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. J. CLARK FRAMING, Respondent.	OSHRC DOCKET NO. 06-2049[1]

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, J. Clark Framing, 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 of the inspection, OSHA issued a Citation

[1]The companion case to this matter, which was heard on the same date as this case, is docket number 06-2050 and is captioned *Secretary of Labor v. Mission Constructors, Inc.*

and Notification 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 25, 2006, Repondent's representative sent a letter to OSHA requesting a "late informal hearing;" attached to the letter was an NOC dated October 17, 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 22, 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 took place on March 16, 2007, in Houston, Texas.

The Relevant Testimony

Thomas Scott, Respondent's representative, testified that his office had called OSHA various times in an attempt to set up an informal conference. He explained that his office's practice, once a client receives a citation, is to have an informal conference with OSHA within the 15-day period; his office attempts to settle the citation at the conference and only contests it if necessary. He also explained that Commission judges had told him an informal conference must be held before a citation can be contested, 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 through the informal conference procedure. As to the phone calls that were made, Mr. W. C. Blayney called OSHA on October 10, 2006,[2] but was unable to

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

arrange a conference. Mr. Scott called OSHA the next day and the person he spoke to told him the people needed for the conference were not available; he was also told an OSHA official would call him back to set up a conference. Mr. Scott discussed R-1, a diary of the actions his office had taken in this matter.[3] He noted that R-1 reflected the phone calls made and also stated that the NOC was prepared on October 10 "for use at Informal if needed;" he said the NOC was never sent as an informal conference never took place. He also noted that R-1 stated, in bold type, that October 17 was the end of the 15-day contest period. He further noted that R-1 showed October 13 and October 17 phone calls to Ms. Stone; in the first, she said the last date for contest was October 13, and in the second, the NOC dated October 10 was referenced. Mr. Scott agreed that the October 25 letter to OSHA indicated he had left the country on October 20 and that he had been unable to settle the case before leaving; he further agreed that the December 22 letter to the Commission indicated that OSHA had advised, during a phone call when his office had requested an informal conference, that the last day to contest the Citation was October 17. (Tr. 10-25, 30-38).

Karen Stone, the assistant area director ("AAD") who supervised the compliance officer who issued the Citation, testified she was in charge of the J. Clark Framing case and would have been the person to speak to anyone calling about that case. Ms. Stone identified C-1 as the OSHA diary sheet reflecting her conversations with the representatives of the employer in this case. The AAD noted that R-1 showed she spoke to Mr. Scott on October 13 and that he stated Respondent had had no employees on the job and had subcontracted it to another company; she advised him to submit a letter and documents supporting his statement, and he agreed to do so and said nothing about filing an NOC or having an informal conference. The AAD further noted that R-1 showed she spoke to Mr. Blayney on October 25 and that he asked what the final date for contesting was; she told him the date was past due and offered him a payment plan, to which Mr. Blayney replied that the owner "had gone to England," that he wasn't sure what to do, and that he might submit a letter. (Tr. 44-50).

Discussion

The record in this case clearly 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

[3]Mr. Scott also discussed R-2 and R-3, phone records showing calls he and Mr. Blayney had made to OSHA on behalf of Respondent. (Tr. 25-29, 33-34).

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;[4] (4) ... ; (5) ... ; or (6) any other reason justifying relief from the operation of the judgment."[5] 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 here 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 6 (emphasis in original). 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.*

[4]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).

[5]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.*

P'ship, 507 U.S. 380 (1993) ("*Pioneer*").[6] *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 additionally stated the following:

> 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 eight days after the NOC period ended, is not substantial and that the impact on judicial proceedings is likewise insubstantial.[7] Finally, I find that Respondent itself has not acted in bad faith in this matter.

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[6]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 (1st Cir. 1997), it was noted that the *Pioneer* decision is understood to provide guidance outside of the bankruptcy rules.

[7]Although the NOC letter to OSHA was only eight days late, I note that Respondent's letter to the Commission was not sent until December 22, which was more than a month after OSHA had advised Respondent to contact the Commission.

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.[8] 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 testimony that he had worked for W.C. Blayney & Associates for eight years, that he had filed NOC's

[8]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. 21-24, 31).

in approximately 40 cases, and that he had "typically" filed the NOC within the 15-day period. (Tr. 23-24).

Based on the foregoing, I find that the reason for the delay in this case constitutes simple negligence, and not "excusable neglect," especially since Respondent was represented by a company that provides consulting and representation in OSHA matters.[9] 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.

[9]My finding is supported by either Mr. Scott's or Ms. Stone's version of the facts.