THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

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. Burlington Capital PM Group, Inc., d/b/a Post Woods Apartment Homes, Respondent.	OSHRC Docket No.: **20-0528**

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission on a Request for Relief Under Rule 60(b) filed by Respondent Burlington Capital PM Group, Inc. d/b/a Post Woods Apartment Homes (Burlington) and docketed by the Commission on April 7, 2020, regarding a Citation and Notification of Penalty issued on October 21, 2019, to which the Secretary of Labor, United States Department of Labor (Secretary) filed a Motion to Dismiss and Opposition. By Order issued July 29, 2020, the Court denied Burlington's Motion for Rule 60(b) Relief and Granted the Secretary's Motion to Dismiss. The Court's July 29, 2020, Order is incorporated herein and sets forth the basis for this Decision and Order. (Attached)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The decision herein, incorporating the Court's July 29, 2020 Order, 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 incorporated herein, Burlington's request for relief pursuant to Rule 60(b)(1) is **HEREBY DENIED**. The Secretary's Motion to Dismiss is **HEREBY GRANTED.**

SO ORDERED.

/s/_____
Sharon D. Calhoun
Administrative Law Judge, OSHRC

Dated: August 13, 2020
Washington, DC

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Secretary of Labor, Complainant v. Burlington Capital PM Group, Inc., d/b/a Post Woods Apartment Homes, Respondent.	OSHRC Docket No.: **20-0528**

ORDER GRANTING THE SECRETARY'S MOTION TO DISMISS AND DENYING BURLINGTON'S MOTION FOR RULE 60(b) RELIEF

This matter is before the Occupational Safety and Health Review Commission on a Request for Relief Under Rule 60(b)[1] filed by Respondent Burlington Capital PM Group, Inc. d/b/a Post Woods Apartment Homes (Burlington) and docketed by the Commission on April 7, 2020, regarding a Citation and Notification of Penalty issued on October 21, 2019. Burlington asserts, as excusable neglect, its good faith as the basis it should be relieved from the final order. The Secretary of Labor, United States Department of Labor (Secretary) filed a Motion to Dismiss and an Opposition to Respondent's Motion to Submit Late Notice of Contest on the basis that both the Notice of Contest (NOC) and the Motion are untimely. Pursuant to the Court's Order, on June 26, Burlington filed a Supplemental Request for Rule 60(b) Relief and Response to Motion to Dismiss, further explaining its delay in filing and asserting a meritorious defense.

For the reasons set forth below, Burlington's request for relief pursuant to Rule 60(b) is **DENIED**.

[1] By Order issued June 26, 2020, the Court construed Burlington's Late Notice of Contest as a Request for Relief Under Rule 60(b).

Background

This matter arose out of an inspection of Burlington's jobsite located at 540 Post Woods Drive, Reynoldsburg, Ohio by the Occupational Safety and Health Administration (OSHA) on August 16, 2019. The inspection was initiated due to notification that an employee had fallen 12 feet 3 inches to the ground from a ladder. As a result of the safety inspection, on October 21, 2019, OSHA issued to Burlington a Citation and Notification of Penalty alleging a serious violation of the standard found at § 1910.23(b)(9) for failing to ensure the ladder was inspected prior to use. OSHA proposed a penalty of $11,934.00 for the alleged violation.

The Citation was mailed to Burlington by Certified Mail Return Receipt. The Return Receipt shows the Citation was delivered to Burlington and signed for as received on October 25, 2019. (Opposition, Exh. 1 (Wilson Declaration, Exh. B)).

The Citation provides Burlington had 15 working days from the date of receipt to contest. Based on the October 25, 2019, delivery date excluding weekends and Federal holidays, the 15-day contest period expired on November 18, 2019. OSHA did not receive a NOC within the contest period. Therefore, the Citation became a final order of the Commission under § 10(a) of the Act on November 19, 2019.

Burlington contends it is entitled to relief from the final order based on good faith as excusable neglect, asserting its NOC was erroneously addressed to one of its properties rather than to OSHA. Burlington admits its error but argues "the missed deadline was attributable to a single instance of unforeseen human error." Further, Burlington contends the Commission has not cited another instance where it missed a filing deadline (Supplemental Response, p. 5). In support of its position, Burlington relies on the analysis set forth by the Third Circuit in *George Harms Constr. Co. v. Chao*, 371 F.3d 156 (3d Cir. 2004) where the Third Circuit rejected the Commission's placing more weight on the control factor at the expense of the other equitable factors.

DISCUSSION

Legal Standards

Pursuant to the requirements of the Act, an employer is required to notify the Secretary of its intent to contest a citation within 15 working days of receipt. Failure to timely file a NOC results in the citation becoming a final order of the Commission by operation of law. Burlington's contest was filed with the Commission on April 6, 2020 and docketed by the

Executive Secretary of the Commission on April 7, 2020, approximately 4 ½ months after the final contest date.

An employer who has filed an untimely notice of contest 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).

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). 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); *See Craig Mechanical*, 16 BNA OSHC 1763, 1765-66 (No. 92-0372-S, 1994).

This matter can be appealed to either the Sixth Circuit, the Eighth Circuit or the D. C. Circuit. The Commission has held that "[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); *see also Interstate Brands Corp.*, 20 BNA OSHC 1102 at *5 n. 7 (No.00-1077, 2003) (since case could be appealed to the Third Circuit, judge properly applied that precedent even though it differed from Commission precedent).

Neither the Eighth Circuit nor the D.C. Circuit have addressed the Commission's analysis of Rule 60(b). The Sixth Circuit does not deviate from Commission precedent regarding Rule 60(b) and whether control of respondent is a key factor in determining the presence of excusable neglect.

> In order to be eligible for relief under 60(b)(1) the movant must demonstrate the following: (1) The existence of mistake, inadvertence, surprise, or excusable neglect. (2) That he has a meritorious defense. . .
>
> In applying 60(b), OSHRC is required to make a careful determination as to the presence of the two requirements reviewed in this decision.

Marshall v. Monroe & Sons, Inc. 615 F.2d 1156, 1160, 1162 (Sixth Cir. 1980) (citations omitted). Therefore, the Commission precedent controls regarding the three circuits to which Burlington could appeal. In this case, the Commission is not bound by the Third Circuit's decision in *George Harms Constr. Co., supra*.

Analysis

It is the Secretary's burden to establish service of the citation. Burlington does not dispute the Citation was served. And although it attempted to send a contest to OSHA, Burlington does not dispute it did not contest the Citation within the requisite time-period. Upon notification the contest had not been received, Burlington on April 6, 2020, filed its NOC, which was docketed by Commission on April 7, 2020, well after the final contest due date. Therefore,

by operation of law, the Citation must be deemed a final order of the Commission, unless Burlington can demonstrate it is entitled to relief.

To show it is entitled to relief, Burlington submitted the Affidavit of Mary Copeland, Administrative Assistant in Burlington's Supportive Services Department stating that she inadvertently shipped the [NOC contained in an envelope addressed to OSHA] to Post Woods Apartment Homes instead of to [OSHA]; and the Shipment Detail Report reflecting the NOC had been shipped by UPS to Post Woods Apartment Homes on October 29, 2019 (Supplement, Exhs. 1, A). Burlington requests that the inadvertent shipping error be excused based on its good faith.

Although there is no indication in the record that Burlington did not act in good faith, the Court is bound by Commission precedent regarding this matter. 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 and requires an employer to exercise due diligence before it will find 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); *Keefe Earth Boring Company, Inc.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991); *See Craig Mechanical*, 16 BNA OSHC 1763, 1765-66 (No. 92-0372-S, 1994).

The Court is persuaded that due to human error Burlington's contest was shipped to the wrong address on October 29, 2019. However, Mary Copeland's affidavit and the Shipment Detail show the contest was shipped to Burlington's Post Woods Apartment Homes property at 1700 Farnam Street, Omaha, NE 68102, by UPS ground. UPS confirmed a receiver address that was not OSHA's but would not reveal the receiver's address (Secretary's Motion pp. 3-4, Exh, 2). The pleadings before the Court are silent on what happened to the contest after it was shipped. Andria Bell's affidavit filed with the Motion to file Late Notice of Contest provides "We are unsure where the letter ended up and it has not been returned to us." (Bell Affidavit, March 9, 2020). However, Mary Copelands's affidavit and the Shipment detail filed afterwards confirm the contest letter was shipped UPS to a Burlington property. There is no indication that it was returned to Burlington's Supportive Services Department. The Court finds the delay was caused by the contest being shipped to the wrong address. The record does not demonstrate any procedures in place to prevent such an error, or to confirm that items were shipped to the correct address. The delay was within Burlington'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 4 ½ months late, and the delay was entirely to blame on Burlington's mail-handling procedure. 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 4 ½ month delay. Therefore, the Court finds the Secretary is not prejudiced by the late filing.

Length of Delay and Impact on Proceedings

The Secretary does not address the impact of the 4 ½ month delay on his case. The Court determines the delay does not have a detrimental impact on the Commission's proceedings in this matter and therefore would not adversely impact the proceedings.

Good Faith

The record does not demonstrate any bad faith on the part of Burlington. Therefore, the Court finds Burlington acted in good faith.

The Court has considered the factors required by *Pioneer.* Despite the lack of prejudice to the Secretary, a delay which would not adversely affect the Commission proceedings, and Burlington's good faith, those factors are outweighed Burlington's control regarding timely filing of the NOC. Burlington 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.* 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). Burlington alleges a lack of knowledge and unpreventable employee misconduct as defenses to the Citation. Therefore, the Court finds Burlington has alleged a meritorious defense.

Having considered all factors enunciated in *Pioneer,* relief from the Final Order in this matter is not warranted. Therefore, for the reasons set forth herein, Burlington's request for relief pursuant to Rule 60(b)(1) is **HEREBY DENIED.** Accordingly, the Secretary's Motion to Dismiss is **HEREBY GRANTED.**

The final order regarding the Citation remains undisturbed.

SO ORDERED.

Date: July 29, 2020

Judge Sharon D. Calhoun
Washington, DC