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. RHEEM MANUFACTURING CO., INC., Respondent.	OSHRC Docket No. 15-1248

APPEARANCES:

Angela F. Donaldson, Counsel; Stanley E. Keen, Regional Solicitor; M. Patricia Smith, Solicitor; U.S. Department of Labor, Washington, DC and Atlanta, GA
For the Complainant

Carla Gunnin, Esq., and Nickole Winnett, Esq.; Jackson Lewis P.C., Atlanta, GA
For the Respondent

REMAND ORDER

Before: ATTWOOD, Acting Chairman and MACDOUGALL, Commissioner.

BY THE COMMISSION:

At issue before the Commission is a November 20, 2015 decision of Administrative Law Judge John B. Gatto denying Respondent's motion for relief from a final order under Federal Rule of Civil Procedure 60(b) after Respondent filed a notice of contest with the Occupational Safety and Health Administration after the statutory deadline. *See* 29 U.S.C. § 659(a) (failure to contest citation within fifteen working days results in citation becoming final order of Commission). For the reasons that follow, we set aside the judge's decision and remand this case to the judge for further proceedings.

On May 6, 2015, OSHA issued Respondent a citation, which was sent via certified mail to Respondent's facility in Montgomery, Alabama, and signed for by the facility's security guard on May 8, 2015. Respondent filed its notice of contest on June 24, 2015, three weeks after the expiration of the fifteen-day contest period and, according to Respondent, two days after it

contacted OSHA and learned that the citation had issued. Since the notice of contest was untimely filed, the Secretary contends it was "properly dismissed." *Id.*

In its motion for Rule 60(b) relief from a final order, Respondent details the company's mail procedures in an affidavit from its human resource manager and claims that its failure to timely file the notice of contest was due to 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 . . . ."). As set forth in its motion, Respondent claims that excusable neglect is established because, despite its orderly procedures for handling mail, the citation never reached the appropriate personnel after the security guard signed for it, and the citation has yet to be found at Respondent's facility. The Secretary's response includes a motion to dismiss Respondent's late notice of contest, along with two supporting affidavits from OSHA personnel.

In ruling on Respondent's motion, the judge had before him the motion for relief, the motion to dismiss, and the parties' supporting affidavits, and concluded based on the human resource manager's affidavit that Respondent's mail-handling procedures were "convoluted." He also found that because Respondent had "sole control" over these procedures, its neglect was not excusable under Rule 60(b) and denied Respondent's motion. While the Commission, as acknowledged by the judge, " 'has consistently denied relief to employers whose procedures for handling documents were to blame for untimely filings' " of notices of contest, we find that his order denying the requested relief is premature based on the limited record. *See NYNEX*, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999) (*citing E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991)). Therefore, we remand this case to the judge for an evidentiary hearing. *See, e.g., Dore & Assocs. Contracting, Inc.*, 19 BNA OSHC 1438, 1439 (No. 01-0067, 2001) (remanding for evidentiary hearing, because "[o]n the limited record before us here we cannot determine whether [Respondent] has established a basis to excuse the untimely filing of its notice of contest").

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

SO ORDERED.

/s/
Cynthia L. Attwood
Acting Chairman

/s/
Heather L. MacDougall
Commissioner

Dated: January 8, 2016

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Complainant,	
v.	OSHRC DOCKET No. 15-1248
RHEEM MANUFACTURING COMPANY, Respondent.	

ORDER DENYING RESPONDENT'S MOTION FOR RELIEF OF THE FINAL ORDER UNDER RULE 60(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Attorneys and Law firms

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Carla Gunnin, Nickole Winnett, Jackson Lewis P.C., Atlanta, GA, for Respondent.

John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

A citation and notice of the associated proposed penalty was issued by the Mobile, Alabama, Area Director of the Department of Labor's Occupational Safety and Health Administration ("OSHA")[1] to Rheem Manufacturing Company ("Rheem"), which Rheem contested after the statutory deadline. The citation and notice was issued under the Occupational Safety and Health Act of 1970 ("Act"), 29 U.S.C. §§ 651–678, and according to the Secretary of Labor, was "deemed" a final order of the Commission. Thus, OSHA notified Rheem it would not treat the case as contested and refused to forward Rheem's untimely notice of contest to the Commission. If the Secretary's assertion is true, "any relief from that

[1] The Secretary of Labor has assigned responsibility to OSHA for enforcement of the Act and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* 65 FR 50017, 50018 (2000). The Assistant Secretary has promulgated regulations authorizing OSHA's Area Directors to issue citations and proposed penalties under the Act. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

order can only be granted under Federal Rule of Civil Procedure 60(b)." *Northwest Airlines, Inc.*, 19 BNA OSHC 1383 (No. 00-0954, 2001).

On July 7, 2015, Rheem filed a motion with the Commission seeking relief under Rule 60(b) and the Secretary filed a response to Rheem's motion on September 11, 2015, which included within it a motion to dismiss Rheem's late notice of contest. Rheem filed a reply on September 25, 2015. The court notes the Secretary's response was not timely. *See* 29 C.F.R. §§ 2200.4(a), (b) and § 2200.40(c) for permissible response period and time computation. Both parties also failed to comply with Commission Rule 40(a), which requires that prior to filing a motion, the moving party "confer or make reasonable efforts to confer with the other parties" and "state in the motion if any other party opposes or does not oppose the motion." § 2200.40(a). Rheem has also failed to comply with the corporate disclosure requirements of Commission Rule 35(a). *See* § 2200.35(a) ("initial pleadings filed under these rules by a corporation shall be accompanied by a separate declaration listing all parents, subsidiaries, and affiliates of that corporation or stating that the corporation has no parents, subsidiaries, or affiliates, whichever is applicable").

The court also notes Rheem's untimely notice of contest is not properly before the court since it did not file it with the Commission but merely attached it as an exhibit to its motion. Therefore, the Secretary's motion to dismiss Rheem's late notice of contest is moot. Further, the Secretary's motion to dismiss Rheem's late notice of contest is also not properly before the court since he included it within his response to Rheem's motion in violation of Commission Rule 40(a), which mandates "[a] motion shall not be included in another document," but "shall be made in a separate document." 29 C.F.R. §2200.40(a); *see also Elan Lawn & Landscape Serv., Inc.*, 22 BNA OSHC 1337, 1340 (No. 08-0700, 2008).

Long-standing Commission precedent indicates relief may be granted under Rule 60(b) from a final order of the Commission resulting from an untimely filed notice of contest. *Elan Lawn & Landscape Serv., Inc.*, 22 BNA OSHC 1337, 1338 (No. 08-0700, 2008) (*citing Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1949 (No. 97-851, 1999). Thus, the court concludes it has jurisdiction to rule on Rheem's motion seeking Rule 60(b) relief. However, for the reasons indicated *infra*, Rheem has not established excusable neglect or any other reason justifying relief and its motion is therefore **DENIED**.

II. FACTS

On March 24-25, 2015, OSHA conducted a two-day inspection of Rheem's Gunter Park Drive facility in Montgomery, Alabama, where Rheem manufacturers heating and cooling products. (Mot. p. 1; *see also* Ex. A.) The inspection was conducted following a report that an employee's thumb had been crushed by machinery or equipment. (Resp. p. 1; *see also* Sanders Decl., Ex. A.) On May 6, 2015, OSHA issued the citation and notice to Rheem via certified mail, return receipt requested, and as evidenced by the certified mail return receipt, it was signed for by Charles Berg, Rheem's security guard, on May, 8, 2015. (Mot. p. 3, *see also* Ex. A, Ex.; Day Decl., Ex. B, Ex. C.) Rheem did not file its notice of contest until June 24, 2015. (Resp. p. 2.) OSHA determined the citation and notice was deemed a final order of the Commission on June 2, 2015, and notified Rheem on June 25, 2015, it would not treat the case as contested and refused to forward Rheem's notice of contest to the Commission. (Mot. p. 5; *see also* Ex. E.) Therefore, on July 7, 2015, Rheem filed its Rule 60(b) motion in the Commission.

Prior to January 17, 2015, Rheem's process for mail delivery was handled "by an assigned Rheem mailroom attendant." (Mot. p. 4; *see also* Burnette Decl., ¶ 6.) However, on or around that date, Rheem eliminated the assigned mailroom attendant position and from that day forward, Rheem's mail delivery process consisted of the following:

> (1) First, FedEx, U.P.S. and U.S. Postal Service deliveries arrive at Gate 1 and any letters or packages requiring signatures are signed for by the security guard on duty. (2) The security guard then returns the letters or packages requiring signatures to the FedEx, U.P.S. or U.S. Postal Service delivery person.
> (3) The FedEx, U.P.S. or U.S. Postal Service delivery person then deposits all mail (certified, packages, and other) in a designated area inside the door of Rheem's mailroom located adjacent to the shipping receiving dock doors on the East side of the facility.
> (4) Next, one of three Rheem employees sort the mail *at some point during the day* and add it to dedicated bins in the mail room for each department/area.
> (5) Finally, the dedicated bins are delivered to the departments for distribution.

(*Id.*) (Emphasis added).

According to Rheem, "[t]he person usually tasked with sorting mail states that, when she is doing the task, she personally delivers any FedEx or U.P.S. envelopes or certified mail to the actual department to whom it is addressed." (*Id.*; *see also id.* at ¶ 4.) Rheem also asserts, "[o]n the day in question, the person who performed this task most frequently stated that she had taken

a half-day of vacation." (*Id.*; *see also id.* at ¶ 5.) Therefore, Rheem asserts a "back-up person most likely sorted and delivered the mail on May 8, 2015." (*Id.*; *see also id.*)

III. ANALYSIS

Rule 60(b)(1) of the Federal Rule of Civil Procedure provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding" for "mistake, inadvertence, surprise, or excusable neglect[.]" Fed. R. Civ. P. 60(b)(1). The D.C. Circuit has noted the trial judge, "who is in the best position to discern and assess all the facts, is vested with a large measure of discretion in deciding whether to grant a Rule 60(b) motion, and the [judge's] grant or denial of relief under Rule 60(b), unless rooted in an error of law, may be reversed only for abuse of discretion." Computer Professionals for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 903 (D.C. Cir. 1996), amended (Feb. 20, 1996).

A. Citation and Notice Deemed Final Order of the Commission

Under the Act when the Secretary issues a citation, he is also required to "notify the employer *by certified mail* of the penalty, if any, proposed to be assessed." 29 U.S.C. § 659(a) (emphasis added). If the employer fails to "notify the Secretary that [it] intends to contest" the citation or notice within "fifteen working days from the receipt of the notice," the citation and notice is "deemed a final order of the Commission." *Id.* Rheem does not dispute that the citation and notice was signed for by its security guard on May, 8, 2015, and that it was not contested by June 1, 2015. Thus, the Secretary argues, and the court agrees, his citation and notice was deemed a final order of the Commission by operation of law on June 2, 2015. *See* 29 U.S.C. § 659(a). (Resp. p. 2.)

Rheem argues it has been unsuccessful in its attempts to locate the citation and notice and "no management officials or mailroom personnel recall seeing or delivering an envelope from OSHA in May or June." (Mot. p. 5; see also Ex. C-9.) "The question in this case is not whether [Rheem] had actual notice of the [citation and notice], but whether such reasonable steps had been taken to give [it] notice[.]" *Atherton v. Atherton*, 181 U.S. 155, 172 (1901). The court concludes such reasonable steps were taken by the Secretary. While it would have been better if Rheem's management had actually received the citation and notice, as indicated *infra*, the failure

of its management "to receive it was due partly to its own dereliction." *S & G Inv. Inc. v. Home Fed. Sav. & Loan Ass'n*, 505 F.2d 370, 375 (D.C. Cir. 1974).[2]

Rheem also argues "despite acknowledging delivery," the mail is not "received" by the security guard "but remains in the possession of the U.S. Postal Service delivery person at this point." (Mot. p. 3; *see also* Burnette Decl., ¶ 3.) To state it in terms of the Act, Rheem essentially argues that even though it signed for the certified mail, it was not in "receipt of the notice issued by the Secretary." 29 U.S.C. § 659(a). However, under the Act, since the date of the employer's "receipt of the notice" triggers the "fifteen working days" time limit to initiate a contest, the Act's additional requirement that the Secretary "notify the employer by certified mail" effectuates one of Congress' declared purposes of the Act, of "providing an effective enforcement program." 29 U.S.C. § 651(b)(10). Rheem's position is contrary to this legislative purpose and not only leads to an absurd result, it is itself absurd, particularly since it chose to implement such a convoluted mail-handling process.

The "absurd results doctrine" embodies "the long-standing rule that a statute should not be construed to produce an absurd result." *Ctr. for Biological Diversity v. E.P.A.*, 722 F.3d 401, 411 (D.C. Cir. 2013) (*citing Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998)); *cf. Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Under Rheem's interpretation, there would never be a date certain of the employer's "receipt of the notice" and the Secretary would therefore never know with certainty when the "citation and the assessment, as proposed, shall be deemed a final order of the Commission."

[2] Since the alleged violation occurred in Montgomery, Alabama, and Rheem's principal office is in Atlanta, Georgia, both in the United States Court of Appeals for the Eleventh Circuit, either party may appeal the final order in this case to the Eleventh Circuit, and in addition, Rheem may also appeal to the United States Court of Appeals for the District of Columbia Circuit. *See* 28 U.S.C. § 41, 29 U.S.C. § 660(a) & (b). The Commission has held "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). As recently as 2011, the Eleventh Circuit cited *Brennan v. Occupational Safety & Health Review Comm'n ("Otinger")*, 502 F.2d 30, 33 (5th Cir. 1974), which held the Commission does not have jurisdiction to reconsider its final orders under Rule 60(b). Since the Eleventh Circuit has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its governing body of precedent, *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), and *Otinger* is still binding precedent in the Eleventh Circuit, it is not likely Rheem would take an appeal to that circuit court.

Further, upon "receipt" of any citation under the Act, the Secretary's regulations require the employer to "immediately post" the citation "at or near each place an alleged violation referred to in the citation occurred." 29 C.F.R. §1903.16(a). The Secretary's regulations also require each citation to "remain posted until the violation has been abated, or for 3 working days, whichever is later." §1903.16(b). Further, any employer that fails "to comply with the provisions of paragraphs (a) and (b) of this section" is subject to a "citation and penalty in accordance with the provisions of section 17 of the Act." §1903.16(d). Again, without a date certain of the employer's "receipt of the notice," the Secretary would not know with certainty whether the employer has complied with his posting requirements. Clearly, the Secretary could not operate "an effective enforcement program" under such an absurd interpretation.

However, the court concludes there is an alternative interpretation consistent with the legislative purpose of "providing an effective enforcement program" that avoids Rheem's argument and absurd result. Since the Act requires the Secretary to "notify the employer by *certified mail*" of his notice and also limits initiating contests to within "fifteen working days from the receipt of the notice," the court interprets the phrase within "fifteen working days from the receipt of the notice" to mean within "fifteen working days from the" day the company signs for the *certified mail*, as evidenced by the certified mail return receipt. *See e.g.*, *NYNEX*, 1996 WL 109585 (No. 95-1671, 1996) (ALJ) ("A signed receipt for certified mail is prima facie evidence of delivery of the citation"), *aff'd*, 18 BNA OSHC 1967 (No. 95-1671, 1999). There is no dispute here that the citation and notice was signed for by Rheem's security guard on May, 8, 2015. Since Rheem did not notify the Secretary within fifteen working days from the day it signed for the certified mail, the court concludes the Secretary's citation and notice was "deemed a final order of the Commission" by operation of law on June 2, 2015. 29 U.S.C. § 659(a).

B. Meritorious Claim or Defense

The Commission and the D.C. Circuit have recognized that motions for relief under Rule 60(b) are not to be granted unless the movant can demonstrate a meritorious claim or defense. *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1953 (No. 97-851, 1999); *Lepkowski v. U.S. Dep't of Treasury*, 804 F.2d 1310, 1314 (D.C. Cir. 1986). *See also FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 447 F.3d 835, 842 (D.C. Cir. 2006). That element has been "satisfied with minimal allegations that the employer could prove a defense if given the opportunity." *Jackson Assoc. of Nassau*, 16 BNA OSHC 1261, 12675 (No. 91-438, 1993). "The key consideration is 'to determine whether there is some

possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default."' *Northwest Conduit*, 18 BNA OSHC at 1953 (citation omitted). Stated another way, to clear the "meritorious defense" hurdle, Rheem need only provide "reason to believe that vacating the judgment will not be an empty exercise or a futile gesture." *Marino v. Drug Enforcement Admin*., 685 F.3d 1076, 1080 (D.C. Cir. 2012) (citation omitted). This is not a high bar. *Id.*

A meritorious defense is not measured by "[l]ikelihood of success," but by whether it "contain[s] 'even a hint of a suggestion' which, proven at trial, would constitute a complete defense." *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372, 374 (D.C. Cir. 1980) (citation omitted). Rheem asserts in its motion it will allege employee misconduct, as well as other defenses to OSHA's citation and notice, "including a prior and longstanding interpretation by OSHA that indicates that guarding was not necessary." (Mot. p. 8.) Rheem's motion has the requisite "minimal allegations" that it "could prove a defense if given the opportunity" and provides at least "a hint of a suggestion" which, if proven at trial, "would constitute a complete defense." Therefore, Rheem has cleared the "meritorious defense" hurdle.

C. Merits of Rheem's Rule 60(b) Request for Relief

On the merits, Rheem asserts it is entitled to Rule 60(b)(1) relief because the citation and notice "was either mistakenly not dropped off in the designated mailroom" by the U.S. mail carrier after its security guard signed for its delivery "or it was inadvertently and unforeseeable lost or misplaced in the mailroom." (Mot. pp. 1-2; Burnette Decl., ¶ 8.) Thus, Rheem argues "an inadvertently lost or misplaced envelope by Rheem mail personnel" or "a failure" of the carrier "to properly delivery the certified mail to the mailroom after the signature" warrants a finding of "excusable neglect" or "mistake." (*Id.* p. 8.) On the other hand, the Secretary argues Rheem "has not established excusable neglect because the reason for the late filing was entirely within its control, and [ ] has only speculated regarding a possible mail delivery failure, after the Citation package was successfully delivered to its address of record." (Resp. p. 5.) The court agrees with the Secretary.

Rheem does not support its motion with evidence the court credits and its assertions are therefore not accepted as fact. Rheem relies on bald assertions in hearsay statements,[3] coupled with mere speculation and hypothesis, concerning what *may* have happened to the citation and notice *after* Rheem's security guard signed for it, which the court does not find sufficiently reliable to credit. Rheem offers the declaration of Greg Burnette, the company's Human Resource Manager, which clearly is not based on Burnette's first-hand knowledge of the relevant events. (Mot. Ex. C.) Burnette speculates that the citation and notice did not remain in the possession of its security guard after the guard signed for it but rather, remained in the possession of the U.S. mail carrier.

Thus, the company hypothesizes that the citation and notice *may* have been "mistakenly not dropped off in the designated mailroom" by the mail carrier. (Mot. pp. 3, 5; Burnette Decl., ¶ 3, 8.) Rather than speculating and hypothesizing, Rheem should have supported its assertions with affidavits or declarations from its security guard and the U.S. mail carrier based upon their first-hand knowledge. *See e.g.*, *Grant v. U.S. Air Force*, 197 F.3d 539, 541 (D.C. Cir. 1999) (where the mail carrier who attempted delivery testified regarding those attempts). Rheem's motion also relies on a hearsay statement in Burnette's Declaration purportedly made by the person "usually tasked" with sorting mail "that she had taken a half-day of vacation." (Mot. p. 4; Burnette Decl., ¶ 4.) Again, rather than supporting this assertion with this hearsay statement, Rheem should have supported its motion with an affidavit or declaration from the actual person "usually tasked" with sorting mail that purportedly made that statement. Likewise, rather than speculating that the "back-up person most likely sorted and

[3] Deciding whether hearsay testimony constitutes substantial evidence in an agency decision requires consideration of several factors outlined in *Richardson v. Perales,* 402 U.S. 389 (1971). These factors are as follows: (1) the independence or possible bias of the declarant, (2) the type of hearsay material submitted, (3) whether the statements are signed and sworn to as opposed to anonymous, oral, or unsworn, (4) whether the statements are contradicted by direct testimony, (5) whether the declarant is available to testify and, if so, (6) whether the party objecting to the hearsay statements subpoenas the declarant, or whether the declarant is unavailable and no other evidence is available, (7) the credibility of the declarant if a witness, or of the witness testifying to the hearsay, and finally, (8) whether the hearsay is corroborated. *Id.* at 402-07. *See also Myers v. Secretary of HHS,* 893 F.2d 840, 845 (6th Cir.1990) (holding that the multi-factor test applies to agency decisions). Here, (1) the declarants were Rheem's mailroom employees responsible for the lost or misplaced citation, clearly not independent or unbiased, (2) the hearsay statements were not relevant since they describe a general process for handling certified mail by the person "usually tasked" with sorting mail and were not statements made by the "back-up person" Rheem asserts "most likely sorted and delivered the mail on May 8, 2015," (3) the purported declarants were not named and the statements were apparently orally made and unsworn, (7) the hearsay was corroborated. Although the court is unable to weight the remaining factors based upon the record evidence, considering factors (1)-(3), and (7), the court does not find the hearsay sufficiently reliable to credit.

delivered the mail on May 8, 2015," (*id.*), Rheem should have supported its motion with an affidavit or declaration from that "back-up" employee. Moreover, even if Rheem's assertions are accepted as true, they do not establish any ground for relief under Rule 60(b)(1).

In evaluating motions for Rule 60(b)(1) relief, both the Commission and the D.C. Circuit have adopted the Supreme Court's "excusable neglect" analysis as set forth in *Pioneer Ins. Servs. Co. v. Brunswick Assocs. Ltd. Pship.*, 507 U.S. 380 (1993). *See*, *e.g.*, *Northwest Conduit*, 18 BNA OSHC at 1952 and *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1209 (D.C. Cir. 2003) (both applying the *Pioneer* analysis to a Rule 60(b) motions). Relevant circumstances for the court to consider under *Pioneer's* equitable analysis include: "(1) the danger of prejudice to the opposing party, (2) the length of delay and its potential impact on the proceeding, (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." *Northwest Conduit*, 18 BNA OSHC at 1950*, quoting Pioneer*, 507 U.S. at 395. In determining whether a party's neglect of a deadline is "excusable," the Supreme Court noted in *Pioneer* that Congress provided no guideposts for determining what sorts of neglect will be considered "excusable." *Pioneer*, 507 U.S. at 395.

Thus the *Pioneer* Court concluded that "the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.* However, for purposes of Rule 60(b), "'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Pioneer*, 507 U.S. at 394. Thus, "[b]ecause of the language and structure of Rule 60(b), a party's failure to file on time for reasons *beyond his or her control* is not considered to constitute 'neglect.'" *Id.* (emphasis added). Here, however, the court finds this case *does* involve "neglect" since the delayed filing of the notice of contest *was* within the control of Rheem and could have been avoided if Rheem had exercised reasonable diligence by not implementing such a convoluted mail-handling process.

Under the first factor, the D.C. Circuit has held prejudice "appears typically and properly to contemplate costs that reconsideration of the final judgment would inflict on the non-moving party independent of the chance of reversal." *FG Hemisphere*, 447 F.3d at 840. The Commission has also recognized it is usually a given that there is "a lack of prejudice to the Secretary[.]" *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2157 n. 5 (No. 98-367, 2000). The Secretary has also not asserted Rule 60(b)(1)

relief should be denied due to costs "independent of the chance of reversal." Therefore, the court concludes the first factor does not weigh against granting Rule 60(b)(1) relief.

Under the second factor, the Secretary has not asserted Rule 60(b)(1) relief should be denied due to the length of delay and its potential impact on these proceedings. The Commission has also held there is usually a lack of prejudice "to the interests of efficient judicial administration." *CalHar Constr.*, 18 BNA OSHC at 2157 n. 5. The D.C. Circuit has held where "a neutral rule of general application require[s] a response" to be filed within a certain period of time, "in such situations, violation of the rule itself indicates prejudice to an already overburdened system of litigation." *Lepkowski*, 804 F.2d at 1313. However, since that case did not address a statutory provision, but rather, Rule 1–9(d) of the Local Rules of the District Court, which require that an opposition to a motion to dismiss be filed within ten days, that case is factually distinguishable and is not controlling. Therefore, the court finds there is no prejudice "to the interests of efficient judicial administration" and therefore concludes the second factor also does not weigh against granting Rule 60(b)(1) relief.

As to the fourth factor, there is no suggestion that Rheem acted in other than good faith and the record shows that Rheem and its attorney showed some diligence in pursuing their remedies. Rheem contacted its counsel "when several weeks went by after the closing conference and they had yet to receive the [citation and notice]" and Rheem's counsel "immediately reached out to OSHA's Mobile Area Office on June 22, 2015, to determine if and when [it] had been delivered." (Mot. p. 9.) Upon learning that it had been delivered, "Rheem immediately filed a late" notice of contest "in the attempt to preserve its rights." (*Id.*) The Secretary did not dispute these assertions. The court concludes the fourth factor also does not weigh against granting Rule 60(b)(1) relief.

As to the third factor, the reason for the delay, the Commission has held it is "a key factor" in determining whether a late filing was due to excusable neglect, "including whether it was within the reasonable control of the movant." *CalHar Constr.*, 18 BNA OSHC at 2153, citing to *Pioneer*, 507 U.S. at 395. In appropriate circumstances, the Commission has held this to be the dispositive factor. *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1149 (No. 99-945, 2000). Here, the court concludes the reason for the delay was within Rheem's reasonable control. The Commission has held that "[e]mployers must maintain orderly procedures for handling important documents." *Louisiana–Pacific Corp.*, 13 BNA OSHC 2020, 2020 (No. 86–1266, 1989). Thus, 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. Clearly, given Rheem's convoluted mail-

handling process, it did not "maintain orderly procedures for handling important documents" and did not exercise "due diligence."

Rheem relies on *LeFrois Builder, Inc.*, 18 BNA OSHC 1978, 1981 (No. 98-1099, 1999), arguing the Commission has found excusable neglect and mistake when there was "a highly unusual, inadvertent error." (Mot. p. 8.) Rheem's reliance on *LeFrois* is misplaced since *LeFrois* is factually distinguishable. In that case, as Rheem points out, the reason for the delay was "a highly unusual, inadvertent error" by the company employee who picked up the mail on the day in question. A secretary for Le Frois received and signed for the citation on May 15, 1998, and placed it in her car before returning to the office and subsequently discovered the certified mail under the front seat of her car on the July 4th weekend. The secretary gave the certified mail to the company president on Monday, July 6, and he promptly contacted OSHA and filed a late notice of contest on July 8. Further, the company previously had not experienced a problem with its mail pickup system during the eighteen years it had been in effect.

Here however, unlike in *LeFrois*, Rheem's untimely filing did not result from an employee picking up mail and later finding it in her car since Rheem admits the citation "has yet to be found within the facility." Although Rheem asserts the "person usually tasked with sorting mail indicates that, when she is doing the task, she personally delivers any FedEx or U.P.S. envelopes or certified mail to the actual department to whom it is addressed," on the day in question, Rheem also admits "the person who performed this task most frequently stated that she had taken a half-day of vacation" and therefore a "back-up person most likely sorted and delivered the mail on May 8, 2015." However, Rheem offered no evidence that the "back-up person" also "personally delivers any FedEx or U.P.S. envelopes or certified mail to the actual department to whom it is addressed." Therefore, the court has no basis for determining whether the delay in filing was "excusable," and Rule 60(b) requires a showing of excusable neglect, not just simple negligence. Further, unlike in *LeFrois*, where the company had not experienced a problem with its mail pickup system during the eighteen years it had been in effect, Rheem's new convoluted mail-handling process was in place less than four months before the citation and notice was delivered.[4] Therefore, *LeFrois* is not controlling.

[4] Further, the Second Circuit reversed the *LeFrois* Commission, concluding "the Commission may not exercise jurisdiction based on Rule 60(b)(1)." *Chao v. Russell P. LeFrois Builder, Inc.*, 291 F.3d 219, 229 (2d Cir. 2002). Thus,

Further, even though Rheem asserts a "back-up person most likely sorted and delivered the mail on May 8, 2015," "[a]n employer's failure to have a procedure in place to address such occurrences does not provide a basis for relieving an employer from the effects of the final order," *E. K. Construction*, 15 BNA OSHC at 1167, and "[h]andling important business matters in this manner cannot be considered excusable neglect such that relief under Rule 60(b) would be appropriate." *A.W. Ross*, 19 BNA OSHC at 1149. In *J.F. Shea Co.*, 15 BNA OSHC 1092, 1093 (No. 89-0976, 1991), relief was also denied by the Commission since the company's failure to demonstrate "orderly procedure for handling important documents" indicates that "this is a case of simple negligence, which is not an adequate excuse for relief under Rule 60(b)."

Here, prior to January 17, 2015, Rheem had orderly procedures for handling important documents since its process for mail delivery was handled "by an assigned Rheem mailroom attendant. The court finds Rheem no longer had "orderly procedures for handling important documents" when it eliminated the assigned Rheem mailroom attendant position and began using its convoluted mail-handling process. However, such "staff changes" "do not support a conclusion of justifiable mistake or inadvertence, or excusable neglect." *Rebco Steel Corp.*, 8 BNA OSHC 1235, 1238 (Nos. 77-2040 & 77-2947, 1980).

Rheem argues this is not a case where it "did not properly route the mail to the appropriate person upon delivery," (Mot. p. 10), but as indicated *supra*, this is exactly such a case. Clearly, Rheem did not properly route the citation or it would know where it is. Relief was denied by the Commission in *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830, 1989), where the failure of the employee "who received the mailed citation to bring it to the attention of the proper officer of the company does not constitute 'excusable neglect' or 'any other reason justifying relief.'" Likewise, in *Louisiana–Pacific Corp.*, *supra*, and in *Rebco Steel*, 8 BNA OSHC at 1238, the Commission held relief under Rule 60(b) was not justified where the employer failed to properly supervise the employee who mishandled the OSHA

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the Commission has not relied on its *LeFrois* analysis for more than fifteen years and the only case where it referenced *LeFrois* after it was reversed by the Second Circuit was in *HRH Constr. Corp.*, 19 BNA OSHC 2042 (No. 99-1614, 2002). However, in that case, the Commission was composed of only two Commissioners and although they affirmed "the judge insofar as the Secretary's motion to dismiss HRH's notice of contest [was] granted," they reached this result for different reasons. Commissioner Rogers agreed with the result but in her concurring opinion indicated she would have affirmed without considering the merits of the arguments raised "based on applying the law of the [Second] Circuit" in *LeFrois*. *Id.* at 19 BNA OSHC 2044.

citation.[5] In *Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185, 2187 (No. 01-0830, 2003), consistent with the *Louisiana–Pacific* precedent, the Commission also affirmed the judge's conclusion that the company "did not have orderly procedures in place for the handling of important documents" based upon the judge's finding that the company's messenger "mishandled" the mail.

In, *NYNEX*, a company clerical employee signed for the citation, which was recorded in the company's log the same day. The next known action on the certified mail was when OSHA's compliance officer telephoned NYNEX's OSHA representative concerning the citation, who was unaware of the citation. As the Commission found in affirming the judge's denial of Rule 60(b)(1) relief, NYNEX failed to explain "what happened to the citation after it was received and logged in at the New York City office, or what procedures the employer had at that office to ensure a timely response to important documents." *NYNEX*, 18 BNA OSHC 1970. Again the Commission reiterated it expects employers to "maintain orderly procedures for handling important documents." *Id.* (*citing Louisiana-Pacific*, 13 BNA OSHC at 2020). Here, as in *NYNEX*, Rheem has not explained what happened to the citation and notice after it was received by its security guard. However, like in *NYNEX*, the company is "responsible for redirecting the citation." *NYNEX*, 18 BNA OSHC at 1947.

Rheem also argues the failure to grant it relief under Rule 60(b) would be prejudicial since the final order "could be used by OSHA in future investigations as a means of establishing that Rheem committed a 'Repeat' or 'Willful' violation" under the Act. (Mot. p. 10.) However, the equitable analysis announced in *Pioneer* does not take into account the danger of prejudice to the party seeking Rule 60(b) relief, but rather, takes into account "the danger of prejudice to the opposing party." *Pioneer*, 507 U.S. at 395. Although this analysis takes into account "all relevant circumstances," *id.*, and the factors listed by *Pioneer* are of course not exclusive, *id.* at 395–96, the court does not find prejudice to Rheem a "relevant circumstance" in this case since any such prejudice could have been avoided if Rheem had simply exercised reasonable diligence. Further, Rheem's position overlooks or ignores a critical element in this case, and that is the undisputed fact that Rheem had sole control over its convoluted mail-handling procedures at its facility both *before and after* its security guard signed for the citation and

[5] Although both parties cited to *CSX Transportation*, 19 BNA OSHC 1916 (No. 01-0608, 2002) (ALJ), in support of their positions, (Resp. pp. 4, 5, 6; Reply, p. 1), unreviewed decisions of an administrative law judge are not binding precedent. *Leone Constr. Co.*, 3 BNA OSHC 1979 (No. 4090, 1976).

notice. Such control carries with it a duty to exercise reasonable diligence in handling important documents.

Based upon the record in this matter, the court finds, as the Commission did in *Stroudsburg*, the failure of Rheem's employee to bring the citation and notice to the attention of the proper officer of the company does not constitute "excusable neglect" or "any other reason justifying relief." As in *Louisiana–Pacific* and in *Rebco Steel*, relief is not justified under Rule 60(b)(1) since Rheem failed to properly supervise the employee who mishandled the citation and notice. The Commission "has consistently denied relief to employers whose procedures for handling documents were to blame for untimely filings" of notice of contests. *NYNEX*, 18 BNA OSHC 1967 (No. 95-1671, 1999) (*citing E. K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991). The court concludes this is also such a case. Thus, the court finds the delayed filing of the notice of contest was within the reasonable control of Rheem and could have been avoided if Rheem had exercised reasonable diligence. Therefore, as in *E. K. Construction* and in *J.F. Shea*, the company has failed to demonstrate an "orderly procedure for handling important documents" and at best, has shown only carelessness or simple neglect, which is not an adequate excuse for relief under Rule 60(b)(1). Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT Rheem's motion for relief under Rule 60(b) is **DENIED**.[6]

SO ORDERED THIS 20th day of **November, 2015.**

/s/

John B.Gatto, Judge

[6] The court's jurisdiction is limited to entertaining the Rule 60(b) motion and "when [a notice of contest] is untimely and there are no grounds for relief under Rule 60(b)," an untimely notice of contest "deprives the Commission of jurisdiction." *GT Tile Loading*, 25 BNA OSHC 1470, 1472 n. 1 (No. 15-0190, 2015). With the denial of Rheem's Rule 60(b) motion, the court is deprived of jurisdiction and the citation and notice, deemed a final order of the Commission by operation of law, is left undisturbed. Therefore, the court concludes it has no authority to "affirm" the citation and notice after denying Rule 60(b) relief, as is the practice of some Commission judges. *See e.g., Polylite Roof Decks Inc.*, 2014 WL 7237789, at *6 (No. 13-1473, 2014); *Alcides Avelar*, 25 BNA OSHC 1013, 1019 (No. 13-1757, 2014); *G. Santos Masonry, Inc. d/b/a Roberto Santos*, 24 BNA OSHC 2246, 2252 (No. 13-1886, 2014); *Robinson Masonry*, 24 BNA OSHC 2206, 2210 (Docket Nos. 13-1956 & 13-1957, 2014).