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. COLEMAN HAMMONS CONSTRUCTION CO., INC. Respondent.	OSHRC Docket No. 17-0992

APPEARANCES:

Nicholas C. Geale, Acting Solicitor of Labor; Stanley E. Keen, Regional Solicitor; Karen E. Mock, Counsel; Jeremy K. Fisher, Attorney; U.S. Department of Labor, Atlanta and Washington, D.C.
For the Complainant

David Goff, Esq.; Wise Carter Child & Caraway P.S., Gulfport, Mississippi
For the Respondent

DECISION

Before: MACDOUGALL, Chairman; ATTWOOD and SULLIVAN, Commissioners.

BY THE COMMISSION:

The Occupational Safety and Health Administration issued Respondent two citations and Respondent failed to contest them within fifteen working days; as a result, the citations became a final order of the Commission. *See* 29 U.S.C. § 659(a) (employer's failure to contest citation within fifteen working days results in citation becoming a final order of the Commission). After the Secretary filed a motion to dismiss Respondent's untimely filing, Administrative Law Judge Heather A. Joys held a hearing to determine whether Respondent was entitled to relief from a final order under Federal Rule of Civil Procedure 60(b)(1). *See* 29 U.S.C. § 661(g) (Commission proceedings in accordance with the Federal Rules of Civil Procedure unless the Commission has adopted a different rule).

"Relief under Rule 60(b)(1) motions is rare" and can only be granted if the employer proves

that its failure to timely contest a citation was due, as relevant here, to excusable neglect.[1] *Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006); Fed. R. Civ. P. 60(b)(1). Proof of excusable neglect requires the consideration of several factors, including the reason for the party's delay in filing, which the Commission has identified as a key factor. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) (factors "include . . . 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"); *A. W. Ross Inc.*, 19 BNA OSHC 1147, 1148 (No. 99-0945, 2000) ("A key factor in evaluating whether a party's delay in filing was due to excusable neglect is 'the reason for the delay' including whether it was within the reasonable control of the movant.").

The judge concluded that Respondent failed to prove it was entitled to relief under Rule 60(b)(1) and granted the Secretary's motion to dismiss. Upon review of the record and Respondent's arguments, we agree that relief is not warranted. It is undisputed that Respondent's secretary-treasurer "happened to be there" when the postal carrier entered Respondent's office and that the secretary-treasurer signed for the citations and placed them unopened on the desk of the superintendent in charge of the inspected project. The superintendent, who was out at a construction worksite, did not return to Respondent's office until about eighteen working days after the notice of contest was due.

While there is no evidence that Respondent acted in bad faith, that its untimely notice of contest had any impact on our proceedings, or that the delay in filing caused any prejudice to the Secretary, it is clear that the reason for the delay was within Respondent's control. The record shows that mail is typically handled by Respondent's office manager, who opens the mail and then distributes it. According to Respondent's controller, the office manager places any mail from OSHA on the desk of the superintendent in charge of the inspected project. This means that Respondent's procedure for handling OSHA mail does not account for the assigned superintendent's absence, which could—as it did in this case—extend past the fifteen-day contest period. *See Villa Marina Yacht Harbor Inc.*, 19 BNA OSHC 2185, 2187 (No. 01-0830, 2003) (citing *La.-Pac. Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (excusable neglect not

[1] Rule 60(b)(1) provides in full that "[o]n motion and just terms, the court may relieve a party or its legal representatives from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]" Fed. R. Civ. P. 60(b)(1).

established where employer lacks "orderly procedures for the handling of important documents")).

Even if we were to consider this mail procedure adequate for handling a time-sensitive OSHA citation, Respondent's contention that its secretary-treasurer's alleged interference with the procedure was outside the company's control lacks merit. The secretary-treasurer—a corporate officer and an agent of Respondent having the legal right and capacity to bind the company in its dealings—placed the citations exactly where the office manager would have pursuant to Respondent's mail procedure. Moreover, the record lacks any evidence to show that opening this mail, as the office manager apparently would have done, would have resulted in any different action being taken.[2] There is also nothing in the record regarding how Respondent handles mail in the absence of its office manager given that only four employees regularly staff the office.

Under these circumstances, we find that Respondent has not met its burden to prove that it had adequate procedures to ensure that important mail was processed in a way that ensured timely responses; thus, it has failed to show that its untimely contest of the citations was due to excusable neglect.[3] *See Craig Mech. Inc*., 16 BNA OSHC 1763, 1764 (No. 92-0372-S, 1994) (Respondent

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[2] The record testimony on Respondent's mail handing procedures is: "We have a mailbox in our parking lot and [the office manager] usually takes the mail from the box, opens the mail and distributes it to people in the office." Our dissenting colleague, in footnote 1 of his dissent, makes much of this testimony and claims that the interception of the mail by the secretary-treasurer is a sufficient basis for finding excusable neglect. We simply do not agree. After reviewing the entire record, we are unable to conclude, as our dissenting colleague would find, that had the office manager or controller received and opened the citations at issue, they would have tried "to get in touch with the appropriate superintendent and notify him of [the citations] and of the required deadline within which to respond." There is simply no evidence that ever occurred in response to the previous receipt of a citation.

[3] Our dissenting colleague suggests that Respondent's purported departure from its usual business practice constitutes "unforeseeable human error" and is a basis for excusable neglect. However, excusable neglect under the terms of Rule 60(b)(1) for an untimely notice of contest requires an adequate excuse for the employer's departure and not just a showing of simple negligence. *La.-Pac. Corp.*, 13 BNA OSHC at 2021. What happened here was solely within Respondent's control and while clearly the product of neglect, it has not been shown to be excusable neglect. "The Commission has consistently denied relief to employers whose procedures for handling documents were to blame for untimely filings' of [notices of contest]." *NYNEX*, 18 BNA OSHC 1944, 1947 (No. 95-1671, 1999) (quoting *E.K. Constr. Co., Inc*., 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991)). *See Montgomery Security Doors & Ornamental Iron, Inc.*, 18 BNA OSHC 2145, 2148 (No. 97-1906, 2000) (record showed a breakdown of business procedures and delay unjustified even assuming it was due to employee sabotage).

bears burden to establish basis for requested relief under Rule 60(b)), *aff'd per curiam*, 55 F.3d 633 (5th Cir. 1995) (unpublished).

To find that Respondent established excusable neglect here, our dissenting colleague makes numerous inferences that are based purely on conjecture and not supported by the record. For example, our colleague's finding that the "secretary-treasurer's intervening" failure to open the mail was "unforeseeable" ignores that there is no evidence showing that Respondent had *any* practice in place for handling mail in the absence of its office manager—a circumstance that is itself perfectly foreseeable. Without evidence that adequate procedures exist, we are compelled to conclude it was reasonably foreseeable that mail might be mishandled in the office manager's absence. Thus, this case is not analogous, as our colleague claims, to *Russell B. LeFrois Bldr., Inc.*, 18 BNA OSHC 1978 (No. 98-1099, 1999), *rev'd on other grounds*, 291 F.3d 219 (2d Cir. 2002), in which the intervening event—the OSHA citation falling beneath the car seat of the employee who picked up the mail—was unforeseeable.

Our colleague's reliance on Respondent's apparent timely responses to previous OSHA citations is similarly misplaced—these timely responses do nothing to establish that Respondent had adequate practices in place for handling mail in the absence of the office manager. There quite simply is no evidence that on any of those previous occasions the office manager had been absent when an OSHA citation had been delivered. Consequently, there is no way on this record to determine whether these previous timely responses were the result of adequate mail handling procedures or mere luck.

Finally, our colleague places principal importance on his inference that if Respondent's secretary-treasurer had opened the mail—as was allegedly the office manager's practice—the citations would have been properly handled. As discussed above, the evidence supports only the contrary conclusion. Our dissenting colleague fails to identify how Respondent's procedure for handling OSHA mail—depositing the citations on the assigned superintendent's desk—accounts for the routine and required absence of superintendents from the office for "extended periods of time" that could easily extend past the fifteen-day contest period, just as it did here. Further, if the Commission was permitted to engage in speculation rather than fact-finding, it might be surmised that either the controller or office manager witnessed the secretary-treasurer's actions after intercepting the day's mail and yet still failed to notify the superintendent of the mail, based on the controller's testimony that "[w]e knew that we had had an inspection, and we assumed that [certified mail] was something pertaining to that." However, for all these reasons, we decline to substitute our colleague's speculation for actual evidence on the record.

Accordingly, we affirm the judge's decision to deny relief under Rule 60(b)(1) and grant the Secretary's motion to dismiss.

SO ORDERED.

/s/
Heather L. MacDougall
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: June 13, 2018

SULLIVAN, Commissioner, dissenting:

I dissent from my colleagues' finding that Respondent's mail handling process was inadequate or flawed and therefore, in their view, the company has not proven excusable neglect to warrant relief under Federal Rule of Civil Procedure 60(b)(1). In my view, the record shows that leaving unopened and unread certified mail on a superintendent's desk was not Respondent's business practice.

To reach this conclusion, I look no further than the unrebutted testimony evidencing that when Respondent receives mail, the office manager "opens the mail and distributes it to people in the office." (Tr. 42.) Additionally, the controller testified that certified mail from OSHA is *opened* and distributed to the superintendent of the particular job in question and that the office manager "usually gets it to the right place." In fact, there is no evidence that the company's practice was to ever leave the mail *unopened* without ensuring that the appropriate person or superintendent received timely notice of receiving such mail. To the contrary, the evidence shows that leaving the mail unopened on a superintendent's desk happened this one time as an isolated incident. One isolated and careless mistake by an employee does not establish an inadequate "procedure," or "business practice." Furthermore, contrary to my colleagues' conclusion, the record does not show that had the controller or the office manager received and signed for this certified mail, they would *not have* opened it, read its contents, and alerted the superintendent.[1]

[1] My colleagues assert that I have made numerous "inferences" based "purely on conjecture" and not supported by the record. They contend that there is no evidence in the record showing that the Respondent had *any* practice in place for handling mail in the absence of the office manager. My colleagues must not be reviewing the same record I reviewed. Respondent's controller presented uncontroverted testimony that both he and the office manager handle clerical duties in the office and that the office manager would *open the mail* before distributing it. (Tr. 41-42.) Respondent's secretary-treasurer's failure to leave the mail with either the office manager or the controller, as well as his failure to open the mail was not foreseeable.

There is no need to "infer" that the mail would be opened under Respondent's mail handling process as the record evidence states that *it would be opened*. (Tr. 42.) This is a finding based on *uncontroverted facts* in the record and not "mere speculation" as my colleagues state. The only common-sense inference to draw from the record is that once the controller or office manager opened the mail as the controller testified, they would *read* some portion of the enclosed documents to determine to whom the mail should be given. This is a logical conclusion to reach as it would be impossible to determine which of Respondent's employees should be given the mail without reading at least a portion of the contents.

With respect to Respondent's past citations, the record evidence demonstrates that its process for handling important mail, including mail from OSHA, was plainly adequate. It is undisputed that over the past seven years, the company has responded in a timely fashion to *at least three* prior certified mailings from OSHA, all of which were settled through informal conferences. According to OSHA's assistant area director, these informal conferences had to have been held within the fifteen-working-day contest period. This record demonstrates that Respondent had an adequate procedure for handling important documents in connection with, at least, these three prior certified mailings.[2] Unlike in *Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185, 2187 (No. 01-0830, 2003)—where the Commission, in rejecting an employer's claim for relief under Rule 60(b)(1), noted that the employer had previously failed to timely contest a prior citation—the record here demonstrates that Respondent did ensure that certified mail from OSHA was opened, read, and responded to in a timely fashion. There is no evidence whatsoever that prior to this isolated instance, anyone had ever placed unopened and unread, important certified mail on the desk of an employee expected to be out of the office for an extended period of time.

Respondent's secretary-treasurer signed for the OSHA certified mail at issue here and placed it *unopened* on the superintendent's desk. It is important to note that the secretary-treasurer never told the controller about receiving the mail, signing for it, or placing it on the superintendent's desk. Indeed, the controller testified that he had no knowledge the OSHA certified mail was received, signed for by the secretary-treasurer, and left unopened on the superintendent's desk until eighteen days later when the superintendent discovered it on his desk and informed the controller. It was the secretary-treasurer's intervening and unforeseeable human

[2] My colleagues allege that this record evidence of timely responses demonstrates nothing and could be a result of nothing more than "mere luck." In other words, it is apparently reasonable for my colleagues to "infer" that in every prior case where Respondent received a certified mail package from OSHA, Respondent was "lucky" that someone actually opened the mail and read its contents and responded in a timely manner. It is beyond credulity to "infer" that *any* small business has a mail practice that relies on "good luck" to ensure a timely response to any certified mail package it receives from the United States Government. The unrebutted evidence in the record regarding these prior citations does not demonstrate the company's incredible good fortune; it shows the existence of an adequate mail handling procedure. If any event in this case can be attributed to "luck," it is the misfortune and unforeseeable actions of Respondent's secretary-treasurer.

error of failing to open the mail and read its contents, or at least, notify the controller of its receipt, that caused the failure to respond in a timely manner.[3] The Commission has previously found excusable neglect based on just such an event. *Russell B. LeFrois Bldr., Inc.*, 18 BNA OSHC 1978 (No. 98-1099, 1999), *rev'd on other grounds*, 291 F.3d 219 (2d Cir. 2002).

Due to this unforeseeable human error and weighing the four factors in *Pioneer* equally, I find that Respondent is entitled to relief on the grounds of "excusable neglect" under Rule 60(b)(1). *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). In *Pioneer*, the Court established four factors to weigh when granting relief under Rule 60(b)(1): lack of any prejudice; length of 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*.

In light of the particular set of facts present here, I conclude that my colleagues place too much weight on the "control" factor of the *Pioneer* test in finding excusable neglect lacking. *See George Harms Constr. Co., Inc. v. Chao*, 371 F.3d 156 (3d Cir. 2004). Just as here, the employer in *Harms* had its mail handling system called into question when it failed to file a timely notice of contest. *Id.* at 159. The Third Circuit found:

> [F]ailing to disprove 'reasonable control' is not necessarily fatal to a petitioner's request for relief . . . . [I]t is usually 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[]' . . . [b]ut just because those factors may nearly always favor the petitioner does not mean that the Commission should ignore them.

Id. at 164 (citations omitted).

The Supreme Court stated clearly in *Pioneer* that whether a party's mistake or neglect is "excusable" is a question of equity, "taking account of *all relevant* circumstances." *Pioneer*, 507 U.S. at 395 (emphasis added). Evaluating all considerations equally here, the *Pioneer* factors weigh in favor of Respondent. First, the Secretary failed to provide evidence to show any prejudice

[3] My colleagues give great weight to the fact that the secretary-treasurer of the company has "the legal right and capacity to bind the company in its dealings," and as such, they assume he would have done what the office manager or controller would have done with the certified mail. I disagree. Not only did the secretary-treasurer not open the mail as the two individuals charged with handling the company's clerical work clearly would have (Tr. 41), but the record also shows that in at least two of the company's settled prior citations, it was not the secretary-treasurer who entered into OSHA settlements on behalf of the employer. Rather, it was the controller and superintendent who signed those legally binding documents on the company's behalf. (Tr. 34.)

to his case. Second, good faith on the part of Respondent is established since as soon as the superintendent learned of the citations, he immediately notified OSHA and filed a notice of contest, eighteen working days past the original fifteen-day filing deadline. Third, after the notice of contest was filed, the record shows that a judge was not assigned for three more months, which indicates there was no impact/delay to the judicial proceedings. My colleagues agree these three factors have been met in this case, but nonetheless find that the record evidence demonstrates that receiving and opening a certified letter from OSHA by *any employee* of the company, including the controller or the office manager, would have resulted in the same action being taken, i.e., leaving the mail on the superintendent's desk without any effort to open the mail, read it, and get in touch with the appropriate superintendent to notify him of its existence and of the required deadline within which to respond. The record before us supports the opposite conclusion. In my view, the record demonstrates that the established practice of this employer was to have the controller or office manager sign for, open, and read certified mail, then take appropriate action by having the responsible person contact OSHA in a timely manner.

Because the *Pioneer* factors weigh in favor of Respondent, the company should not be deprived of the opportunity to present meritorious defenses to these citations.[4] I would reverse the judge's decision, reinstate Respondent's notice of contest, and remand the case to the judge for further proceedings.

/s/
James J. Sullivan, Jr.
Commissioner

Dated: June 13, 2018

[4] The Secretary stipulated on the record that Respondent had meritorious defenses to all the citations in question.

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Secretary of Labor, Complainant v. Coleman Hammons Construction Co. Inc., Respondent.	OSHRC Docket No.: **17-0992**

Appearances:

Jeremy K. Fisher, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

David Goff, Esq., Wise Carter Child & Caraway, P.S.
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission on the Secretary's *Motion to Dismiss Respondent's Untimely Notice of Contest* pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act). Respondent, Coleman Hammons Construction, Inc. (Coleman Hammons), opposes the motion and is seeking relief under Fed. R. Civ. P. 60(b) (Rule 60(b)). For the reasons that follow, I find Coleman Hammons is not entitled to relief pursuant to Rule 60(b) and **GRANT** the Secretary's *Motion to Dismiss Respondent's Untimely Notice of Contest*.

Procedural Background

The Commission docketed this matter on June 6, 2017, upon receipt of a notice of contest filed by Coleman Hammons that same day. On August 10, 2017, the Secretary filed his motion to dismiss Coleman Hammons notice of contest on the grounds it was untimely. Chief Judge Rooney assigned the matter to me. I issued an order setting the matter for a hearing to be held October 11, 2017, to resolve the jurisdictional issue presented by the Secretary's motion.

In my scheduling order I required the parties to file prehearing statements by September 22, 2017. Those prehearing statements were to include, among other things, each party's position on:

> a. Whether Respondent was served with the Citation and Notification of Penalty and if so, the date of receipt;
>
> b. Whether the delay in filing was caused by deception on the part of the Secretary or by the failure of the Secretary to follow proper procedures;
>
> c. Whether there is excusable neglect for a late filing;
>
> d. Whether Respondent has a meritorious defense;
>
> e. Whether there is prejudice to the Secretary if relief is granted;

The Secretary timely filed his prehearing statement. Coleman Hammons did not. On October 2, 2017, David Goff filed an entry of appearance notifying the court he recently had been retained by Coleman Hammons to represent it in this matter. With leave of the court, Coleman Hammons filed its prehearing statement on October 3, 2017. According to Coleman Hammons's prehearing statement, it does not dispute that it received the citations. Nor does it claim the delay in filing was the result of deception on the part of the Secretary or failure of the Secretary to follow proper procedures.

I held a hearing on October 11, 2017, in Jackson, Mississippi. The hearing was limited to the Secretary's motion to dismiss and Coleman Hammons's request for relief. At the end of the hearing, the parties gave oral closing arguments. The parties were given the opportunity to supplement those closing arguments in writing by November 6, 2017. Coleman Hammons filed a supplementary post hearing brief. The Secretary did not.

Factual Background

The Secretary Issues the Citations

On November 15, 2016, Compliance Safety and Health Officer (CSHO) Gervase McCoy of the Jackson, Mississippi, OSHA Area Office observed what he believed to be violations of OSHA's fall protection standards at a baseball field under construction in Madison, Mississippi (Tr. 14). He stopped and opened an inspection under a local emphasis program on falls (Tr. 14). The job involved building baseball fields at Liberty Park (Tr. 61-62). CSHO McCoy had been informed Coleman Hammons was the general contractor for the job and Will Van Dusen was

Coleman Hammons's superintendent on site. He began the inspection by holding an opening conference with Van Dusen (Tr. 14). He conducted a walk around inspection of the worksite accompanied by Van Dusen. Upon completion of the walk around inspection, CSHO McCoy attempted to hold a closing conference with Van Dusen, but Van Dusen "stopped [him] short" by saying "just send us the bill." (Tr. 15). Van Dusen then walked off.

A few days later, CSHO McCoy contacted Van Dusen to request documents. Van Dusen directed him to Coleman Hammons's office (Tr. 16). CSHO McCoy was not able to speak with anyone at Coleman Hammons's office, but left a message on Coleman Hammons's office phone (Tr. 17). Following his inspection, CSHO McCoy recommended citations be issued to Coleman Hammons for the violations he observed (Tr. 17). He had no further contact with the company (Tr. 19).

On March 13, 2017, the Secretary issued the Citation recommended by CSHO McCoy to Coleman Hammons (Tr. 24; Exh. C-1). The Citation was mailed from the Jackson, Mississippi, Area Office via certified mail (Tr. 26). Along with the Citation, the Secretary sent the company the *OSHA 3000* – a pamphlet that contains information on an employer's rights and responsibilities, including the right to contest citations (Tr. 27; Exh. C-2). Like the Citation itself, the *OSHA 3000* explains an employer must file a notice of contest within 15 working days of receipt of a citation and failure to do so results in the citation becoming a "final order not subject to review by any court or agency." (Exh. C-2) Coleman Hammons received the Citation and the *OSHA 3000* on March 15, 2017 (Exh. C-4).

Coleman Hammons Responds to the Citation

Coleman Hammons is a construction general contractor. It has 16 full-time employees, most of whom work in the field (Tr. 40). It was founded 40 years ago, and is owned, by Coleman Hammons (Tr. 41). His son, Keven Hammons, works for the company as a project manager and is the secretary/treasurer of the corporation (Tr. 41, 46). Both work in the central office. Also working in the office are an office manager and Larry Barnett, Coleman Hammons's controller (Tr. 40-41). Barnett testified he and the Office Manager handle the clerical work for the company (Tr. 41).[1]

According to Barnett, mail handling duties typically fall on the Office Manager. She retrieves the mail from a mail box located in the office's parking lot, opens, and distributes it (Tr.

[1] The Office Manager did not testify.

42). Barnett testified the Office Manager "usually gets it to the right place." (Tr. 49) It is the company's practice to distribute mail from OSHA to the superintendent of the job to which it applies (Tr. 43). This system had worked in the past. Coleman Hammons had been inspected seven times in the past seven years, receiving citations each time (Tr. 34; Exh. C-7). For at least three of those inspections, Coleman Hammons had requested and attended informal conferences and entered into informal settlement agreements with the Area Office (Tr. 34).

On this occasion, the mail carrier brought the Citation into the office to obtain the certified mail return receipt signature (Tr. 43). Barnett testified although the Office Manager typically sits in the reception area, Kevin Hammons "happened to be there" that day (Tr. 42-43). Kevin Hammons signed for the package and put the unopened envelope on Leslie Mallette's desk (Tr. 44). Mallette was the superintendent for the Liberty Park job. Van Dusen was covering for Mallette on the day of the inspection because Mallette had been "out sick" that week (Tr. 60). Although no one in the office opened the envelope to determine its contents, according to Barnett, Kevin Hammons put it on Mallette's desk because they were aware the Liberty Park job had been inspected by OSHA earlier and assumed "it was something pertaining to that." (Tr. 47)

It was common for superintendents with Coleman Hammons to be away from the office for long periods (Tr. 56). The Liberty Park job had been ongoing and Mallette had not been in the office for several weeks around the time Coleman Hammons received the Citation. It was not until late April that Mallette had occasion to be in the office (Tr. 56). It was then he found the unopened envelope containing the Citation "under some other material" on his desk (Tr. 56). Mallette called the Jackson Area OSHA Office and spoke with Priscilla Jordan, the assistant area director (AAD) of that office the next day (Tr. 57).[2] Mallette explained he had been out of town, had just found the Citation, and was looking for a way to "get the problem resolved." (Tr. 31, 57) Mallette could not recall the exact date of the conversation (Tr. 61). AAD Jordan testified it took place on April 26, 2017 (Tr. 30). AAD Jordan informed Mallette the period in which to contest the citations had passed and explained how to file a late notice of contest with the Commission (Tr. 31, 58).

[2] Jordan testified Mallette had left a message the day prior to this conversation and she returned his call (Tr. 30). Otherwise, the two witnesses did not dispute the date upon which their conversation took place, the substance of that conversation, nor that Mallette initiated the contact. The factual dispute regarding who called whom is not material and need not be resolved.

Mallette and Barnett drafted a notice of contest and mailed it to the Jackson Area Office (Exh. C-5). It was received by the Area Office on May 1, 2017 (Tr. 32; Exh. C-5).[3] AAD Jordan then contacted Mallette and told him the notice of contest needed to be sent directly to the Commission (Tr. 32). Coleman Hammons sent another letter, dated May 5, 2017, directly to the Commission (Tr. 33; Exh. C-6). This letter was signed by Mallette. It stated the notice of contest was "late because I was out of the office working and only found the information unopened on my desk upon returning to the office." (Exh. C-6)

DISCUSSION

Pursuant to the requirements of the Act, an employer is required to notify the Secretary of its intent to contest a citation within 15 working days of receipt of the citation. Failure to timely file a notice of contest results in the citation becoming a final order of the Commission by operation of law. A late notice of contest may be accepted, however, where it is established the delay in filing was due to deception by the Secretary, or where the delay was caused by the Secretary's failure to follow proper procedures. A late notice of contest also may be excused under Rule 60(b), if the final order was entered as a result of "mistake, inadvertence, surprise or excusable neglect." *See Branciforte Builders, Inc.,* 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981)(citations omitted). The moving party has the burden of proving it is entitled to relief under Rule 60(b).

Where, as here, a party is partly to blame for the delayed filing, relief from the final order must be sought under Rule 60(b)(1) and the party's neglect must be excusable.[4] *Pioneer Investment Servs. v. Brunswick Assoc.,* 507 U.S. 380, 393 (1993). The determination of excusable neglect pursuant to Rule 60(b)(1) is an equitable one, taking into account of all relevant circumstances surrounding Coleman Hammons's failure to file a timely notice of contest, including the danger of prejudice to the Secretary, the length of delay and its potential impact on the judicial proceedings, the reason for the delay and whether Coleman Hammons

[3] Curiously, this letter is dated April 21, 2017, before the date on which Mallette spoke with Jordan. Barnett, who signed the letter, testified April 21, 2017, was the day the letter was mailed (Tr. 49). The letter makes no mention of being untimely, as the letter sent directly to the Commission. The fact the letter was sent prior to Mallette's phone conversation with Jordan suggests Mallette's testimony he acted with all dispatch upon finding the unopened envelope from OSHA less credible. Even if sent on April 21, the notice of contest would have been untimely. Although the Secretary brought up this inconsistency on cross examination, he did not dwell on the point and made no mention of it in closing arguments. Given the date on which the letter was received, it seems more likely the date is incorrect and the testimony about it the result of faulty memory.

[4] Coleman Hammons does not contend its failure to timely contest the citations was the result of deception on the part of the Secretary or the Secretary's failure to follow proper procedures.

acted in good faith. *Pioneer Investment Serv.,* 507 U.S. at 395; *Craig Mechanical, Inc.,* 16 BNA OSHC 1763 (No. 92-0372, 1994); *Merritt Electric Company,* 9 BNA OSHC 2088 (No. 77-3772, 1981). The Commission has held that whether the reason for the delay was within the control of the Respondent is a "key factor" in determining the presence of "excusable neglect." *A. W. Ross, Inc.,* 19 BNA OSHC 1147 (No. 99-0945, 2000).

That Coleman Hammons did not contest the Citation within the requisite time period is not disputed. Coleman Hammons received the Citation on March 15, 2017 (Exh. C-4). Its notice of contest was due April 5, 2017. The record reveals it did not contact OSHA until, April 25, 2017. Therefore, by operation of law, the Citation and proposed penalty must be deemed a final order of the Commission unless Coleman Hammons can demonstrate it is entitled to relief. I find it has not.

The Commission requires an employer to exercise due diligence before it will find excusable neglect. *Keefe Earth Boring Company, Inc.,* 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991); *Craig Mechanical,* 16 BNA OSHC at 1763. The Commission has consistently held "[e]mployers must maintain orderly procedures for handling important documents," and that when the lack of such procedures results in the untimely filing of a notice of contest, relief under Rule 60(b) is not warranted. *Villa Marina Yacht Harbor, Inc.*, 19 BNS OSHC 2185, 2187 (No. 01-0830, 2003) (company messenger mishandled mail); *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1149 (No. 99-0945, 2000) (employer's president failed to carefully read and act upon information contained in citation); *Montgomery Security Doors & Ornamental Iron, Inc.*, 18 BNA OSHC 2145, 2148 (No. 97-1906, 2000) (record showed a breakdown of business procedures such that relief was not warranted even assuming employee sabotage); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (notice of contest was overlooked due to personnel change in operations manager position). Based upon the record as a whole, I find the delayed filing was within the control of Coleman Hammons and could have been avoided if it had exercised reasonable diligence.

Coleman Hammons practice was to place any mail from OSHA on the desk of the superintendent for the job to which it presumably applied. Its procedures did not include notice to the job superintendent that such mail had been received. Its procedures did not take into account the fact Coleman Hammons's job superintendents are routinely out of the office and do not check their mail for weeks at a time. Coleman Hammons admits it thought the mail from

OSHA was related to the inspection. Barnett testified the reason for placing it on Mallette's desk was because it was assumed to be related to the inspection. Given its history with OSHA, Coleman Hammons's office personnel had reason to believe the mail may have contained a citation and knew of the time limit for contesting OSHA citations. Mallette's remaining in the field and not coming to the office to check mail was not out of the ordinary, but rather standard practice. The record contains no evidence of any extraordinary circumstances or intervening event that interfered with or hindered Coleman Hammons's timely processing of the Citation. I find Coleman Hammons lacked adequate procedures for handling important business mail and its actions constituted simple negligence.

Coleman Hammons would have me focus, not on the reasons for its failure to meet the statutory deadline, but on the other equitable considerations enumerated in *Pioneer*. I agree with Coleman Hammons the Secretary failed to show he has suffered prejudice or the length of the delay was such it would hinder efficient judicial administration of the matter. The Secretary stipulated Coleman Hammons has a meritorious defense. The record contains no evidence of bad faith on the part of Coleman Hammons. As the Commission noted in *CalHar Construction, Inc*.,

> in almost all 60(b) late filing cases before the Commission, 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. These 60(b) cases involve neglect, and a determination as to whether that neglect is excusable must focus principally on the reason for the delay, including whether it was within the control of the employer.

18 BNA OSHC 2151, 2153 n. 5 (No. 98-0367, 2000). When focusing principally on the reason for the delay, taking into consideration the equities that favor it does not tip the scales in Coleman Hammons's favor. Coleman Hammons provided no evidence of intervening events or unusual circumstances that interfered with its timely processing of the Citation. Coleman Hammons followed its standard practice of leaving to the superintendent the handling of citations without ensuring the superintendent received timely notice of their receipt. As discussed, this standard practice was inadequate given the nature of the work of the company's superintendents. Given its history with OSHA, Coleman Hammons was well aware of the time limits for filing notices of contest. The undisputed evidence regarding Coleman Hammons's handling of the citation establishes the company was exclusively to blame for the failure to timely file its notice of contest. Coleman Hammons has not met its burden to show it is entitled

to relief.

In summary, Coleman Hammons has failed to meet its burden to establish it timely filed a notice of contest; nor has it met its burden to establish it exercised reasonable diligence. Therefore, I find Coleman Hammons has not established entitlement to relief under Rule 60(b).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusion of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is **HEREBY ORDERED** that the Secretary's *Motion to Dismiss Respondent's Late Notice of Contest* is **GRANTED**.

It is further **ORDERED** that the notice of contest filed in this case is **DISMISSED** and the Citation and Notification of Penalty is **AFFIRMED** in all respects.

SO ORDERED.

/s/

Judge Heather A. Joys
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Date: January 8, 2018