

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,  
Complainant,

v.

C&C ROOFING,  
Respondent.

OSHRC DOCKET NO. 13-0312

Timothy S. Williams, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, CO  
For Complainant

No Appearance for the Respondent

Before: Administrative Law Judge Patrick B. Augustine

**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”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a C&C Roofing (“Respondent”) worksite in Colorado Springs, Colorado on October 30, 2012. As a result of the inspection, OSHA issued a Citation and Notification of Penalty (“Citation”) to Respondent alleging one serious violation of the Act with penalties totaling \$2,000.00. The Citation was issued on November 8, 2012. Respondent contested the Citation by filing a Late Notice of Contest on January 29, 2013.

**Procedural History**

On May 21, 2013, Complainant filed a Motion to Dismiss Respondent’s Notice of Contest, which requested that the Citation be affirmed as a final order of the Commission. *See Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185 (No. 01-0830, 2003) (dismissing notice of contest filed one day late). Specifically, Complainant argued that Respondent is not entitled

to relief pursuant to Federal Rule of Civil Procedure 60(b), because (1) Respondent filed its Notice of Contest 48 days late; and (2) Respondent failed to establish any reason that would justify relief from the operation of Section 10(a) of the Act, 29 U.S.C. § 659(a). Respondent did not file a response to Complainant's motion. On June 17, 2013, the Court issued an Order to Show Cause, whereby Respondent was "**ORDERED TO SHOW CAUSE WITHIN TEN (10) DAYS** of this Order as to why the Court should not issue judgment against Respondent and affirm the proposed violations in this case . . . ." The Respondent has not responded to the Order to Show Cause.

### **Discussion**

Rule 60(b) states that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding . . . ." Fed. R. Civ. P. 60(b). The rule lists the reasons that would provide a sufficient basis for granting the relief requested. *Id.* The subsection applicable in this case is (b)(1), which states that "mistake, inadvertence, surprise, or excusable neglect" constitutes a sufficient basis for Rule 60(b) relief. *Id.* Rule 60(b) motions claiming excusable neglect are evaluated pursuant to the criteria set forth in *Pioneer Investment Servs. v. Brunswick Assocs.*, 507 U.S. 380, 395 (1993). *See Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1999 OSHD (CCH) ¶ 31,949 (No. 97-851, 1999). Under *Pioneer*, the Court must consider "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*, 507 U.S. at 395. According to the Commission, "the reason for the delay, including whether it was within the reasonable control of the movant" is the "key factor" in the determination of whether an employer has established excusable neglect. *A.W. Ross Inc.*, 19 BNA OSHC 1147, 2000 OSHD (CCH) ¶ 32,197 (No. 99-0945, 2000) (citing *Calhar Constr.*, 18

BNA OSHC 2151, 2000 OSHD (CCH) ¶ 32,081 (No. 98-0367, 2000)).

Complainant contends that Respondent has failed to establish mistake, inadvertence, surprise, inexcusable neglect, or that Respondent's failure to file a timely notice of contest was due to misrepresentation or other conduct on behalf of Complainant. *See Craig Mech., Inc.*, 16 BNA OSHC 1763 (No. 92-0372-S, 1994); *see also Roy Kay, Inc.*, 13 BNA OSHC 2021 (No. 88-1748, 1989) (holding the burden is on Respondent to show sufficient basis for relief). Specifically, Complainant argues that Respondent received actual notice of the Citation and failed to comply with the instructions—typed in bold-face print—indicating the deadline for filing a notice of contest. By failing to file a response to the Order to Show Cause, Respondent has failed to provide the Court with any supportable reason it could consider to justify its failure to file its Notice of Contest within the 15-day period provided by 29 C.F.R. § 1903.17(a). *See also* 29 U.S.C. § 659(a).

The Court finds that the service effected by Complainant was “reasonably calculated to provide [Respondent] with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest.” *B. J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474, 1979 CCH OSHD ¶ 23,675 (No. 76-2165, 1979). The Court further finds that Respondent has failed to establish any plausible excuse or rationale that would justify relief from the operation of Section 10(a) of the Act. *See* 29 U.S.C. § 659.

Accordingly, with respect to the above-referenced docket, Respondent's Notice of Contest is hereby VACATED and the violations and penalties alleged in the Citation and Notification of Penalty are AFFIRMED.

**ORDER**

1. Citation 1, Item 1 is AFFIRMED and a penalty of \$2,000.00 is ASSESSED.

SO ORDERED.

Date: July 23, 2013  
Denver, Colorado

/s/ \_\_\_\_\_  
Patrick B. Augustine  
Judge, OSHRC