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. ELAN LAWN AND LANDSCAPE SERVICE, INC., Respondent.	OSHRC Docket No. 08-0700

APPEARANCES:

Sharon D. Calhoun, Attorney; Stanley E. Keen, Regional Solicitor; Gregory F. Jacob, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Leslie W. Langbein, Esq.; Langbein & Langbein, P.A., Miami Lakes, FL
For the Respondent

REMAND ORDER

Before: THOMPSON, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

At issue on review is a decision and order by Chief Administrative Law Judge Irving Sommer denying Elan Lawn and Landscape Service, Inc. ("ELL") relief under Federal Rule of Civil Procedure 60(b) for a late-filed notice of contest ("NOC") and affirming five citation items. For the following reasons, we remand the case to the judge for further proceedings consistent with this opinion.

Background

After an inspection of an ELL worksite in Pembroke Pines, Florida, the Occupational Safety and Health Administration ("OSHA") issued ELL by certified mail, return receipt requested, two citations under the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651-78, alleging five violations with a total proposed penalty of $13,800. The

certified mail receipt for the citations was dated April 19, 2008, and signed for by a "T.G. Fedez." On May 13, 2008, one day after the fifteen working day period for notifying the Secretary of its intent to contest the citations expired, ELL submitted a written NOC in the form of a letter to the Executive Secretary. Section 10(a) of the Act, 29 U.S.C. § 659(a). ELL, appearing *pro se* at the time, included in the letter a request for a hearing and explained that an ELL employee had left two unreturned voicemail messages for Ramona Morris, the OSHA Area Office representative who had previously met with company officials to discuss the citations. According to the letter, when an ELL employee finally reached Morris on May 13, she informed him that "the deadline was missed."

On July 11, 2008, the Secretary submitted an Opposition to Relief under Rule 60(b) in which she moved to dismiss the NOC as untimely and argued there was no basis for affording ELL relief under Rule 60(b).[1] According to the Secretary, Morris "was in the office" and "has no record of receiving [ELL's] calls or of voicemails." ELL filed nothing in response, subsequently claiming in its petition for discretionary review that it had neither been contacted by the Secretary nor received her filing. On August 8, the judge issued a decision in which he denied ELL relief under Rule 60(b)—primarily for a failure to support a finding of "excusable neglect"—and affirmed the citations without holding a hearing.

ELL, now represented by counsel, claims that had it been aware of the Secretary's opposition filing and that the judge would render a decision on the matter without the benefit of a hearing, it would have obtained counsel and produced evidence to demonstrate that its NOC was timely or, alternatively, that it deserved Rule 60(b) relief. Specifically, ELL claims it never employed a "T.G. Fedez," its offices were not open on April 19, 2008, and it had attempted to contact OSHA about the citations but received no response until after the contest deadline allegedly expired. ELL has also submitted two sworn affidavits from an officer of the company and an employee declaring these facts.

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

> On motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect . . . .

Discussion

Under "long-standing Commission precedent," relief may be granted under Rule 60(b) from a final judgment that is due to a late-filed NOC. *Nw. Conduit Corp.*, 18 BNA OSHC 1948, 1949 (No. 97-851, 1999). The moving party bears the burden of showing that it is entitled to such relief. *NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 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 takes into account "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." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

In denying ELL relief under Rule 60(b), the judge had before him only a NOC he found was filed one day late and an unrebutted filing from the Secretary opposing Rule 60(b) relief. The judge relied primarily on the fact that "the delay [in filing] was within [ELL's] reasonable control[,]" citing cases where the Commission denied relief because the employer's lack of "orderly procedures . . . for handling important documents" caused the late filing. He also relied on the Secretary's assertions that ELL "has a history of OSHA citations" and noted that an "additional reason for denying relief" was ELL's failure to "allege it has a meritorious defense to the citation." *See Nw. Conduit Corp.*, 18 BNA OSHC at 1951 (moving party must allege a meritorious defense to be eligible for relief under Rule 60(b)).

Although we cannot verify ELL's claim that it did not receive the Secretary's opposition filing given the limited record before us, we note that in filing the motion to dismiss ELL's NOC the Secretary failed to comply with Commission Rule 40(a), 29 C.F.R. § 2200.40(a), in two respects: she did not make the motion "in a separate document" and she failed to state whether she conferred with ELL regarding the motion.[2] The Secretary's apparent failure to confer with ELL before filing the motion eliminated one of the functions of Commission Rule 40(a)—to ensure that a party in jeopardy of being defaulted is warned of that possibility by the moving

[2] Commission Rule 40(a) states that a motion "shall be made in a separate document" and that prior to filing a motion, the "moving party shall confer or make reasonable efforts to confer with other parties and shall state in the motion if any other party opposes or does not oppose the motion."

party. *See A A Plumbing, Inc.*, 20 BNA OSHC 2203, 2204 (No. 04-1299, 2005) (remanding case for *pro se* employer to explain reasons for failing to file a timely answer where Secretary failed to follow Commission Rule 40(a)); *Dore & Assocs. Contracting Inc.*, 19 BNA OSHC 1438, 1438 n.1 (No. 01-0067, 2001) (remanding case where Secretary failed to comply with Commission Rule 40(a) by not contacting *pro se* employer for a motion to dismiss untimely NOC). Compliance with Commission Rule 40(a) is particularly important when the party is appearing *pro se*, as ELL was at the time. As the Commission has recognized, *pro se* employers are "often confused by legal terminology and may not be fully cognizant of the legal technicalities of the judicial process." *A A Plumbing, Inc.*, 20 BNA OSHC at 2204 (internal quotation omitted).

Absent any communication or contact here from either the judge or the Secretary after filing its NOC, ELL was not fully aware of its procedural position and may not have realized its ability to address the possibility of relief under Rule 60(b). In fact, ELL maintains that its NOC was timely because it did not receive the citations until after April 19, an argument it would have had no reason to raise in the NOC and, apparently without notice of the opposition filing or that there would be no evidentiary hearing, it had no reason to raise before the judge issued his decision. Thus, ELL was not given a full opportunity to present evidence as to the timeliness of its NOC, to respond to the Secretary's opposition, and to allege a meritorious defense.

Under these circumstances, we conclude that this matter should be remanded to the judge "to conduct an appropriate evidentiary proceeding." *Dore & Assocs.*, 19 BNA OSHC at 1439; *see A A Plumbing, Inc.*, 20 BNA OSHC at 2204 (remanding case for *pro se* employer to explain reasons for failing to file a timely answer where Secretary failed to follow Commission Rule 40(a)); *Mannkraft Corp.*, 1993 WL 387778 at *1 (remanding case to permit *pro se* employer to develop an evidentiary record to "establish whether its notice of contest should be reinstated"); *Vern's Mfg., Inc.*, 14 BNA OSHC 1846, 1847 (No. 89-3082, 1990) (remanding untimely NOC case where no hearing was held, no affidavits were filed, and employer was *pro se*). On remand, ELL should be given an opportunity, based on a complete evidentiary record, to address whether its NOC was timely and, therefore, should be reinstated. If the judge finds the NOC to be untimely, he should then reconsider in light of the complete evidentiary record whether excusable neglect exists, as well as reevaluate whether ELL has alleged a meritorious defense. *See Architectural Glass & Metal Co.*, 19 BNA OSHC 1546 (No. 00-0389, 2001) (remanding

case to judge to consider evidence to determine whether Rule 60(b) relief may be granted); *Dore & Assocs.*, 19 BNA OSHC at 1439 (same); *Nw. Conduit Corp.*, 18 BNA OSHC at 1951 (applying *Pioneer* factors in analyzing excusable neglect).

Accordingly, we remand the matter to the judge to develop the record, to consider any evidence with respect to whether ELL filed a timely NOC and, if that claim is not supported by the evidence, to reconsider whether relief under Rule 60(b) is warranted.

SO ORDERED.

/s/
Horace A. Thompson III
Chairman

Dated: September 8, 2008

/s/
Thomasina V. Rogers
Commissioner

Secretary of Labor, Complainant, v. Elan Lawn & Landscape Service, Inc., Respondent.	OSHRC Docket No. 08-0700

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 late-filed notice of contest ("NOC") should be accepted.

Background

The Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent, located in Pembroke Pines, Florida, on January 16, 2008. As a result, OSHA issued to Respondent a Citation and Notification of Penalty ("Citation") on April 14, 2008. OSHA mailed the Citation to Respondent's address in Pembroke Pines, Florida, by certified mail, return receipt requested, and a representative of Respondent, T. G. Fedez, signed for the Citation on April 19, 2008. 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 upon the date it received the Citation, Respondent was required to file an NOC on or before May 12, 2008. However, Respondent did not file an NOC by that date. In a letter dated May 13, 2008, addressed to the Commission, Respondent stated as follows:

> On May 6th 2008, our company had an informal meeting with an OSHA representative Ms. Ramona Morris, at the Ft. Lauderdale branch in Florida. We were told that we had until May 12th to request a formal meeting with OSHA to dispute our citations. A telephone call was placed on Friday the 9th and Monday the 12th to Ms.

> Morris. Messages were left on her voicemail but received no response until noon May 13th. At that time we were told that the deadline was missed.
>
> Given the circumstances, we would like to request that the review commission hear our case regarding our recent OSHA citations.
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> The letter is signed by Yoram Gozlan, vice-president of operations.

Only July 11, 2008, the Secretary filed her opposition to the request for relief.

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.

Although Respondent's letter indicates that it contacted Ms. Morris of the Ft. Lauderdale OSHA office and left messages on her voice mail, the Secretary's opposition states that Ms. Morris was in the office on the days in question and that there was no record of calls from Respondent or voice mail messages left by Respondent on those days. Regardless, even if Respondent did leave the messages it claims, the Commission has held that OSHA's failure to return an employer's telephone calls does not serve as a basis for Rule 60(b) relief where the 15-day NOC deadline was unequivocally stated on the face of the OSHA citation. *Craig Mech., Inc.*, 16 BNA 1763, 1765-66 (No. 92–0372 , 1994). As the Secretary notes in her opposition, the Citation sent to Respondent states, 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.**

Based on the foregoing, there is no reason to conclude that the late filing here was due to deception or failure to follow proper procedures on the part of the Secretary. Turning to whether Respondent's late filing was due to "excusable neglect," the Commission follows the Supreme Court's test in *Pioneer Inv. Serv. v. Brunswick Assoc.*, 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.[1] *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).

I find the length of delay in filing here, which was one day, to be insignificant. I further find that the Secretary has not been prejudiced and that the delay would have little impact on judicial proceedings. Moreover, I do not question Respondent's good faith in this matter.

In regard to the reason for the delay, and whether it was within the reasonable control of the movant, I agree with the Secretary that the delay was within the reasonable control of Respondent. The Citation itself provided Respondent with all the necessary information to file an NOC. Further, 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).

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[1]The Commission has indicated that while prejudice to the opposing party, impact on judicial proceedings and good faith are part of the test, these factors generally do not have much relevance in Commission cases. *CalHar Constr., Inc.*, 18 BNA OSHC at 2153 n.5.

Also significant in this case is the fact that Respondent itself admits in its NOC letter that Ms. Morris advised it on May 6, 2008, that it had until May 12, 2008, "to request a formal meeting with OSHA to dispute our citations." Thus, Respondent had not only the written warning set out in the Citation, it also had an oral warning on May 6, 2008, of the final date by which it had to contest the Citation. Commission precedent is well settled that a business must have orderly procedures in place for handling important documents and that if the lack of such procedures caused the late filing, Rule 60(b) relief will not be granted. *NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999); *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991); *Stroudsburg Dyeing & Finishing* Co., 13 BNA OSHC 2058 (No. 88-1830, 1989); *Louisiana Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989). The Commission has thus denied relief in cases where the person responsible for filing the NOC was absent, even if due to illness, and where a disruption to the employer's business, such as a change in management, had occurred. *See, e.g., Jackson Assoc. of Nassau*, 16 BNA OSHC 1261, 1265 (No. 91-0438, 1993); *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989).

Based on the facts of this case and the foregoing Commission precedent, I am constrained to find that the delay was not due to excusable neglect; in this regard, I note the Secretary's statement in her opposition that Respondent has a history of OSHA citations and is therefore very familiar with the NOC requirements. Accordingly, I conclude that Respondent has not demonstrated that relief pursuant to Rule 60(b) is justified.

There is an additional reason for denying relief in this matter. As the Secretary points out, besides showing the late filing was caused by excusable neglect, the party seeking relief must also allege it has a meritorious defense to the citation. *See, e.g., Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1951 (No. 97-851, 1999). Although Respondent's letter sets out an explanation for the late filing, there is no allegation of a meritorious defense to the Citation.

In view of the foregoing, there is no basis for the granting of relief under Rule 60(b). Respondent's request for relief is accordingly DENIED, and the Citation is AFFIRMED in all respects.

SO ORDERED.

/s/

Irving Sommer
Chief Judge

Dated: August 8, 2008
Washington, D.C.