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.

TEXAS MANAGEMENT DIVISION, INC.

Respondent.

OSHRC Docket No. 17-1861

APPEARANCES:

Nicholas C. Geale, Acting Solicitor of Labor; James E. Culp, Regional Solicitor; Madeleine T. Le, Counsel for Safety and Health; Kristina T. Harrell, Senior Trial Attorney; U.S. Department of Labor, Dallas and Washington, D.C.
For the Complainant

Steven R. McCown, Esq.; Travis. J. Odom, Esq.; Littler Mendelson P.C., Austin, Dallas, and Houston, Texas
For the Respondent

REMAND ORDER

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

BY THE COMMISSION:

At issue before the Commission is a decision of Administrative Law Judge Peggy S. Ball denying Respondent's motion for relief from a final order under Federal Rule of Civil Procedure 60(b)(1) after Respondent filed an untimely notice of contest. Upon review, for the reasons that follow, we set aside the judge's decision and remand this case to the judge for further proceedings.

On June 1, 2017, the Occupational Safety and Health Administration issued Respondent a citation that was sent via certified mail and signed for on June 5, 2017, by an employee at Respondent's Carrollton, Texas branch office. Respondent's notice of contest was due on June 26, 2017, but it was not filed until September 18, 2017. Because Respondent's notice of contest

was untimely pursuant to section 10(a) of the Occupational Safety and Health Act, the citation became a final order of the Commission. *See* 29 U.S.C. § 659(a) (failure to contest citation within fifteen working days results in citation becoming final order of Commission). On October 24, 2017, Respondent filed a Rule 60(b)(1) motion seeking relief from the final order, which was denied by the judge.

In its Rule 60(b)(1) motion, Respondent argued that it was entitled to relief from a final order based on "mistake, inadvertence[,] o[r] excusable neglect." *See* Fed. R. Civ. P. 60(b) ("On motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . ."). According to Respondent, management at its headquarters in Houston, Texas did not become aware of the citation until August 8, 2017;[1] the company asserts that it subsequently filed its notice of contest after conducting an internal investigation, communicating with the OSHA area office, and retaining counsel. Respondent also submitted a declaration from its corporate controller in support of its motion and requested an evidentiary hearing with an opportunity for limited discovery. The Secretary filed an opposition to Respondent's motion, asserting that "Respondent has not established any basis for relief" under Rule 60(b)(1). In support of his opposition, the Secretary submitted: (1) a declaration from the OSHA Assistant Area Director; (2) a handwritten statement that OSHA obtained during the inspection from Respondent's former branch manager; and (3) copies of correspondence sent from OSHA to Respondent during the period between the inspection and the issuance of the citation.

On January 17, 2018, the judge issued the parties an order to appear for a "Telephonic Motions Hearing" on February 21, 2018, stating that "[t]he parties should be prepared to address the current status of the case, and any pending issues before this Court." That same day, the judge issued a "Notice of Trial," scheduling trial dates of July 18 and 19, 2018. After apparently communicating with Respondent's counsel, the Secretary's counsel sent an email on February 12, 2018, to the judge's legal assistant, in which she copied Respondent's counsel and sought

[1] Respondent claims that following receipt of the citation at Respondent's branch office, it was given to Respondent's branch manager, who thereafter resigned on or about June 20, 2017. Respondent asserts that this branch manager did not forward the citation to its corporate headquarters as he was required to do pursuant to company policy; thus, Respondent was not aware of the citation until August 8, 2017, when a successor employed in the position of branch manager found in a pile of papers left in the predecessor's office a notice of delinquency regarding the citation.

clarification about the judge's telephonic hearing order: "The parties do not interpret the Order as requiring the parties to put on a telephonic evidentiary hearing involving witnesses, exhibits and a court reporter. Please let the parties know if our understanding is incorrect." There is nothing in the record to indicate that a response to this email was ever sent, nor is there any documentation of what transpired during the telephonic hearing.

In denying Respondent's Rule 60(b)(1) motion, the judge found that even if its initial handling of the citation constituted excusable neglect because the former branch manager did not follow the company's established procedure of transmitting the citation to corporate headquarters, Respondent's "continued failure to respond in a timely manner" after receiving a second copy of the citation at its headquarters was unjustified.[2] *See 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.") (citations omitted). In her decision, the judge relied primarily on the parties' declarations to make her factual findings. There is no mention—nor any record—of the judge having ruled on Respondent's requests for limited discovery and an evidentiary hearing.

On review, Respondent raises several arguments that center largely on the judge's failure to explicitly rule on these specific requests. Respondent contends that it was not made aware of the "purpose" of the telephonic hearing and therefore, had "no opportunity to put on evidence and testimony" regarding its Rule 60(b)(1) motion. In addition, Respondent challenges the judge's reliance on what it asserts are hearsay statements in the declaration submitted by the Secretary. We agree that the absence of express rulings from the judge on Respondent's requests is problematic, particularly where an opportunity for limited discovery may have addressed the hearsay concerns evident in the declarations submitted by both parties. It also appears that the parties may have been confused by the judge's simultaneous issuance of orders scheduling a telephonic "hearing" and a subsequent "trial" in the case. Indeed, based on the record before us,

[2] The judge also rejected Respondent's alternative claim that it was unfairly surprised by the citation because, as a staffing agency, it did not believe it was the subject of OSHA's inspection or that it could be the recipient of a citation. In rejecting Respondent's argument, the judge found that employees of Respondent participated in various stages of the inspection, and in any event, Respondent's allegation that "it did not expect to be issued a citation . . . does not justify its failure to file a timely notice of contest" once a citation was received.

the parties were never informed that the telephonic hearing would constitute the dispositive hearing on the Rule 60(b)(1) issue.

Under these circumstances, we remand this case to the judge to: (1) address Respondent's request for limited discovery and provide a written explanation of the basis for her ruling; and (2) conduct an evidentiary hearing to afford the parties an opportunity to develop the record.[3] *See Elan Lawn and Landscape Serv.*, 22 BNA OSHC 1337, 1339-40 (No. 08-0700, 2008) (remanding case for evidentiary hearing where Respondent was confused about opportunity to establish potential basis for Rule 60(b)(1) relief); *see, e.g., Rheem Mfg. Co., Inc.*, 25 BNA OSHC 1838, 1839 (No. 15-1248, 2016) (remanding case for evidentiary hearing where judge's order

[3] Our dissenting colleague, while noting that "Respondent provided the judge with an explanation for its failure to file its notice of contest before the June 26 statutory deadline . . .", places a great deal of emphasis on Respondent's "delay" in filing its notice of contest after August 8, when it became aware of the citation. Other than hearsay evidence upon which the judge relied, there is no record evidence as to the substance of Respondent's communications with OSHA, either during the inspection, after the closing conference, or up until September 18. In addition, there is no legal basis to say that Respondent was obliged to file a notice of contest within fifteen days after receiving the second copy of the citation, as requesting a copy did not restart the clock on the 15-day contest period. The issue in determining whether relief is warranted under Rule 60(b)(1) is whether there was excusable neglect in failing to timely respond before the June 26 statutory deadline. That is not to say that the reason(s) for the delay and the conduct of Respondent should not be weighed, but this consideration should not artificially mandate a new deadline; rather, the Respondent's untimeliness should be considered together with other such circumstances as might be relevant. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) (these circumstances include "the danger of prejudice to the debtor, 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"). Unlike our colleague, we do not create an artificial deadline that a delay of six weeks might pass muster but, without a full consideration of the *Pioneer* factors, a delay of almost three months tips the scale to too many "passing day[s]" and merits a finding of no excusable neglect.

Further, our decision today does not, despite our colleague's concern, create an "unfettered right to have discovery and an evidentiary hearing on [Respondent's] motion." Our dissenting colleague poses the loaded question of why we believe that discovery and an evidentiary hearing is necessary, given her assumption that Respondent already possesses the information it seeks. However, this unfounded assertion fails to acknowledge that discovery was not allowed, the judge relied upon hearsay information, and Respondent was unable to cross-examine the proffered hearsay evidence. Rather, we simply find that the circumstances here warrant directing the judge to consider Respondent's request to engage in limited discovery and then conduct a hearing on its motion for Rule 60(b)(1) relief.

denying Rule 60(b)(1) relief based on excusable neglect was "premature based on the limited record").

Accordingly, we set aside the judge's decision and remand this case to the judge for further proceedings.

SO ORDERED.

/s/
Heather L. MacDougall
Chairman

/s/
James J. Sullivan, Jr.
Commissioner

Dated: July 31, 3018

ATTWOOD, Commissioner, dissenting:

Because I find no error in the judge's decision to deny Respondent's Rule 60(b)(1) motion without first conducting an evidentiary hearing, I dissent. In my view, Respondent has not only failed to assert facts sufficient to support a finding that the untimely filing of its notice of contest was due to excusable neglect; it has also failed to even hint at how an evidentiary hearing on the issue would remedy that failure of proof.

After filing its notice of contest almost three months past the statutory deadline, Respondent filed a Rule 60(b)(1) motion for relief with the judge, as well as a reply to the Secretary's opposition to its motion. *See* 29 U.S.C. § 659(a) (failure to contest citation within fifteen working days results in citation becoming final order of Commission). Both parties submitted sworn declarations and exhibits with their filings. In her decision, the judge considered the parties' arguments and the record before her, then sufficiently explained the basis for her findings. She noted the applicability of *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993), and following the Commission's decision in *A. W. Ross Inc.*, 19 BNA OSHC 1147, 1148 (No. 99-0945, 2000), focused on the reasons for Respondent's delay. Specifically, she concluded that even if Respondent's claim that its corporate management did not learn of the citation until August 8, 2017 was sufficient to excuse its failure to contest the citation prior to August 8, 2017, Respondent failed to provide a sufficient explanation for why it "still did not file its notice of contest until September 18, 2017." The judge found that this continued delay cuts "against a finding that Respondent was maintaining orderly procedures for the handling of important documents such as the [c]itation[,] and making a good faith effort to comply with the Act" and therefore denied the motion.

I agree with the judge's ruling that Respondent failed to establish that its almost six-week delay in filing its notice of contest after OSHA provided it with a second copy of the citation was due to excusable neglect. Under *Pioneer*, the factors to consider in determining whether a party has established excusable neglect such that it is entitled to relief under Rule 60(b)(1) "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." 507 U.S. at 395. Although Respondent provided the judge with an explanation for its failure to file its notice of contest prior to August 8, it made no attempt whatsoever to justify its delay after that date. Indeed, in its

filings here and below, Respondent simply stated that "[a]fter conducting an internal investigation (which is ongoing to date) and communicating with the OSHA Area Office, TMD retained the undersigned counsel to represent it in this matter." Respondent made no claim either before the judge or in its petition to us that these activities prevented it from promptly filing a notice of contest.[1] Compounding this failure, Respondent has not asserted any other reason for its lengthy delay, which was fully within Respondent's control. *Cf. Nw. Conduit Corp.,* 18 BNA OSHC 1948, 1950-51 (No. 97-851, 1999) (granting Rule 60(b)(1) relief where employer's president and attorney showed "diligence in pursuing their remedies" and attorney personally delivered notice of contest to OSHA the same day he discovered it had not been timely filed).[2] Absent any attempt at an explanation, I agree with the judge that this further delay in filing demonstrates Respondent's failure to maintain orderly procedures for handling important documents and to proceed in good faith and does not constitute excusable neglect. *La.-Pac. Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) ("Even during a management transition, a business must maintain orderly procedures for handling important documents.")

[1] The majority asserts that "there is no legal basis to say that Respondent was obliged to file a notice of contest within fifteen days after receiving the second copy of the citation." Neither the judge nor I posit anything of the sort, what I am asserting is that with every passing day after Respondent received the second copy of the citation, its argument that its delay was due to excusable neglect became more difficult to sustain. Moreover, the majority erroneously asserts that I have created "an artificial deadline that a delay of six weeks might pass muster but, . . . a delay of almost three months tips the scale to too many 'passing day[s].' " But like the judge, I simply rely upon the delay from August 8 to September 18 because, whatever happened between June 26 and August 8, Respondent failed to put forth any facts justifying its further six-week delay following receipt of the second copy of the citation. Thus, the judge committed no error in finding that Respondent's delay after August 8 was not excusable.

[2] My colleagues find significance in the fact that "other than hearsay evidence upon which the judge relied, there is no record evidence as to the Respondent's communications with OSHA, either during the inspection, after the closing conference, or up until September 18." And they label as an "unfounded assertion" my statement that *all* of that evidence was known to Respondent. However, since Respondent presumably participated in all of its "communications with OSHA," evidence of those communications must, by application of elementary logic, have been known to Respondent. Given that it was Respondent's burden to demonstrate that it was entitled to relief, its failure to do so before the judge is fatal to its motion. One can only wonder why the majority believes that Respondent's failure to put forth evidence unquestionably in its possession entitles it to discovery and an evidentiary hearing.

(citation omitted).[3]

Respondent argues, and my colleagues agree, that the judge erred in denying Respondent's Rule 60(b)(1) motion without ruling on its request to have limited discovery and an evidentiary hearing on the motion. Although the judge did not explicitly deny this request (which was only included in the conclusion of Respondent's motion and reply and was not supported by any assertions, facts, or argument), she effectively denied it in rejecting Rule 60(b)(1) relief. Thus, the real issue is whether in the circumstances of this case, the judge erred in failing to afford Respondent an opportunity for discovery and/or an evidentiary hearing on its motion. In contrast to my colleagues, I find nothing in the record before us that would support a conclusion that the judge erred in this respect. Thus, at most the judge's failure to expressly deny Respondent's request is harmless error.

Nothing in the Occupational Safety and Health Act, the Commission's Rules of Procedure, the Federal Rules of Civil Procedure, or the Administrative Procedure Act grants Respondent the unfettered right to have discovery and an evidentiary hearing on its motion. And Respondent has made no showing that it is legally entitled to either, nor has it shown how it was harmed by this alleged error. As any attorney who routinely engages in a motions practice is well aware, in the absence of some showing by Respondent that discovery and an evidentiary hearing were required here, the judge was under no compulsion to grant that request prior to ruling on Respondent's motion. Moreover, Respondent has not put forth a single fact that it claims it could have proven in support of its motion for relief but for the judge's denial of discovery and an evidentiary hearing. *See Williams Enters. Inc.*, 13 BNA OSHC 1249, 1250-51 (No. 85-355, 1987) (party that "seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted") (citation omitted). Since *all* of the facts that would be relevant to any justification for Respondent's delay in filing its notice of contest from August 8 until September 18 are exclusively within Respondent's control, discovery and an evidentiary hearing could add nothing beyond what it already knows in this regard. Respondent, with benefit of counsel, chose at its peril not to assert before the judge any facts related to its almost six-week delay in filing after receipt of the second copy of the citation

[3] I would also reject Respondent's argument that it was unfairly surprised by the citation for the reasons stated in the judge's decision.

beyond its unsupported claim that it was conducting an internal investigation.[4] Its failure to do so should not now provide a justification for a needless remand. Thus, I find not even a shred of support for my colleagues' conclusion that Respondent was deprived of a sufficient opportunity to show that the untimely filing of its notice of contest was due to excusable neglect.[5]

Accordingly, I would affirm the judge's decision.

/s/
Cynthia L. Attwood
Commissioner

Dated: July 31, 2018

[4] In any event, Respondent did not need to obtain *any* facts before immediately filing its notice of contest upon obtaining the second copy of the citation—completion of an "internal investigation" to gather information regarding either the merits of the citation or to support its motion for relief under Rule 60(b)(1) was not a necessary predicate for taking such action.

[5] Respondent and my colleagues assert that the judge's simultaneous issuance of an order to appear for a "Telephonic Motions Hearing" and a "Notice of Trial" was potentially confusing to the parties. On the contrary, it was perfectly reasonable for the judge to schedule a hearing on the merits at the same time she scheduled a "Telephonic Motions Hearing." Presumably, prior to that hearing the judge had not determined that the motion should be denied. And early scheduling of a hearing on the merits benefits the parties, works to expedite the adjudicative process, and can be easily undone at a later date should a hearing no longer be required. Nor do I sign on to my colleague's apparent view that the judge overstepped her authority by relying on the parties' declarations instead of holding an evidentiary hearing. Indeed, the Commission has routinely relied on declarations and related documents in ruling on Rule 60(b) motions. *See, e.g., Burrows Paper Corp.*, 23 BNA OSHC 1131, 1132 (No. 08-1559, 2010); *Acrom Constr. Serv., Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *J.F. Shea Co.*, 15 BNA OSHC 1092, 1093-94 (No. 89-976, 1991); *La.-Pac. Corp.*, 13 BNA OSHC at 2021.

As discussed above, it is Respondent's failure to even assert facts essential to its position that renders its motion unsupportable, and as the judge found, "[n]o essential dispute of facts material to this [d]ecision and [o]rder has been established." *See, e.g., Evergreen Envtl. Serv.*, 26 BNA OSHC 1982, 1984 (No. 16-1295, 2017). Finally, my colleagues rely on *Rheem Manufacturing Co., Inc*., to support their decision to remand for an evidentiary hearing, but in that case the Commission was not faced with a lengthy filing delay following the employer's receipt of the citation after the contest period in that case; on the contrary, the employer filed its late notice of contest only two days after discovering the citation. 25 BNA OSHC 1838, 1839 (No. 15-1248, 2016). *Elan Lawn and Landscape Services* is also inapposite—the employer in that case, initially appearing pro se, filed its notice of contest only one day late and was not fully aware of its procedural position "[a]bsent any communication or contact . . . from either the judge or the Secretary." 22 BNA OSHC 1337, 1339-40 (No. 08-0700, 2008).

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SECRETARY OF LABOR, Complainant, v. TEXAS MANAGEMENT DIVISION, INC., Respondent.	OSHRC Docket No.: 17-1861

DECISION AND ORDER

This matter 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, *et sec.* (the Act). The Occupational Safety and Health Administration (OSHA) issued a Citation and Notification of Penalty (Citation) to Respondent on June 1, 2017, resulting from Inspection Number 1213423, conducted at 204 East Bethany Drive, Allen, Texas (worksite). Such Citation was not timely contested and thus became a Final Order of the Commission pursuant to Section 10(a) of the Act.

Respondent, Texas Management Division, Inc., filed a *Motion for Relief From A Final Order Pursuant to Rule 60(b)(1), Federal Rules of Civil Procedure (FRCP)* (motion). A hearing on the motion was held February 21, 2018. The Court has reviewed briefs from both parties regarding this request for Rule 60(b)(1) relief. For reasons set forth below, the motion is denied and the Citation and Penalty are affirmed as the Final Order of the Commission.

Background

Respondent is a staffing agency which provided temporary workers at the worksite. An onsite manager of the Respondent, Ms. Elena Tavira, was present at the time of the inspection on February 23, 2017. Respondent's branch manager, Chris Garza, was present when air sampling for methylene chloride was conducted at the worksite on March 23, 2017. The parties disagree

regarding the extent of the Respondent's active participation in the opening and closing conferences. Results of air sampling were provided to the Respondent, and OSHA sent requests for additional documentation to the Respondent.

A Citation and Notification of Penalty was served to the Respondent on June 5, 2017, by certified mail to Respondent's Carrollton, Texas Branch Office. An employee of the Respondent, Mr. Ramirez, signed for receipt of the Citation, which informed the Respondent it had 15 working days from the date of receipt to contest the Citation pursuant to Section 10(a) of the Act. Since Respondent did not contest the Citation or submit the required verification of abatement within the time periods allotted, on July 27, 2017, OSHA sent notice to the Respondent regarding nonpayment and delinquency (notice of delinquency).

On August 9, 2017, Respondent's Controller, Melisa Del Rio, contacted the OSHA Richardson Area Office, reporting the Respondent had received the notice of delinquency, but was not able to locate the Citation. Respondent asserts its corporate office did not have knowledge of the Citation until August 8, 2017. A copy of the Citation and air sampling results were e-mailed to the Respondent's corporate headquarters on August 9, 2017, the same day the request for a second copy was received. A "late letter of contest", dated September 18, 2017, was submitted by facsimile mail (notice of contest).

Respondent asserts its late filing of the notice of contest resulted from excusable neglect and requests relief from the Final Order. No essential dispute of facts material to this Decision and Order has been established.

Discussion, Findings, and Conclusions

Discretionary relief from a Final Order of the Commission may be granted, pursuant to Fed.R.Civ.P. 60(b)(1), if the Court finds the employer has established that "mistake, inadvertence, surprise, or excusable neglect" was the cause of the employer's failure to contest a citation within the time mandated by Section 10(a) of the Act, or finds any other cause has been established that justifies relief. *Branciforte Builders*, 9 BNA OSHC 2113, 2116-2117 (No. 80-1920, 1981). The presence of a potentially meritorious defense must also be established so that vacating the Final Order will not be an empty exercise. The Respondent, as the moving party, has the burden of proof that it is entitled to such equitable relief.

In determining whether the late filing of a notice of contest may be found to result from "excusable neglect" under Rule 60(b)(1), the equitable analysis enunciated by the Supreme Court in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 393 (1993) is applicable. In *Pioneer*, the Court held that "excusable neglect" is determined based upon equitable considerations that take into account all relevant circumstances, and include 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.* "(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 assessing the presence of excusable neglect. *A.S. Ross, Inc.,* 19 BNA OSHC 1147 (No. 99-0945, 2000).

It is undisputed the notice of contest was due to have been filed not later than June 26, 2017, pursuant to Section 10(a) of the Act, but was not in fact filed until September 18, 2017.

Respondent asserts its delay in filing the notice of contest constituted excusable neglect because the employee who signed for the Citation delivered it to the branch manager, Mr. Garza, who then left Respondent's employment without following established company policy to transmit the Citation from the branch location to company headquarters. As a result, Respondent alleges its corporate headquarters did not have knowledge of the Citation until August 8, 2017.[1] No explanation has been offered for why Respondent's headquarters had direct knowledge of the Citation on August 8, 2017, yet still did not file its notice of contest until September 18, 2017.

The Secretary does not dispute the facts alleged by the Respondent as noted above, but petitions the Court as a matter of law to affirm the finality of the Citation.[2]

Considering facts very similar to those in this case, the Commission held in *Stroudsburg Dyeing & Finishing Company,* 13 BNA OSHC 2058, 1987-90, CCH OSHD (No. 88-1830, 1989), that when the employee who received a mailed citation failed to bring it to the attention of the proper officer of the company, that failure did not constitute excusable neglect or any other reason justifying relief pursuant to Rule 60(b). *See also J.F. Shea Co*., 15 BNA OSHC 1092, 1094 (No. 89-976, 1991). Transmittal of the Citation between its branch location and its headquarters clearly was within the exclusive control of the Respondent.

The Commission has consistently ruled that employers 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. *A.W. Ross, Inc., supra; Montgomery Security Doors and Ornamental Iron, Inc., 18 BNA OSHC 2145, 2148 (No. 97-1906, 2000).* Prompt employer response to citations issued pursuant to the OSH Act not only facilitates efficient case management, but also furthers the ultimate purpose of the Act to assure safe and healthful working conditions for employees in their place of work. The failure of Respondent's branch manager to communicate adequately to headquarters upon receipt of the Citation did not constitute excusable neglect. The Declaration of Ms. Del Rio alleges the branch

[1] Respondent submitted a Declaration from Melisa Del Rio, Controller for the Respondent. Ms. Del Rio avers that the branch manager at the time when the Citation was issued, Chris Garza, resigned on June 20, 2017. The notice of delinquency was found buried on Mr. Garza's former desk on August 8, 2017, by his successor. The original Citation was not found. (Respondent's Exhibit 2)

[2] The Secretary tenders supporting evidence in the form of: 1) A Declaration from Greg Wynn, Assistant Area Director for the Richardson Area OSHA Office; 2) a handwritten statement of Mr. Chris Garza, Respondent's branch manager; and 3) copies of correspondences sent from OSHA to the Respondent during the time period between the inspection and issuance of the Citation.

manager resigned June 20, 2017, but it was not until August 8, 2017, that his successor found the notice of default dated July 27, 2017 buried on his former desk - none of which convinces the Court Respondent had a sufficiently orderly process for managing important documents.

No justification for Respondent's continued failure to file a notice of contest in a timely manner after requesting and receiving a second copy of the Citation has been tendered. Respondent's request for an additional copy of the Citation did not alter the deadline for filing a notice of contest, or start the response time mandated by Section 10(a) of the Act over again. Section 10(a) does not include a tolling provision when a second copy of a citation is requested. Even if the Court were to find the Respondent's handling of its first copy of the Citation constituted excusable neglect because its branch manager did not follow established company policy for transmittal of the Citation to corporate headquarters, that finding would not justify Respondent's continued failure to respond in a timely manner after receiving a second copy directly in its headquarters. Respondent's continued failure to file a timely notice of contest after requesting and receiving a second copy of the Citation exacerbated the potential impact of the delay on the proceedings and also the potential prejudice to the opposing party. Such continued delay also mitigates against a finding that Respondent was maintaining orderly procedures for the handling of important documents such as the Citation and making a good faith effort to comply with the Act.

In the event excusable neglect is not found, Respondent alleges in the alternative that although it was aware of the inspection, since it is a staffing agency, it did not believe its safety procedures were a subject of the ongoing inspection or that that it could be the recipient of a citation. Therefore, it alleges it was unfairly surprised by issuance of the Citation. However, the evidence shows the inspecting Compliance Safety and Health Officer, Ryan McAliney, had extensive communication with the Respondent during the period of the inspection, including an opening conference, requests from OSHA to the Respondent for documents, and the presence of a Respondent representative during air sampling and at the closing conference. (Declaration of Greg Wynn, Complainant's Exhibit A). Mr. Wynn also avers he discussed requirements for filing a notice of contest with the Respondent's Controller, Ms. Del Rio, when she called to request the second copy of the Citation. The Respondent's assertion that it did not expect to be issued a citation at the conclusion of the inspection does not justify its failure to file a timely notice of contest when it received one, or still less its continued delay when it had requested and received a second copy.

Since Respondent has not established an entitlement to relief from the Final Order as a result of mistake, inadvertence, surprise, excusable neglect, or any other just cause encompassed by Rule 60(b), the presence or absence of a potentially meritorious defense is not germane[3]. The presence of a latent defense would not by itself justify failure to file a notice of contest as required by Section 10(a) of the Act. A ruling that an employer can simply assert at any time that it didn't

[3] Respondent alleges as a defense that its review of the worksite did not reveal the need for hazard assessments or personal protective equipment, and the primary employer did not inform it of any such need. Respondent alleges its employees did not operate the machinery onsite. (Respondent's Exhibit 2)

submit a timely notice of contest to a citation because it thought it had a good defense would defeat the purpose of Section 10(a) and ignore its plain meaning.

The Respondent has not established sufficient justification for relief from the Final Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing Decision and Order constitutes the Court's findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

The Respondent's motion for relief is denied. The Citation and Penalties are affirmed as the Final Order of the Commission.

SO ORDERED.

/s/_____
Judge Peggy S. Ball
Occupational Safety and Health Review Commission

Dated: May 30, 2018