent on June 8, advising that the penalty was due. On June 17, Gerald Roy, Respondent's president, called the OSHA office and spoke to CO Ortiz, who told him that the individual in the office who handled debt collection letters would call him.[3] That individual called Mr. Roy that same day, but Mr. Roy was in a meeting and indicated he would return the call. Mr. Roy called the OSHA office again on July 6, and he again spoke to CO Ortiz, who told him that the contest period was over, that the Citation had become final, and that if he wanted to appeal the matter he should do so to the Commission.[4] On August 17, Mr. Roy faxed a letter to the OSHA office, wherein he disputed the Citation and penalty; specifically, he requested "that this issue be opened to further discussion due to the fact that all information pertinent to the incident was not

[1]AD Carpena testified that his office had issued the Citation and that he had reviewed the office files for Roy's Construction in preparation for his testimony. (Tr. 9).

[2]Unless indicated otherwise, all dates hereinafter will refer to the year 2004.

[3]Mr. Roy evidently asked to speak to CO Rivera, who had conducted the inspection, but she was out of the office and on vacation. *See* C-3.

[4]Almost a month after this conversation, on August 4, 2004, OSHA's National Office sent a debt collection letter to Roy's Construction.

immediately available to Ms. Rivera at the time the penalty was assessed."[5] On August 18, OSHA sent a letter to Mr. Roy, explaining once more that the contest period had ended, that the Citation had become a final order, and that he could appeal directly to the Commission; the letter also provided the Commission's address. On August 23, Mr. Roy sent a letter to the Commission in which he stated that he wished "to appeal the citation based on extraordinary circumstances and a misunderstanding as to the events and individuals involved in the citation." At the hearing, AD Carpena stated that, based on OSHA's records relating to Roy's Construction, the company had been cited eight times; on four of those occasions, the company had contested the citations before the end of the contest date, and on the other occasions, the company had either requested an informal conference within the 15-day period or had elected to pay the penalty proposed. (Tr. 7-21; C-1-5).

The Respondent's Evidence

James Breunlin is a site superintendent for Respondent, and he was the site supervisor for the Project. He testified that he was not on the Project when the OSHA CO initially arrived on December 10, 2003, but that he was there the following day when she returned to continue her inspection. Mr. Breunlin further testified that he cooperated with the CO, that he was the person with whom she held a telephonic closing conference about six weeks later, and that he understood from what she said that a citation would be issued and penalties levied unless the company "started an appeal process." Mr. Breunlin stated that Roy's Construction hired a former OSHA inspector within two to three days of the inspection to make sure its abatements of the cited conditions were done correctly and to monitor future OSHA compliance on the Project. (Tr. 31-32).

Noreen Taylor, Respondent's office administrator, testified that the company had 20 to 25 employees at the time of the inspection and that about five had been office workers. She further testified that while she could not say with any certainty when she first saw the Citation, it could have been in May or June of 2004. She explained that the company had moved to a new office between April and May of that year and that the entire process from beginning to end, including unpacking and

[5]The letter was dated August 16 but was not faxed until the following day. (Tr. 15, C-3).

getting settled in the new office, probably took six to eight weeks.[6] She also explained that Respondent received its mail at a mailbox at the Nisky Center, a private company.[7] When certified mail arrived for Respondent, a Nisky employee would sign for it, and the employee of Respondent who picked up the mail would then sign in a book to confirm receipt. Ms. Taylor noted that although she was the only one who picked up the mail currently, she and Bernita Roy, Mr. Roy's wife, were the two persons who picked up the mail at the time the Citation was issued; Mrs. Roy had picked up the mail most of the time, and if it was something important she passed it on to Mr. Roy.[8] Ms. Taylor said she had gone to the Nisky Center to see if they had a record of who had signed for the Citation, but they did not. She also said she did not know who had signed the return receipt for the Citation but that it would have been an employee of Nisky. (Tr. 32-46).

Craig Farley, a project manager with Respondent, testified that he was familiar with the Project and that he had talked to Mr. Breunlin about the alleged violations. He further testified that he had first seen the Citation around the second week of June 2004. He explained that Respondent had decided to move its office to a new location because the old lease was expiring and the landlord wanted to double the rent. He also explained that the new premises required substantial construction and that that, combined with moving, unpacking and setting up the new office, took about a month.[9] Mr. Farley indicated he became aware of the June 8 letter from OSHA when it arrived in the office and that he immediately brought it and the Citation to Mr. Roy's attention. (Tr. 47-56).

Gerald Roy, the owner and operator of Roy's Construction for 25 years, testified that the company had moved during the spring of 2004 as its old lease was expiring and the landlord had wanted to double the rent; the build-out of the new premises and the move, including unpacking and sorting everything out, had taken place in April 2004. He further testified that his company had been

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[6]Ms. Taylor stated that the old office was in Contant, a neighborhood in St. Thomas, and that the new office was in the Island Block Building. (Tr. 34).

[7]Respondent's mailing address is #116 Nisky Center, St. Thomas, USVI 00802.

[8]Ms. Taylor said that Mrs. Roy no longer worked for the company. (Tr. 36, 44).

[9]Mr. Farley was unsure of the exact time of the move, but he thought it had taken place in April and May 2004. (Tr. 52-56).

cited before, that he knew he had to contact OSHA within 15 days after receiving a citation, and that he had usually done so in an attempt to have the penalties reduced. Mr. Roy said he was not aware of either the Citation or the June 8 letter from OSHA until around the middle of June, when Mr. Farley brought them to his attention; he was very upset, especially about the penalty, and he said he called OSHA on June 17 so that he could "[o]pen it back up again for discussion."[10] He spoke to CO Ortiz, because CO Rivera was on vacation, and explained that the cited employee had been working for another subcontractor and that his company had had only one employee on the job; according to Mr. Roy, the CO could not find the file and said that Mr. Roy would have to wait until CO Rivera came back. It was Mr. Roy's understanding that someone from OSHA would call him, but, when they did not, he called again on July 6 and spoke to CO Ortiz again, which resulted in his letter of August 16. Mr. Roy said the August 16 letter was accurate and that while it did not mention the company's move that had not been the purpose of the letter. (Tr. 57-81).

Discussion

The record plainly shows that Respondent did not file an NOC within the requisite 15 working-day period. 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 mitigating circumstances such as absence, illness or a disability that would prevent a party from protecting its interests." *See Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981). There is no evidence that the untimely filing in this case was caused by any deception on the part of the Secretary or her failure to follow proper procedures. Respondent contends, rather, that the late filing should be found to be "excusable neglect" pursuant

[10]Mr. Roy was aware that a citation would be issued because Mr. Breunlin had spoken to him about it, but he did not follow up with Mr. Breunlin or OSHA to determine the status of the matter. (Tr. 72-74).

to Rule 60(b) and the Third Circuit's decision in *George Harms Constr. Co. v. Chao*, 371 F.3d 156 (3d Cir. 2004) ("*George Harms*").[11]

In *George Harms*, the court reaffirmed its holding in *J.J. Hass Co. v. OSHRC*, 648 F.2d 190, 195 (3d Cir. 1981), that the Commission had jurisdiction to consider late-filed NOC's.[12] 371 F.3d at 163. The court then discussed the Supreme Court's decision in *Pioneer Invest. Serv. v. Brunswick Assoc.*, 507 U.S. 380 (1993) ("*Pioneer*"), which addressed the "excusable neglect" standard. The court concluded that *Pioneer's* broad construction of the excusable neglect standard applied to Commission cases implicating that standard, and it then went on to set out the factors the Supreme Court identified to consider: "the danger of prejudice ..., 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." 371 F.3d at 163-64 (citing *Pioneer*, 507 U.S. at 395). The court noted that "a court must take into account all relevant circumstances surrounding a party's failure to file" and that the "control" factor "did not necessarily trump all the other factors." 371 F.3d at 164. The court also noted that, as the Supreme Court stated in *Pioneer*, "the lack of any prejudice to the [opposing party] or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim." 371 F.3d at 164 (citing *Pioneer*, 507 U.S. at 398).

As the court points out in *George Harms*, the Commission has recognized that, in almost all Rule 60(b) late filing cases, "it is a given that there is a lack of prejudice to the Secretary or to the interests of efficient judicial administration, combined with a lack of bad faith by the employer." 371 F.3d at 164 (citing *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 n.5 (No. 98-0367, 2000)). I find, accordingly, that excusing the late filing in this case would not prejudice either the Secretary or the interests of efficient judicial administration. This is particularly true because, while Respondent's

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[11]"Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the law of that circuit in deciding the case, even though it may clearly differ from the Commission's law." *D.M. Sabia Co.*, 17 BNA OSHC 1413, 1414 (No. 93-3274, 1995). This case arose in the Third Circuit, and an appeal in this matter would very likely be to the Third Circuit. The undersigned is thus constrained to follow Third Circuit precedent.

[12]In so doing, the Third Circuit noted the Second Circuit's contrary holding in *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002).

NOC was filed on August 17, 2004,[13] the Secretary's motion to dismiss was not filed until December 7, 2004.[14] I also find that Respondent acted in good faith in this matter; Mr. Breunlin's testimony, which was not rebutted, was that he cooperated with the CO and that a former OSHA CO was hired two to three days after the inspection to ensure that the company's abatements were done correctly and to monitor future OSHA compliance at the site. (Tr. 29-32).

As to the reason for the delay, Respondent suggests that the fact that Nisky had no record of who picked up the Citation shows there is no evidence as to "exactly when, if ever, the [Citation] was received by Roy's." I disagree. First, the record shows the Citation was received and signed for by a Nisky employee on April 17. (Tr. 10-11, 35-36). Second, Ms. Taylor testified that either she or Mrs. Roy picked up the mail during that time, and she admitted she was unaware of any other difficulties in getting mail from Nisky. (Tr. 36, 40-46). Third, it is clear the Citation did arrive at Respondent's place of business, in that three employees testified they saw it in the company's new office; as noted above, Ms. Taylor thought she saw it in May or June, and Mr. Farley and Mr. Roy both said that they first saw it in June. (Tr. 37, 49, 64-65). The most likely explanation is that the Citation was picked up by Ms. Taylor or Mrs. Roy after Nisky received it and that it got "lost in the shuffle" during the move and was not discovered until afterwards, when it was brought to Mr. Roy's attention.

Respondent also contends that the move disrupted its usual business practices and caused its failure to file a timely NOC. The Secretary disputes this contention, noting that Mr. Roy's August 16 letter did not mention anything about the move or a reason for the late filing.[15] (Tr. 77-79). However, as noted above, Mr. Roy testified that that was not the purpose of the letter. (Tr. 80). Moreover, I observed Mr. Roy's demeanor as he testified, and that of Respondent's other witnesses, and found them all to be credible and sincere witnesses; further, Mr. Roy's testimony about the move was

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[13]I find that the letter faxed to OSHA on August 17, 2004, was an NOC because, liberally construed, the statements in the letter exhibit a clear intent to dispute the Citation. *See Herasco Contractors, Inc.*, 16 BNA OSHC 1401, 1402 (No. 93-1412, 1993), and cases cited therein.

[14]When the Secretary's complaint was not filed by October 21, 2004, an Order to Show Cause as to why the Citation should not be vacated was issued. The Secretary filed a motion for an extension of time, which was granted, and her motion to dismiss was filed December 7, 2004.

[15]Mr. Roy's August 23 letter likewise does not mention the move.

consistent with that of Ms. Taylor and Mr. Farley. I thus credit the statements of Respondent's witnesses and reject the Secretary's suggestion that the testimony about the move was not believable. I also found the testimony about the Citation not being discovered until June credible, and I find as fact that Mr. Farley and Mr. Roy both became aware of the Citation around the middle of June. Finally, I find that, pursuant to the Third Circuit's decision in *George Harms*, *supra*, and its similar decision in *Avon Contractors, Inc., v. Secretary of Labor*, 372 F.3d 171 (3d Cir. 2004), Respondent's failure to file a timely NOC before mid-June was due to excusable neglect; this is so in light of the move and the consequent disruption to the company's regular business practices.

Notwithstanding the foregoing, I conclude that Respondent's subsequent delay in filing an NOC letter was not excusable neglect. The record shows that Mr. Roy called OSHA on June 17 and spoke to CO Ortiz. (Tr. 13, 24, 66). While Mr. Roy's account of the conversation was different than that of AD Carpena, I find that any differences are attributable to a misunderstanding on the part of Mr. Roy and/or the fact that AD Carpena was reading from the case file and did not have personal knowledge of what was said. Regardless, after the June 17 conversation, and whether Mr. Roy was to call back or someone from OSHA was to call him back, Mr. Roy did not contact OSHA again until July 6. (Tr. 14, 24, 67, 75-76). In addition, despite his conversation with CO Ortiz on July 6, when the CO told him the Citation was final and to write the Commission if he wanted to appeal, Mr. Roy did not do so until August 17, when he faxed his letter dated August 16 to OSHA.[16] (Tr. 14-15, 68, 76-78). Mr. Roy's company had been cited eight times before, and he was familiar with OSHA and the 15-day filing requirement. (Tr. 17-21, 58, 68-69, 74). In these circumstances, Mr. Roy's waiting until August 17 to fax an NOC letter to OSHA was not excusable neglect.

Having found that the failure to file an NOC until August 17 was not due to excusable neglect, I turn now to whether Respondent is nonetheless entitled to Rule 60(b) relief. As set out above, the Third Circuit stated in *George Harms* that "a court must take into account all relevant circumstances surrounding a party's failure to file" and that the "control" factor "did not necessarily trump all the other factors." 371 F.3d at 164. The Third Circuit also noted that, as the Supreme Court stated in *Pioneer*, "the lack of any prejudice to the [opposing party] or to the interests of efficient judicial

[16]As noted in footnote 4, *supra*, on August 4, 2004, OSHA's National Office sent a debt collection letter to Respondent.

administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim." 371 F.3d at 164 (citing *Pioneer*, 507 U.S. at 398). Based on these statements, and upon considering all of the circumstances in this case, including the good faith of Respondent, I conclude that Roy's Construction is entitled to Rule 60(b) relief in this matter.[17]

In view of the foregoing, the Secretary's motion to dismiss the NOC as untimely is DENIED. The Secretary shall file her complaint within twenty (20) days of the date of this order.

SO ORDERED.

/s/

Irving Sommer
Chief Judge

Dated: July 5, 2005
Washington, D.C.

[17]In so concluding, I note that the Commission requires that the party seeking relief must allege a meritorious defense. However, that element is satisfied with "minimal allegations that the employer could prove a defense if given the opportunity." *See Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1951 (No. 97-851, 1999); *Russell B. Le Frois Builder*, 18 BNA OSHC 1978, 1980 (No. 98-1099). I find that Respondent's letters of August 16 and 23, 2004, in addition to Mr. Roy's testimony at the hearing, satisfy the meritorious defense requirement. (Tr. 67-68).