OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. ALL AROUND THE HOUSE SERVICES, Respondent.	OSHRC Docket No. 07-0059

APPEARANCES:

Christine Eskilson, Esquire
U.S. Department of Labor
Boston, Massachusetts 02203
For the Complainant

Jessica Lee, Owner
All Around the House Services
229 Corn Hill Road
Boscawen, New Hampshire 03303
For the Employer

BEFORE: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This case is before the Occupational Safety and Health Review Commission ("the Commission"), pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), to determine whether relief from a final order of the Commission should be granted to All Around the House Services ("Respondent") under Federal Rule of Civil Procedure 60(b) ("Rule 60(b)").

Background

The Concord, New Hampshire Area Office of the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent on November 15, 2006. During the course of the inspection, James Moran introduced himself as the installation manager for the site and fiance of the owner, Jessica Lee. (Tr. 9). At the conclusion of the inspection, Mr. Moran attended the closing conference and represented that he was familiar with post-inspection proceedings. (Tr.10).[1] On November 21, 2006, Serious Citation 1 ("Citation"), consisting of two items and proposing penalties totaling $1500.00, was issued and mailed to Respondent via first class certified mail. The Citation specifically set out the15 working day time period within which a notice of contest must be filed. A copy of OSHA Publication 3000-08R, Employer Rights and Responsibilities Following an OSHA Inspection, was also included in this mailing to Respondent. (Tr. 13-16; Exs. C-1, C-2). On November 27, 2006, the OSHA area office received the certified mail return receipt, which showed that the Citation had been signed for by Jessica Lee, Respondent's owner, on November 24, 2006. (Tr. 17; Ex.C-3). Fifteen working days after November 24, 2005, was December 15, 2006. The OSHA area office received no letter of contest from Respondent on or before that date. (Tr.18).

On December 19, 2006, the OSHA area office received a letter from Ms. Lee disputing the Citation. Although the letter was dated December 10, 2006, the envelope was postmarked December 18, 2006, three days after the last day of the contest period. (Tr. 19-20; Exs. C-4, C- 5). After receiving this letter, OSHA Assistant Area Director ("AAD") George Kilens telephoned Respondent on December 20, 2006. Ms. Lee was unavailable, so Mr. Kilens spoke with Mr. Moran and informed him the contest period was over and a final order had been entered. (Tr. 21). The AAD advised Mr. Moran that Respondent could contact the Commission for further action. (Tr. 21).

On January 5, 2007, the Commission received from Respondent a copy of its December 10, 2006 letter, which was construed to be a late-filed notice of contest. On January 23, 2007, the Secretary filed an Opposition to Relief under Rule 60(b). A hearing originally scheduled for Tuesday, April 17, 2006, was rescheduled, with the oral telephonic assent from both parties, for Wednesday, April 18, 2006. As a reminder of the next day's hearing, on Tuesday, April 17, 2007, the administrative assistant of the undersigned had both telephonic and faxed contact with

[1] An OSHA history review revealed that Mr. Moran was the owner of High Peaks Roofing, which had had three OSHA inspections in 2000. (Tr. 11-12).

Respondent.[2] However, no one appeared on behalf of the Respondent at the hearing. Counsel for the Secretary moved for a default judgment against Respondent for its failure to appear.

Discussion

Pursuant to section 10(a) of the Act, if an employer fails to notify the Secretary within 15 working days of receipt of its intent to contest the citation and/or proposed penalty, then the citation and proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency." *Secretary of Labor v. Barretto Granite Corp.*, 830 F.2d 396 (1st Cir. 1987); 29 U.S.C. § 659(a). The Secretary of Labor has prescribed the manner in which a notice of contest must be made. 29 C.F.R. § 1903.17(a) states that the employer must notify the Area Director in writing and that "[s]uch notice of intention to contest shall be postmarked within 15 working days of the receipt by the employer of the notice of proposed penalty."

The record plainly shows that Respondent did not file a notice of contest within 15 working days of its receipt of the Citation, as required by section 10(a) of the Act and 29 C.F.R. § 1903.17(a). The Citation was received by Respondent on November 24, 2006, and 15 working days following that date was December 15, 2005. No notice of contest was filed on or before November 24, 2006. Any notice of contest postmarked after the 15-day contest period has no effect. *Barretto Granite Corp.*, 830 F.2d 396, 397-98 (1st Cir. 1987).

An untimely notice of contest 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. *B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1476-77 (No. 76-2165, 1979). Furthermore, long-standing Commission precedent establishes that relief may be granted in appropriate circumstances pursuant to Rule 60(b), where a final order has been entered as a result of an untimely notice of contest.[3] The rule permits discretionary relief from final orders that have been entered due to a party's "mistake, inadvertence, surprise, or excusable neglect," or "any other reason justifying relief," including mitigating circumstances such "as absence, illness, or a similar disability preventing a party from acting to

---

[2] Mr. Moran, who identified himself as Ms. Lee's husband, represented Respondent during each of the telephonic contacts.

[3] Rule 60(b) provides in relevant part that "[o]n motion and upon such terms as are just, the court may relieve a party … from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence …; (3) fraud …, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied …; or (6) any other reason justifying relief from the operation of the judgment." Only the issue of "excusable neglect" is relevant here.

protects is interests." *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 8–1920, 1981). The burden is on Respondent to show a sufficient basis for relief. *Roy Kay Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748). To evaluate claims of excusable neglect, the Commission applies the criteria set forth in *Pioneer Inv. Serv. v. Brunswick Assoc*., 507 U.S. 380, 395 (1993). *E.g.*, *Northwest Conduit Corp.*, 18 BNA OSHC 1948 (No. 97-0851, 2000). Under the *Pioneer* test, the Commission takes into account "all relevant circumstances," including [1] "the danger of prejudice to the [other side]," [2] "the length of the delay and its potential impact on judicial proceedings," [3] "the reason for the delay, including whether it was within the reasonable control of the movant," and [4] "whether the movant acted in good faith." *Id.* at 1950 (quoting 507 U.S. at 395).

Under the Commission and First Circuit Court of Appeals precedent applying this test, the "reason for the delay, including whether it was within the reasonable control of the movant," is a "key factor" in the excusable neglect inquiry and, in appropriate circumstances, the dispositive factor. *Calhar Constr., Inc.*, 18 BNA OSHC 2151 (No. 98-367, 2000); *NYNEX*,18 BNA OSHC 1948 (No. 97-851, 2000). *See also Hospital Del Maestro v. NLRB,* 263 F.3d 173, 174-75 (1st Cir. 2001) ("excuse given for the late filing must have the greatest import").

Here, Respondent has presented no reason for its delay. The Commission has held that a respondent bears the burden of its own lack of diligence in failing to act upon the information contained in the citation. *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). The Commission has also held that it expects employers to "maintain orderly procedures for handling important documents." *NYNEX*, at 1951(quoting *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 1989). Respondent has a professional duty as a business to, at a minimum, institute a procedure to ensure that business documents are addressed in a timely manner, especially those concerning court procedures or those that come to its attention via certified mail. Respondent apparently did not institute such a procedure, or its procedure was inadequate, and its failure to file a timely notice of contest in this case amounts to no more than simple negligence.

Furthermore, Respondent has not asserted a meritorious defense. In addition to the burden of establishing that its neglect was excusable, a respondent seeking Rule 60(b) relief must also assert a meritorious defense to the citation. *See Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 20 (1st Cir. 1992) ("[it is] the rule in this circuit, that a litigant, as a precondition to relief under Rule 60(b), must give the trial court reason to believe that vacating the judgment will not be an empty exercise"); *United States of America v. Proceeds of Sale of 3,888 Pounds Atlantic Sea Scallops*, 857 F.2d 46, 48 (1st Cir. 1988) (same); *see also Park*

Nursing Center, Inc. v. Samuels, 766 F.2d 261, 264 (6th Cir. 1985) (a final judgment should be set aside under Federal Rule 60(b) if it was no fault of the moving party and if the moving party established a meritorious defense to the underlying violation). A meritorious defense is one that is valid at law with respect to the underlying action. *Id.* Here, Respondent claims that its employee was not exposed to the fall protection violations alleged in this case. (Ex.C-4). This bare claim, without more, does not establish that the Citation was invalid.

In view of the aforementioned, I find that Respondent's letter dated December 10, 2006, does not set forth a sufficient basis for relief from judgment. Moreover, as of this writing, Respondent appears to have abandoned its request for relief from judgment.

WHEREFORE, Respondent's notice of contest is dismissed as untimely, and the Citation and proposed penalty is AFFIRMED in all respects.

/s/
Covette Rooney
Judge, OSHRC

Dated: May 25, 2007
Washington., D.C.