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. PETSMART, INC., and its successors, Respondent.	OSHRC Docket No. 20-0623

REMAND ORDER

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

BY THE COMMISSION:

On August 24, 2020, Administrative Law Judge Sharon D. Calhoun issued a decision denying Respondent's motion for relief pursuant to Federal Rule of Civil Procedure 60(b) and affirming the underlying one-item serious citation issued by the Occupational Safety and Health Administration.[1] For the following reasons, we set aside the judge's order and remand for the judge to hold an evidentiary hearing on the issue of the citation's service.

On August 30, 2017, OSHA initiated an inspection of a PetSmart store in Vero Beach, Florida. A week later, Respondent's safety and compliance manager, Karen Barry, sent OSHA a letter in response to a "Notice of Alleged Safety or Health Hazard" and a request for documents from the compliance officer. In her letter dated September 7, 2017, Barry stated that "[t]o ensure timely future responses" OSHA should "reach out to [her] directly with any questions." The letter included Barry's email address, phone number, and fax number. In addition, the letterhead included a mailing address in Phoenix, Arizona. Subsequently, OSHA (through its regional office

[1] The judge also denied the Secretary's motion to dismiss under Federal Rule of Civil Procedure 60(c)(1), which alleged that Respondent's request for relief was untimely. The Secretary has not petitioned for review on this ruling, and we do not address it here.

that conducted the inspection) issued Respondent a citation and sent it via certified mail to the Vero Beach address of the store that had been inspected. The U.S. Postal Service return receipt shows the citation was signed for, but the identity of the individual who signed is unknown.

In its motion for relief before the judge, Respondent claimed, among other things, that the citation was not properly served, and that it only learned of the citation when a debt collection agency contacted its corporate office earlier this year. The Secretary disputes this, claiming that he satisfied the statutory obligation under section 10(a) of the Occupational Safety and Health Act, 29 U.S.C. § 659(a), to notify Respondent of the citation by sending it via certified mail to the worksite. The Secretary also alleges that Respondent knew of the citation earlier than it claims based on an OSHA diary sheet entry showing that on November 19, 2018, "Petsmart corporate called to ask how to pay the penalty." In her decision, the judge rejected Respondent's argument and found that the citation was properly served.

Under Commission precedent, as the judge noted, whether service of a citation is proper under section 10(a) of the Act depends on "whether the service is reasonably calculated to provide an employer 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 (No. 76-2165, 1979). The Commission has not adopted the precedent of the Third and Sixth Circuits, which requires that "notification must be given to one who has the authority to disburse corporate funds to abate the alleged violation, pay the penalty, or contest the citation or proposed penalty" such that for a corporate employer, "notice to the officials at the corporate headquarters, not the employee in charge at the particular worksite" is typically required.[2] *Buckley & Co., Inc.*

[2] The Third and Sixth Circuits are not relevant circuits here for purposes of any appeal, as the worksite was in Florida (located in the Eleventh Circuit) and Respondent's corporate headquarters are in Arizona (located in the Ninth Circuit). *See* 29 U.S.C. § 660(a) (parties may appeal to circuit where worksite is located or employer is headquartered; employer may also appeal to D.C. Circuit); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) ("Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has . . . applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent.") (citation omitted). The Ninth and Eleventh Circuits have not ruled on this issue, and as noted below, the D.C. Circuit has applied the Commission's rule. Thus, Commission precedent applies in this case. *See Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096 n.4 (No. 10-0359, 2012) (Commission "follow[s] [its] own precedent" where the circuit court "has neither decided nor directly addressed [an] issue") (quoting *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1110-12 (No. 97-1918, 2000).

v. Sec'y of Labor, 507 F.2d 78, 81 (3d Cir. 1975); *see Capital City Excavating Co. v. Donovan*, 679 F.2d 105, 110 n.4 (6th Cir. 1982) (agreeing with the Third Circuit that "delivery to a work site is not sufficient and that delivery to such a location does not constitute receipt by a corporate employer"). Rather, the Commission has found that service of a citation via certified mail was proper when sent to a worksite rather than a corporate office, and the D.C. Circuit has found the same. *See NYNEX*, 18 BNA OSHC 1944, 1947 (No. 95-1671, 1999) (finding citation sent to worksite, though not addressed to a specific individual, was proper); *David E. Harvey Builders Inc. v. Sec'y of Labor*, 724 F. App'x 7, 8 (D.C. Cir. 2018 (unpublished) (finding service of citation proper when sent via certified mail to office other than corporate headquarters).

Here, we are concerned that even though Barry's letter to OSHA requested that "questions" be sent directly to her to "ensure future timely responses," OSHA sent the citation to the store. Absent a hearing, however, the record has not been developed on the factual issues surrounding the citation's service, including whether Barry's letter served to inform OSHA that Respondent was, in fact, requesting that the citation be sent to its corporate office. Under these circumstances, we find that an opportunity for the parties to present evidence is warranted.[3]

[3] For instance, the introduction of evidence of any communication or documentation on this issue at the closing conference for the inspection, as well as evidence regarding the identity of the person who signed the U.S. Postal Service return receipt, would be relevant to assessing the parties' claims.

Accordingly, we set aside the judge's order and remand for an evidentiary hearing on the issue of whether the citation was properly served on Respondent.[4]

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: October 13, 2020

[4] We do not address the judge's denial of relief under Federal Rule of Civil Procedure 60(b)(4) and (b)(6), as these claims depend at least in part, on whether the citation was properly served. As to Respondent's motion for relief under Rule 60(b)(1), we note that such relief would be barred as untimely here, as it was filed almost two and a half years after the citation, if properly served, became a final order. *See* Rule 60(c)(1) (motion under 60(b)(1) must be made "no more than a year after the entry of the judgment or order or the date of the proceeding").

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1120 20th Street, N.W., Ninth Floor

Secretary of Labor, Complainant v. PetSmart, Inc., and its successors Respondent.	OSHRC Docket No.: **20-0623**

On Pleadings:

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Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia

For Complainant

John F. Martin, Esq. and J. Davis Jenkins, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, D.C.

For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission on a Late Notice of Contest dated March 30, 2020 from Respondent PetSmart, Inc., and its successors (PetSmart), which was received and docketed by the Commission on April 23, 2020. On May

27, 2020, Complainant, Secretary of Labor, United States Department of Labor (Secretary) filed a Motion to Dismiss Respondent's Late Notice of Contest Pursuant to Fed. R. Civ. P. 60(c)(1).

On May 29, 2020, the Court issued an Order construing PetSmart's Late Notice of Contest (NOC) to be a request for relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and ordered PetSmart to supplement its request for Rule 60(b) relief by setting forth reasons for its delay in filing, a meritorious defense, and to respond to the Secretary's motion. PetSmart complied with the Court's Order by filing a Response to the Secretary's Motion to Dismiss and an Alternative Rule 60(b) Motion on June 18, 2020. Thereafter, the Secretary filed an Opposition to PetSmart's Alternative Rule 60(b) Motion on July 6, 2020, to which PetSmart filed Objections and a Reply on July 9, 2020[5].

For the reasons set forth herein PetSmart's request for relief pursuant to Rule 60(b)(1) is **DENIED**.

BACKGROUND

This matter arises out of an Occupational Safety and Health Administration (OSHA) complaint inspection regarding rats in PetSmart's store located at 6590 20th Street, Vero Beach, Florida. The inspection took place during the period August 30, 2017 through September 18, 2017. During the inspection OSHA requested documentation regarding PetSmart's extermination program. PetSmart sent the requested extermination program documentation to OSHA. Thereafter, on October 12, 2017, OSHA issued a Citation and Notification of Penalty (Citation) for one serious violation of the standard found at 1910.141(a)(5), alleging PetSmart did not institute an effective rodent extermination program. A penalty in the amount of $5,432.00 was proposed for the alleged violation.

[5] PetSmart's Objections regarding Condell Eastmond's Affidavit are overruled. The information contained in the Eastmond Affidavit is relevant; contains his understanding of the information on the return receipt card; does not constitute legal conclusions which invade the province of the Court; and is not hearsay or is excepted from the hearsay rule.

The Secretary mailed the Citation by Certified Mail/Return Receipt to PetSmart at its Vero Beach, Florida address on October 12, 2017 (Secretary's Motion, pp. 1-2, Lopez Aff. ¶ 3; Secretary's Opposition, p. 2, Eastmond Aff. ¶ 11). Pursuant to the requirements of the Act, an employer is required to notify the Secretary of its intent to contest (Notice of Contest or NOC) a Citation within 15 working days of receipt. Failure to timely file a NOC results in the Citation becoming a final order of the Commission by operation of law. The Citation provided PetSmart had 15 working days from the date of receipt to contest. The return receipt shows PetSmart received the Citation on October 18, 2017.[6] Therefore, any contest by PetSmart was to be filed within the contest period, no later than November 8, 2017. PetSmart, however, did not file a contest within the 15-day contest period. As a result, the Citation became a final order of the Commission under § 10(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act), on November 9, 2017.

Nearly 2 ½ years after the Citation became a final order, PetSmart, filed the late NOC at issue in this proceeding. PetSmart asserts the first time it became aware of the Citation was when it was contacted by a debt collection agency in 2020 at its Phoenix office.[7]

DISCUSSION

PetSmart argues this matter is not regarding a late NOC because the Citation was not properly served. Therefore, according to PetSmart, its April 23, 2020, contest was not filed late.

[6] PetSmart challenges the authenticity of the return receipt card and argues it contains hearsay. PetSmart also requests the Court to strike para. 4 of Jaime Lopez's Affidavit which provides "[a]s evidenced by the certified mail return receipt card, the Citation and Notification of Penalty was received and signed for by Respondent on October 18, 2017." PetSmart contends the return receipt card has not been authenticated; and argues that as a corporation PetSmart does not have the physical capacity to sign a return receipt card. It further argues Mr. Lopez does not identify the signatory on the return receipt card or his or her relationship to PetSmart, therefore Mr. Lopez misstates the evidence (Response, p. 4). The Court denies PetSmart's request to strike; and rules the return receipt card is self-authenticating pursuant to Rule 902(5) of the Federal Rules of Evidence. The Court further rules, the information contained in the return receipt card is excepted from the hearsay rule pursuant to Rule 803(6) of the Federal Rules of Evidence.

[7] Although a demand letter was sent to PetSmart by the OSHA Area Office on January 10, 2018, to the same address used for the Citation (not returned to OSHA as undeliverable), no further action was taken by PetSmart until November 19, 2018, as reflected in OSHA's Case Diary Sheet, when PetSmart contacted OSHA regarding how to pay the penalty (Eastmond Aff. ¶ 23; Exh. E). PetSmart claims it did not become aware of the Citation until it was contacted by a debt collection agency in 2020; but does not explain its November 18, 2018, contact with OSHA regarding payment of the penalty. When no payment was received as a result of OSHA's January 10th demand letter, the OSHA Area Office referred the matter to its Washington DC Office on February 22, 2018, for collection. (Eastmond Aff. ¶¶ 20-23; Exhs. D and E).

The Secretary asserts the Citation was properly served and the late NOC should be dismissed. For the reasons set forth herein, the Court finds PetSmart's April 23, 2020 is a late NOC.

Rule 60(c)(1) Dismissal

As an initial matter, the Court addresses the Secretary's Rule 60(c)(1) Motion to Dismiss alleging PetSmart's request for relief should be denied as untimely due to it being filed more than one year after entry of the final order in this matter. Rule 60(c)(1) of the Federal Rules of Civil Procedure sets forth the time frame for filing a motion for Rule 60(b) relief and provides:

> (c) **Timing and Effect of the Motion**.
> (1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
> (2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

Fed. R. Civ. P. 60(c).

As set forth above, the Citation in this matter became a final order on November 9, 2017. PetSmart's late NOC was received on April 23, 2020, 2½ after the final contest date, and therefore is untimely. On May 29, 2020, the Court construed the late NOC to be a request for Rule 60(b) relief. PetSmart seeks relief pursuant to Rules 60(b)(4) and 60(b)(6), which it asserts are not limited by Rule 60(c)(1). As set forth herein, the Court has also considered whether relief is appropriate under Rules 60(b)(1) and 60(b)(3). Although PetSmart's Rule 60(b) request was not filed within one year of the final order, as required by Rule 60(c)(1), in the interest of justice, the Court finds that the issues raised in PetSmart's request for relief warrant the Court's consideration. Therefore, pursuant to Commission Rule 2200.67(n) the Court deems PetSmart's Rule 60(b) request timely. Accordingly, the Secretary's Motion to Dismiss pursuant to Rule 60(c)(1) is **DENIED**.

Sufficiency of Service

It is the Secretary's burden to establish service of the Citation. PetSmart contends its contest was not untimely because it never received the Citation due to the Secretary improperly sending the Citation with no addressee identified to its Vero Beach, Florida store (PetSmart Response, p. 2). PetSmart argues the Citation was not addressed to an individual with authority to accept service of the Citation and contends the Citation should have been mailed to its corporate headquarters in Phoenix, Arizona, where it receives legal process. According to PetSmart, since it was not, the Secretary failed to notify it of the Citation and penalty as required by section 10(c) of the Act, and that the way it was served was not reasonably calculated to provide PetSmart with knowledge of the Citation and proposed penalty (Late NOC; Response and Rule 60(b) Motion, pp. 1-2, 9-11). The Court disagrees.

Although the Act refers only to the penalty, the Commission has consistently held § 10(a) of the Act governs service of citations. *B.J. Hughes, Inc*., 7 BNA OSHC 1471, 1474 n. 6 (No. 76-2165, 1979). It requires the Secretary to "notify the employer by certified mail of the penalty…" It provides no more specificity. In *B.J. Hughes*, the Commission addressed the Secretary's obligation under § 10(a), holding,

> The test to be applied in determining whether service is proper is whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest.

7 BNA OSHC at 1474. Applying this test, the Commission held service on an employee in charge of a local worksite valid. In so holding, the Commission reasoned

> A company that maintains multiple worksites necessarily invests the persons in charge of those worksites with a certain degree of discretion and authority to conduct the company's business. As with other aspects of its business, it is reasonable to expect such an employer to implement internal procedures for dealing with OSHA citations.

Id. at 1475.

PetSmart requests that the Commission revisit and clarify its decision in *B. J. Hughes* and its progeny[8]. PetSmart asserts imposition of the civil penalties resulting from the Citation and the Secretary's method of service violate its right to due process afforded by the Fifth Amendment of the United States Constitution. The Court disagrees with PetSmart's assertion that clarification of the Commission's longstanding precedent on this issue is necessary. The Commission has had opportunities to do so yet has held steadfastly to its holding set forth in *B. J. Hughes* and subsequent cases involving service of citations. The Court, for the reasons set forth below, also disagrees with PetSmart's argument it was denied due process.

PetSmart's argument regarding insufficient service is premised on its position that because it is a corporation it can only act through its officers and representatives. Therefore, PetSmart asserts, service of the Citation at its Vero Beach store, signed for by an unidentified individual, is insufficient. The Court is not persuaded. The Commission considered corporate status and who could sign for service in *B. J. Hughes*.[9] And as in *B. J. Hughes*, because PetSmart has multiple worksites with persons in authority to conduct its business, "it is reasonable to expect such an employer to implement internal procedures for dealing with OSHA citations." *B. J. Hughes, id.*

PetSmart provides no evidence the Secretary failed to follow his own, or any other required procedures when determining where to serve the Citation. PetSmart simply argues the Secretary erred by not serving the Citation at its corporate headquarters in Phoenix, Arizona where it receives legal process. And that the Secretary erred by not addressing the Citation to a person with authority to receive service. The Commission has not required the Secretary to determine who in a company is responsible for accepting service. "[T]he Secretary's representative should not have to spend time ferreting out the complexities of a corporate

[8] As to *B. J. Hughes's* progeny, PetSmart refers to *Secretary of Labor v. NYNEX*, 18 OSHC (BNA) 1944 (No. 95-1671, 1999) and *George Harms Construction Co.*, 20 OSHC (BNA) 1155 (No. 02-0371, 2003) *rev'd* (3d Cir. 2004), which uphold service on clerical employees and unknown employees. (PetSmart Response, p. 15)

[9] The Court finds PetSmart's arguments that Fed. R. Civ. P. 4(h)(1)(B) applies since the Commission has not adopted a rule addressing service on a corporation and that § 10(a) of the Act does not include service on a corporation unpersuasive. Contrary to PetSmart's argument, § 10(a) of the Act provides that the Secretary "shall . . . notify the employer by certified mail of the penalty . . . and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty." It addresses employers, without distinguishing whether the employer is a partnership, an LLC, or a corporation.

hierarchy, but should be able to rely instead upon the ability of individuals at a local worksite to direct the citation to the appropriate officials." *Id.* at 1474.

In support of its contention the Secretary had an obligation to serve the Citation on the company's corporate headquarters, PetSmart relies on the Third Circuit's holdings in *Buckley & Co., v. Secretary of Labor, 507 F.2d 78 (3rd Cir. 1975)* and *J. I. Hass Co., v. Occupational Safety and Health Review Comm'n,* 648 F.2d 190, 195-96 (3d Cir. 1981); and the Sixth Circuit's holding in *Capital City Excavating v. Donovan*, 679 F.2d 105 (6th Cir. 1982). In *Buckley*, the Third Circuit interpreted § 10(a) of the Act to require the Secretary to serve notice on "an official having the authority to disburse funds to abate the violation, pay the penalty, or contest the citation or penalty notification" *Buckley*, 507 F.2d at 81. The Third Circuit's holding in Buckley was reiterated in *J. I. Hass Co.,* 648 F.2d at 195. In *Capital City*, the Sixth Circuit, following *Buckley*, held service on a worksite was not sufficient because "notification to a corporate employer must be sent to corporate headquarters unless the employer has directed that it be sent to a different address." *Capital City*, 679 F.2d at 110 n. 4.

The Commission in *B.J. Hughes* explicitly rejected the Third Circuit's holding in *Buckley*.[10] The Commission is bound to follow an appellate court's decision only within the circuit in which the case arose. *Kenny Niles d/b/a Kenny Niles Construction and Trucking Co*., 17 BNA 1940, 1941 n.2 (No. 94-1406, 1997); *see also North Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1473 n. 8 (No. 96-0721, 2001) ("Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied that circuit's precedent in deciding a case, even though it may differ from the Commission's precedent"). Under § 11(a) and (b) of the Act, this matter is not appealable to either the Third or the Sixth Circuit. This Court therefore is bound by the Commission precedent in *B.J. Hughes*. And Commission precedent for denying relief where untimely filings were due to faulty mail

[10] The Commission held

> To the extent that the Third Circuit in *Buckley* did not subscribe to this rationale we respectfully decline to follow it. The Commission gives due deference to the views of the circuits, but unless reversed by the U.S. Supreme Court, the Commission is obligated to establish its own precedent in carrying out its adjudicatory functions under the Act.

B.J. Hughes, 7 BNA OSHC at 1474 (citations omitted).

handling procedures have been upheld by the D.C. Circuit in *David E. Harvey Builders, Inc. v. Sec'y of Labor*, 724 F. App'x 7, 9 (D.C. Cir. 2018) (unpublished) (citations omitted).

The Secretary's service of the Citation on PetSmart at its Vero Beach, Florida store meets the test set out in *B.J. Hughes.* The test is one of reasonableness. It was reasonable for the Safety and Health Compliance Officer who conducted the inspection to conclude mailing the Citation to the location where the inspection was conducted would result in its delivery to the appropriate person within PetSmart's corporate hierarchy. Further, the Commission's holding in *B. J. Hughes* that "[t]he test to be applied in determining whether service is proper is whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest" satisfies the due process requirements set forth by the United States Supreme Court that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mulane v. Cent. Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950).

Service by certified mail at PetSmart's Vero Beach store location satisfies the due process requirements of *Mulane, id.* The Secretary properly served the Citation on PetSmart.

Rule 60(b) Relief

As previously noted, PetSmart maintains this matter is not a late NOC case because the Citation was not properly served pursuant to Fed. R. Civ. P. 4(h)(1)(B), denying it due process. PetSmart does so in complete denial of longstanding Commission precedent and rejection of the applicability of section 10(a) of the Act to corporations. As set forth above, the Citation was properly served. PetSmart's NOC was received on April 23, 2020, after the November 8, 2017, final contest date, and therefore is untimely.[11]

[11] PetSmart further argues the Secretary does not have clean hands due to his failure to file a timely complaint or motion to dismiss in lieu thereof. The Court finds no merit in this argument. Jurisdiction in late NOC matters is limited to only whether the late filing was excusable. Filing of a late NOC does not trigger the complaint filing deadline. Filing of a complaint will only be necessary if relief from the final order is granted. As to the alleged late filing of the Secretary's motion, the Court notes that PetSmart's late NOC was not docketed until April 23, 2020. It was assigned to the Court on May 27, 2020, the same day the Secretary's Motion to Dismiss was filed. The Court did not construe PetSmart's late NOC to be a motion for relief until May 29, 2020. Therefore, the Secretary's Motion to Dismiss was not due until June 19, 2020. The Secretary's motion was timely.

An employer who has filed an untimely NOC may be granted relief under Rule 60(b) in certain circumstances. *George Harms Constr. Co. v. Chao*, 371 F.3d 156 (3d Cir. 2004). A late filing may be excused under Rule 60(b)(1) if the final order was entered as a result of "mistake, inadvertence, surprise or excusable neglect." A late filing also may be excused under Rule 60(b)(3) if the late filing was caused by the Secretary's "deception or failure to follow proper procedures." *See Branciforte Builders*, *Inc.*, 9 BNA OSHC 2113, 2116-17 (No. 80-1920, 1981); *B.J. Hughes*, *Inc*., 7 BNA OSHC 1471, 1476 (No. 76-2165, 1979); *Keppel's Inc.*, 7 BNA OSHC 1442, 1443-44 (No. 77-3020, 1979). In addition, a late filing may be excused under Rule 60(b)(6), for any other reason that justifies relief, such as when "absence, illness, or a similar disability prevent[s] a party from acting to protect its interests." *Branciforte Builders*, 9 BNA OSHC at 2117. The moving party has the burden of proving it is entitled to relief under Rule 60(b). PetSmart has failed to provide sufficient proof that it is entitled to relief.

In determining whether the late filing of a NOC may be found to be due to "excusable neglect" under Rule 60(b)(1), the equitable analysis enunciated by the Supreme Court in *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership* 507 U.S. 380 (1993) is applicable. *George Harms Constr. Co., supra.* In *Pioneer* the Court held that "excusable neglect" is determined based upon equitable considerations that take into account all relevant circumstances, and includes consideration of the following factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the party seeking relief, and (4) whether the party seeking relief acted in good faith. *Id.* at 395; *see also Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1951 (No. 97-851, 1999). "[N]either a lack of prejudice to the Secretary nor good faith on the part of Respondent in attempting to comply with the statutory filing requirement alone will excuse a late filing." *Prime Roofing Corp.*, 23 BNA OSHC 1329 (No. 07-1409, 2010).

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. S. Ross, Inc.,* 19 BNA OSHC 1147 (No. 99-0945, 2000); *See also Calhar Constr.*, *Inc*., 18 BNA OSHC 2151 (No. 98-0367, 2000). A party seeking relief under Rule 60(b)(6) "must show 'extraordinary circumstances' suggesting that the party is faultless in the delay."

Where 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. *See Pioneer Investment Serv.*, 507 U.S. at 393. 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 1763 (No. 92-0372, 1994).

PetSmart contends it is entitled to relief under Rules 60(b)(4) and 60(b)(6). For relief pursuant to Rule 60(b)(4) PetSmart asserts the Court lacks personal jurisdiction because of improper service of the citation or violation of due process. However, as shown above, the Court finds service of the Citation was proper, and PetSmart's due process rights were not violated. Accordingly, as set forth by longstanding Commission precedent, the Court has the authority under § 10(a) to determine whether PetSmart is entitled to relief from the final order. *Gulf & W. Food Prods. Co.*, 4 BNA OSHC 1436, 1439 (No. 6804, 1976) (consolidated).

The Court further finds PetSmart's argument that the Secretary does not know who signed for the certified mail containing the Citation, fails. Although it is unclear to those unfamiliar with the signature on the return receipt card, PetSmart was in control of its store and is in the best position to know which of its employees would have been designated to sign for mail at the store. And to the extent it is uncertain, it is in the best position to be able to inquire of its employees regarding the signature. It is not the Secretary's responsibility to identify the person who signed the return receipt.

PetSmart should have had adequate mail handling procedures to ensure that important items are received. The Secretary was under no obligation to request signature by a specific person at the PetSmart store. Nor is the Secretary required to know who signed the return receipt. Once the Citation was addressed to PetSmart's Vero Beach, Florida store and submitted to the United States Postal Service, the Secretary had every reason to expect that the Postal Service would carry out its duties and deliver the Citation to the addressed location. In the absence of evidence to the contrary, it is reasonable to presume the Postal Service officials properly discharged their duties. *See Powell v. Commissioner*, 958 F.2d 53, 54 (4th Cir. 1992). Indeed, the return receipt card was delivered to the Secretary as evidence the Citation had been delivered to the addressed location. PetSmart does not dispute that its Vero Beach, Florida store is located

at the address set forth on the return receipt card. Relief pursuant to Rule 60(b)(4) is not warranted.

In seeking relief pursuant to Rule 60(b)(6), which provides for relief for any reason that justifies it, PetSmart again relies on its claim that the Citation was improperly served. As the Court has determined the service was proper, relief pursuant to Rule 60(b)(6) fails. Justice does not warrant relief under 60(b)(6) where, as here, PetSmart delayed filing for 2 ½ years. Nor is it warranted where PetSmart's mail handling procedures are such that important mail was not properly routed.

The Court finds PetSmart's assertion it did not become aware of the Citation until it was contacted by a debt collection agency lacks credulity. It has not provided an explanation as to why it was not aware that a Citation had been issued when it received the demand letter from the OSHA Area Office on January 10, 2018, seeking payment of the penalties. Further, its having contacted the OSHA Area Office in November 2018, regarding how to pay the penalty suggests that on date PetSmart was aware of the Citation.

The only reason PetSmart has provided to the Court for the delay is that the Citation was not properly served, and that justice would be served by the Court not allowing the Secretary to "game the system." The record fails to substantiate this unjustified claim. Further, this claim provides insufficient basis for the Court to conclude the reason for the delay was not under PetSmart's control. PetSmart has not shown "extraordinary circumstances" suggesting it is faultless in the delay" as required for relief under Rule 60(b)(6).

The Court finds PetSmart failed to exercise due diligence and was simply negligent in failing to file the contest before the expiration of the contest period. The Commission has long held an employer's mere carelessness or negligence, even by a layperson, in failing to timely file a Notice of Contest does not amount to "excusable neglect" that would justify relief under Rule 60(b). *Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). Neither the record evidence nor PetSmart's explanations for its late filing show deception or a failure to follow proper procedures on behalf of the Secretary. Instead, the record shows PetSmart had inadequate mail handling procedures at its Vero Beach, Florida store. The return receipt shows it was delivered to the store, however what happened to it after it was signed for and received at the PetSmart Vero Beach, Florida location has not been explained. This suggests problems with

PetSmart's mail handling procedures. The record does not demonstrate PetSmart had any procedures in place to instruct employees regarding what to do when they receive certified mail. The delay was within PetSmart's control.

> Where timely response was within the employer's reasonable control, the Commission has denied relief even to petitions filed only one or two days late, *see Sec'y of Labor v. Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185, 2186-87 (2003) (one day late); *see also Sec'y of Labor v. A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148-49 (2000) (11 days late). The Commission "has consistently denied relief" under Rule 60(b)(1) "to employers whose procedures for handling documents were to blame for untimely filings." *Sec'y of Labor v. NYNEX*, 18 BNA OSHC 1944, 1946-47 (1999) (citation omitted).

David E. Harvey Builders, Inc. v. Sec'y of Labor, 724 F. App'x 7, 9 (D.C. Cir. 2018) (unpublished). Here, the NOC was 2 ½ years late, and the delay was entirely to blame on PetSmart's mail-handling procedures.

However, as shown above, control is not the only factor the Court must consider. The Court must also consider the danger of prejudice to the opposing party; the length of the delay and its potential impact on the proceedings; and whether the party seeking relief acted in good faith.

Danger of Prejudice

The Secretary does not assert it would be prejudiced because of the nearly 2 ½ year delay. However, a lack of prejudice to the Secretary, alone, will not excuse a late filing. *Prime Roofing Corp*., 23 BNA OSHC 1329 (No. 07-1409, 2010). Therefore, the Court finds the Secretary is not prejudiced by the late filing.

Length of Delay and Impact on Proceedings

Although the 2 ½ year delay in contesting is lengthy, the Court determines the delay would not adversely impact the Commission's proceedings.

Good Faith

PetSmart has not provided the Court evidence regarding any good faith efforts to timely contest. Therefore, the Court finds PetSmart did not make a good faith effort to comply. The Court does not find credible PetSmart's assertion that it did not become aware of the Citation until contacted by a debt collection agency. PetSmart waited almost a year after receiving OSHA's demand letter to even inquire about paying the penalty. And then waited approximately 1 ¼ years to attempt to file a late NOC with OSHA. Under these circumstances, it is impossible for the Court to find PetSmart acted in good faith.

The Court has considered the factors required by *Pioneer.* Despite the lack of prejudice to the Secretary and that the delay would not adversely affect the Commission proceedings, the lack of good faith by PetSmart and PetSmart's control of the delay in timely filing the NOC are determinative. PetSmart was in control of its mail handling procedures which resulted in the NOC not being timely filed.

Meritorious Defense

In addition to the factors set forth in *Pioneer,* an employer also must establish the presence of a meritorious defense for Rule 60(b)(1) relief. *Northwest Conduit Corp.*, 18 BNA OSHC 1948 (No. 97-851, 1999). A meritorious defense is one that is valid at law with respect to the underlying action. *Park Nursing Center, Inc., v. Samuels,* 766 F.2d 261, 264 (6th Cir. 1985). The presence of a meritorious defense is "satisfied with minimal allegations that the employer could prove a defense if given the opportunity." *Jackson Assoc. of Nassau*, 16 BNA OSHC 1261, 1267 (No. 91-0438, 1993).

As a meritorious defense, PetSmart alleges it had an effective vermin control program in place. The Court finds PetSmart has established the minimum requirement necessary for a meritorious defense. However, it has not established a basis for Rule 60(b) relief.

Having considered all factors enunciated in *Pioneer,* relief from the Final Order in this matter is not warranted. PetSmart's control over the delay and its lack of good faith are determinative.

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

Therefore, for the reasons set forth herein, PetSmart's request for relief pursuant to Rule 60(b)(1) is **HEREBY DENIED.** The final order for the Citation remains in effect and is hereby **AFFIRMED.** Further, the Secretary's Motion to Dismiss on the basis of Rule 60(c)(1) is hereby **DENIED.**

SO ORDERED.

/s/_____

Sharon D. Calhoun

Dated: August 24, 2020

Administrative Law Judge, OSHRC

Washington, DC