

**United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,

Complainant,

v.

RIEBER CONTRACTING, INC.

Respondent.

OSHRC DOCKET NO. 19-1670

For Complainant: Elaine M. Smith, Esq. and Rachael Parsons, Esq., U.S. Department of Labor, Office of the Solicitor, 2300 Main Street, #1020, Kansas City, MO

For Respondent: Jalon Rieber, Pro Se, Rieber Contracting, Inc., 14370 260th Street, Council Bluffs, Iowa

JUDGE: Judge Patrick B. Augustine, U.S. Administrative Law Judge

**DECISION AND ORDER GRANTING COMPLAINANT’S MOTION TO VACATE
RESPONDENTS UNTIMELY NOTICE OF CONTEST**

Jurisdiction

This proceeding is before the Occupational Safety and Health Review Commission (the “Commission”) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the “Act”) due to a filing of a late *Notice of Contest* (“NOC”) by Respondent with the Commission. *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). The parties also stipulated to the Court’s jurisdiction. Ex. J-1, ¶ 11.

Procedural Background

The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Respondent’s worksite located at 4827 Dodge Street, Omaha, NE on March 11, 2019. Tr. 31-34, 105. On August 2, 2019, OSHA issued one citation with one serious item (“Citation”) to Respondent. Tr. 60, 104; Exh. C-9. The Citation proposed Respondent pay a penalty in the amount of \$9,282.00. Exh. C-9. OSHA mailed the Citation to Respondent via United States Postal Service

(“USPS”) certified mail on August 2, 2019. Tr. 60. Angela Rieber signed for the certified mail based on the certified mail return receipt provided by USPS, but the date she signed for it did not appear on the receipt. Tr. 108-09; Exh. C-10. Complainant used the date it received the receipt from the USPS as the date to begin the 15-day calculation. Tr. 109-110; Exh. C-8. Therefore, the Citation was received by and signed for by Respondent.

The Citation informed Respondent of its right to contest the citations¹ and stated, in part:

Right to Contest: ...

Unless you inform the area director in writing that you intend to contest the citation(s) and/or proposed penalty(ies) within 15 working days after receipt, the citation(s) and the proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.

Tr. 106-07; Exh. C-9.

Because Respondent was deemed to have received the Citation on August 9, 2019, Respondent’s Notice of Contest (“NOC”) was due by August 30, 2019. Tr. 111. Respondent failed to file its NOC by that date. Respondent had no contact with the Area Office between August 9, 2019 and August 30, 2019 when the NOC period ended. Tr. 112.

On September 13, 2019, Jeff Funke, the former Area Director of the Omaha office, mailed a letter to Respondent stating it had failed to provide a certification of abatement of the Citation and the proposed penalty was due Tr. 113-14; Exh. C-11. This letter requested Respondent to respond within five business days with verification of abatement. Tr. 115; C-11. Respondent did not respond to the September 13, 2019 letter. Tr. 116. On September 20, 2019, Complainant issued a one item other-than-serious citation and notice of penalty to Respondent (“Abatement Citation”)

¹ The Secretary of Labor has prescribed requirements for an employer to timely make a notice of contest. The employer contest must be made in writing. 29 C.F.R. § 1903.17(a). *See Sec’y of Labor v. Barretto Granite Corp.*, 830 F.2d 396, 398 (1st Cir. 1987) (per curiam).

for failing to certify abatement of the Citation had been accomplished. Tr. 116-17; Exh. C-12. The Abatement Citation was mailed certified mail to Respondent's business office address and was received by Respondent on September 26, 2019 as evidenced by the receipt returned by the USPS. Tr. 117-18, 120; Exh. C-9, C-12. Respondent had no communication with the Area Office from September 26, 2019, when Respondent received the Abatement Citation, until October 9, 2019. Tr. 124.

On October 9, 2019 Respondent's owner, Jalon Rieber, spoke with the Area Director, Matthew Thurlby. Mr. Rieber stated someone had signed for the Citation and the Abatement Citation but he did not know about them because they were in his inbox. Tr. 124; Exh. C-8. Mr. Thurlby informed Mr. Rieber the Citation has become a final order and to contest he would have to file a late NOC. Respondent did not submit a late NOC at that time. Tr. 126. On October 18, 2019, Scott Jacobson, then Acting Area Director, called Respondent and Respondent stated it would submit a late NOC on October 21, 2019. *Id.* Not having received the late NOC on that date, the Area Office again contacted Mr. Rieber to determine if he was going to submit a late NOC. Respondent did reply with a letter giving a factual background of the workplace accident but did not state it was contesting the Citation. Tr. 129; Exh. C-14. On October 25, 2019 Respondent emailed two letters to the Area Office indicating it was contesting the Citation. Therefore, the late NOC was filed 56 days after the contest period for the Citation had expired. Thus, by operation of law, the Citation has become a final order of the Commission.

By filing a late NOC Respondent has, in effect, requested relief from the operation of § 10(c) of the Act. Fed. R. Civ. P. 60(b) states “[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding” Fed.R.Civ.P. 60(b)(“Rule 60(b)”). The rule lists the reasons that would provide a sufficient basis for granting

the relief requested. *Id.* Subsection 60(b)(1) states that “mistake, inadvertence, surprise, or excusable neglect” constitute sufficient bases upon which Rule 60(b)(1) relief can be granted. *Id.*

On December 16, 2019, Complainant filed his *Motion to Vacate Respondent’s Late Notice of Contest* (“Motion”) Complainant seeks affirmance of the Citation and the proposed penalty because Respondent failed to file a timely NOC and has demonstrated neither “excusable neglect” pursuant to Rule 60(b)(1) nor a meritorious defense. Complainant contends Respondent has failed to establish mistake, inadvertence, surprise, or excusable neglect.

Hearing Held

The Court held a hearing on July 23, 2020 to obtain testimony from witnesses. Complainant called Matthew Lombardi and Matthew Thurlby. Respondent called Angela Rieber and Jalon Rieber.

Joint Stipulations

The parties entered into the following thirty-three (33) Joint Stipulations:

1. Rieber Contracting, Inc. is incorporated under the state laws of Iowa as a corporation.
2. Rieber Contracting, Inc. engages in commercial construction.
3. Rieber Contracting is headquartered at 14370 260th Street, Council Bluffs, IA 51503.
4. Rieber Contracting receives mail, including invoices and contracts at 14370 260th Street, Council Bluffs, Iowa.
5. Rieber Contracting, Inc. uses goods, equipment, machinery, tools, supplies, and materials which have originated in whole or part from locations outside the State of Iowa.
6. Rieber Contracting, Inc. performs work in the states of Nebraska, Illinois, Indiana, Arizona and Colorado.

7. Rieber Contracting, Inc. is engaged in a business effecting interstate commerce within the meaning of Section 3(3) of the OSH Act, 29 U.S.C. 652(3).
8. Rieber Contracting, Inc. was engaged in construction work at address on August 22, 2019.
9. Rieber Contracting, Inc. employs approximately forty employees.
10. Rieber Contracting, Inc. is an employer within the meaning of Section 3(5) of the OSH Act, 29 U.S.C. 652(5).
11. The Review Commission has jurisdiction in this proceeding pursuant to section 10(c) of the OSH Act, 29 U.S.C. 651 et. seq.
12. On March 11, 2019, an authorized representative of the Secretary of Labor, OSHA Compliance Safety and Health Officer, Matthew Lombardi, inspected a worksite located at 4827 Dodge Street in Omaha, Nebraska.
13. Don Burgess was the project manager at the worksite subject to the inspection.
14. Don Burgess stopped by the worksite the morning of March 11, 2019 to deliver tapcons to Angel Francisco.
15. NOT STIPULATED TO.
16. On March 11, 2019, Don Burgess was employed by Rieber Contracting, Inc. as a project manager.
17. On March 11, 2019 Shelby Baumeister was employed by Rieber Contracting, Inc. as the Director of Operations.
18. On March 11, 2019 Angela Rieber was employed by Rieber Contracting, Inc. as the Office Manager.
19. Jalon Rieber is the owner/operator of Rieber Contracting, Inc. and is the Chief Executive Officer.

20. Don Burgess, Shelly Baumeister, and Angela Rieber are paid by Rieber Contracting, Inc. at a rate set by Jalon Rieber.
21. Jalon Rieber sets the work schedules and directs the work of Don Burgess, Shelby Baumeister and Angela Rieber.
22. Shelby Baumeister and Angela Rieber regularly work at the office located at 14370 260th Street, Council Bluffs, Iowa.
23. Rieber Contracting, Inc. contracted with Angel Francisco to install siding at the worksite.
24. Rieber Contracting, Inc. directed the work of Angel Francisco.
25. Rieber Contracting, Inc. had the authority to fire Angel Francisco.
26. On August 2, 2019, the Secretary issued a Citation and Notification of Penalty to Respondent as a result of Inspection Number 1384717. Citation 1, Item 1 alleges a Serious violation of 29 C.F.R. 1926.416(a)(1) and a proposed penalty of \$9, 282.00.
27. Citation 1 was mailed to Rieber Contracting at 14370 260th Street, Council Bluffs, IA 51503.
28. The address listed on the Iowa Secretary of State website for Rieber Contracting, Inc. is 14370 260th Street, Council Bluffs, IA 51503.
29. The green card for Citation 1 was signed for by Angela Rieber no later than August 30, 2019.
30. On September 20, 2019, the Secretary issued a Citation and Notification of Penalty to Respondent as a result of Inspection Number 1425538 for failure to submit an abatement certification. Citation 2, Item 1 alleges an other-than-serious violation of 29 C.F.R. 1903.19(c)(1) and proposed a penalty of \$744.00.

31. Citation 2 was mailed to Rieber Contracting at 14370 260th Street, Council Bluffs, IA 51503.

32. The green card for Citation 2 was signed for by Gabriel Rodriguez on September 29, 2019.

33. A notice of contest was submitted to the Omaha area office on October 23, 2019, by Shelby Baumeister.

34. Jalon Rieber attended a pre-hearing conference on January 2, 2020 as representative of Rieber Construction, Inc.

See Exh. J-1.

Controlling Case Law

Upon receiving a citation, an employer has 15 working days within which it must file a NOC. See § 10(a) of the Act, 29 U.S.C. § 659(a). If the employer does not file a NOC within the specified time period, “the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.” *Id.* An uncontested citation is generally unreviewable. See *Culver v. U.S. Dept. of Labor Occupational Safety & Health Administration*, 248 Fed. Appx. 403 (3rd Cir. 2007).

The Commission has recognized situations where the finality of § 10(a) of the Act, 29 U.S.C. § 659(a), does not preclude the Commission from hearing an employer’s challenge to citations even when a timely NOC has not been filed. One instance is where the employer requests relief under Rule 60(b)(1). The Commission has held an employer may move under Rule 60(b)(1) for permission to file a late NOC. *Branciforte Builders*, 9 BNA OSHC 2113 (No. 80-1920, 1981). The burden is on the employer to show sufficient basis for relief under the rule. *Id.* See also *Craig Mech. Inc.*, 16 BNA OSHC 1763, 1764 (No. 92-0372, 1994)(Respondent bears burden to establish

basis for relief), *aff'd per curiam* 553 F.3d 633 (5th Cir. 1995)(unpublished). Relief under Rule 60(b)(1) is the most appropriate basis for the relief requested by Respondent.

An employer who has filed an untimely NOC may be granted relief under Rule 60(b)(1) 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 because of “mistake, inadvertence, surprise or excusable neglect.” *Id* at 163 (Commission “has jurisdiction to entertain a late notice of contest under” the excusable neglect standard of Rule 60(b)(1));² *Branciforte Builders, Inc.*, 9 BNA OSHC at 2117.

In addition, the Commission requires a party seeking relief under Rule 60(b)(1) to show it had a meritorious defense that might have affected the outcome. *Northwest Conduit*, 18 BNA OSHC 1948, 1949, 1951 (No. 97-851, 1999). *See Evergreen Envtl Serv*, 26 BNA OSHC 1982, 1985 (No. 16-1295, 2017). The Commission has found this requirement “satisfied with minimal allegations that the employer could prove a defense if given the opportunity.” *Jackson Assocs. of Nassau*, 16 BNA OSHC 1261, 1267 (No. 91-0438, 1993). Before reaching the issue of whether Respondent has a meritorious defense to a citation, the record first must establish Respondent has a basis for relief from the Commission’s final order under Rule 60(b)(1). *Id*. If the record does not establish a basis for relief from the Commission’s final order for Respondent’s untimely filing under Rule 60(b)(1), the issue of a meritorious defense need not be addressed.

In determining whether Respondent’s late NOC was due to “excusable neglect,” the Commission follows the Supreme Court’s test in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 381 (1993). Under *Pioneer*, the Court must consider “the danger of

² *But see Chao v. Russell P. Le Frois Builder Inc.*, 291 F.3d 219 (2d Cir. 2002) (concluding Commission may not exercise jurisdiction based on Rule 60(b)(1)).

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.” *Pioneer*, 507 U.S. at 395. *See Evergreen Env'tl Serv*, 26 BNA OSHC at 1984.

The Supreme Court stated “inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute ‘excusable’ neglect.” *Pioneer*, 507 U.S. at 392.³ The Court found “excusable neglect” to be, in part, an “elastic concept” not restricted to “omissions caused by circumstances beyond the control of the movant.” *Id.* Regarding relief sought pursuant to Rule 60(b)(1), the Court stated that “‘excusable neglect’ is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” *Id.* at 394

In *Pioneer*, “excusable neglect” is defined as an equitable determination of all relevant circumstances surrounding the party’s omission, and the prejudice these circumstances presented to the opposing party. This definition has been applied to other federal procedural rules, including proceedings by the Commission. *See NW Conduit Corp.*, 18 BNA OSHC at 1950.

When evaluating claims of excusable neglect, many circuit courts focus on the third factor in the *Pioneer* equitable analysis, “the reason for the delay, including whether it was within the reasonable control of the movant.” *Id.* at 395.

The four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good

³ Commission decisions are in comport with the Supreme Court and state that ignorance of procedural rules does not constitute “excusable neglect” and that mere carelessness or negligence, even by a lay person, in failing to timely file a notice of contest does not justify relief under Rule 60(b)(1). *Acrom Constr. Serv. Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991). Mr. Rieber, Respondent’s owner, testified he had received OSHA citations in the past and knows what to do when the company gets an OSHA citation. Tr. 186.

faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry . . . [A]t the end of the day, the focus must be upon the nature of the neglect.

Hospital del Maestro v. NLRB, 263 F.3d 173, 175 (1st Cir. 2001) (per curiam) (quoting *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000)). See *Cohen v. Bd. of Trs. of Univ. of D. C.*, 819 F.3d 476, 479-80 (D.C. Cir. 2016) (same); *Dimmitt v. Ockenfels*, 407 F.3d 21, 24-25 (1st Cir. 2005) (same); *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366, 366 n.7 (2d Cir. 2003) (same); *Graphic Communications Int'l Union v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5-6 (1st Cir. 2001) (same); *David E. Harvey Builders, Inc. v. Sec'y of Labor*, 724 Fed. Appx. 7, 9 (D.C. Cir. 2018) (same).⁴

Other circuit courts emphasize that the *Pioneer* equitable analysis requires consideration of “all relevant circumstances” surrounding a party’s request for relief due to excusable neglect. Therefore, the “control” factor must not be weighted too heavily at the expense of the other relevant *Pioneer* factors. *Avon Contractors, Inc. v. Sec'y of Labor*, 372 F.3d 171, 174 (3d Cir. 2004). See *Coleman Hammons Constr. Co. v. OSHRC*, 2019 WL 5782425, at *3 (5th Cir. 2019) (same); *George Harms Constr.*, 371 F.3d at 164 (same).

The D.C. Circuit⁵, the Eighth Circuit⁶ and the Commission are in agreement as to the factors to be considered and the weight being given those factors. In *NW Conduit*, the Commission quoted *Pioneer*, noting that the “reason for the delay, including whether it was within the reasonable control of the movant,” is a “key factor” and, in appropriate circumstances, the

⁴ This matter could be appealed to either the D.C. Circuit or the Eighth Circuit. The Commission generally applies the law of the circuit where a case will likely be appealed. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

⁵ See *Cohen v. Bd. of Trs. of Univ. of D. C.*, 819 F.3d 476, 479-80 (D.C. Cir. 2016); *David E. Harvey Builders, Inc. v. Sec'y of Labor*, 724 Fed. Appx. 7, 9 (D.C. Cir. 2018).

⁶ *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000).

dispositive factor. *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148 (No. 9-0945, 2000); *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153 (No. 98-0367, 2000); *NYNEX*, 18 OSHC 1944, 1947 (No. 95-1671, 1999) (finding because employer failed to present evidence on the reason for delay, it did not establish excusable neglect). See *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000) (“excuse given for the late filing must have the greatest import”). See also *David E. Harvey Builders, Inc. v. Sec’y of Labor*, 724 Fed. Appx. 7, 9 (D.C. Cir. 2018) (same). Therefore, long-settled Circuit and Commission precedent focuses on the third factor in the *Pioneer* equitable analysis. *CalHar Constr., Inc.*, 18 BNA OSHC 2151, 2153-54 (No. 98-0367, 2000). In appropriate circumstances, the Commission finds this to be the dispositive factor.

It well settled the Commission requires an employer to exercise due diligence before it will find excusable neglect. *Keefe Earth Boring Company, Inc.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991); *Craig Mechanical*, 16 BNA OSHC at 1763. The Commission has consistently held “[e]mployers must maintain orderly procedures for handling important documents,” and when the lack of such procedures results in the untimely filing of a NOC, relief under Rule 60(b)(1) is not warranted. *Villa Marina Yacht Harbor, Inc.*, 19 BNS OSHC 2185, 2187 (No. 01-0830, 2003) (company messenger mishandled mail); *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1149 (No. 99-0945, 2000) (employer's president failed to carefully read and act upon information contained in citation); *Montgomery Security Doors & Ornamental Iron, Inc.*, 18 BNA OSHC 2145, 2148 (No. 97-1906, 2000) (record showed a breakdown of business procedures such that relief was not warranted even assuming employee sabotage); *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (notice of contest was overlooked due to personnel change in operations manager position).

Analysis and Findings of Fact

Respondent seeks relief from the operation of § 10(a) of the Act, which states:

If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty . . . the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

29 U.S.C. § 659(a).

Respondent has provided no excusable basis for its failure to file a timely NOC before August 30, 2019.

Based on a discussion of the evidence below the Court finds the late NOC was the result of Respondent's simple negligence and oversight which arose from the lack of a business process to promptly and accurately handle important incoming mail. The Citation was received at Respondent's place of business. Respondent's testimony he did not see the communication containing the Citation is insufficient to constitute "excusable neglect" under Rule 60(b)(1). *See JLD Custom Carpentry*, OSHRC Docket 12-0972 (Aug. 13, 2012, ALJ Coleman). As in *JLD Custom Carpentry*, this Court finds simple negligence and oversight are not grounds for relief under Rule 60(b)(1)⁷ and the filing of the NOC was within Respondent's control to accomplish.

Angela Rieber, who during the period at issue was Respondent's office manager, described the business process that was in place to process Respondent's mail. J-1 ¶ 18. On direct examination from Mr. Rieber, Angela Rieber testified as follows:

Q. When we're out of town on vacation or when we are gone together, what is the process for our mail?

A. We had it forwarded to Shelly Baumeister and Matt started in November of last --- 2019. And before that, it was just collected by anyone that was at the house.

⁷ As noted in *JLD Custom Carpentry*, a long line of Commission decisions rejects the notion that negligence or carelessness can justify relief under Rule 60(b)(1). *See Acrom Constr. Serv.*, 15 BNA OSHC 1123, 1126 (No.88-2291, 1991); *see also Roy Kay, Inc.*, 13 BNA OSHC 2021, 2122 (no. 88-1748, 1989); *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192 (No. 88-2521, 1991).

Q. When you receive Certified Mail at the house, what do you do with it?

A Any mail I get I just sign it and then just put it on the table.

On cross examination conducted by Solicitor Racheal Parsons, Angela Rieber further clarified the process in place for the processing of Respondent's mail.

Q. Okay. And your home was also your office at 14370 260th Street in Council Bluffs, Iowa?

A. Yes. We have a separate office on the property, but all the mail came to the same mail box, so our office – or post office lady would pull in to the – you know, onto the property, and she honked and then I'd come out and I'd just – she signed. She'd let anyone sign for it. So, I mean, I watched her let our – one of our guys sign it as I was walking out of the house to come get it from her. She just handed it to him, and he signed it, and then she handled it to me.

Q. So, your personal mail came there and the mail for the company?

A. Correct.

Q. Okay. And once that – once that mail came in, either to the mailbox or someone signed for it, what happened to the mail next?

A. I just bring it in to the – into the house and just usually set it on our kitchen table and deal with it later. It was usually just too busy dealing with the kids, so I just – We would always get a stack of mail, you know, between the company and personal, so I just sat it down and go about the rest of my day. And I did not open everything right away.

Q. So, when did open it, what did you do with it?

A. When I did open it, if I thought it was something important, I would either try to get it to him. But, you know, I can't always verify when it was given to him because things just – I mean, our desk – our kitchen table became a catchall for everything, you know. It was just – kids' stuff, office stuff, personal items. So, you know, just – and so if it got shuffled around, I forget things.

Q. When there is mail for Rieber Contracting, was there a place you put that or at a home office or you mentioned there was another building that Rieber Contracting worked out of. Did you take the mail there?

A. I didn't always take it out there. I usually just leave it on the kitchen table because I felt like if I left it there, it would bring more of my attention to it or his attention to it than taking it out to the office.

Q. (Re-direct by Mr., Rieber) Would it be true to say that you only opened mail that was relevant towards stuff that you did?

A. Yes.

A. So, what would you do with stuff that you did not recognize or wasn't pertaining to you?

A. Usually just set it on the table and wait for you to come around to having a, I guess, moment to discuss, like here's the mail. This is important for you, you know. I can't get it to you, but, I mean, you're we don't have a normal routine, no more schedule, because you travel a lot.

Q. If I was out of town for an extended period of time, what would you do with the mail? I just stack it up and wait for you to come home and deal with it. Like I said, I was not really part of the company, and it's all beyond my knowledge. And so, a lot if it, I just left alone because I thought that was better than me getting into it and not knowing what to do with any of it.

Q. (Re-cross by Ms. Parsons) So what is the process when Mr. Rieber is out of town for getting important mail or important documents to him?

A. I can't get it to him. If anything, emails, we have Shelly Baumeister is connected to his email, and she watches his email closely now. But as far as paper documents, I just – we have to wait until he gets back into town. I don't – I don't, you know, forward anything to him. I just – we just wait. We hold on to it. And whenever he comes back into town, he gets his stack of mail and now they go through it.

Tr. 143, 148-158.

It is clear Respondent failed to have in place proper business processes and practices to ensure timely action as may be required during business operations for the proper and timely processing of mail. Mr. Rieber, on cross examination, testified Respondent did not have a business procedure in place to make sure he was copied from mail received from OSHA. Tr. 191. To the extent Respondent's request for relief is premised on its failure to properly handle mail or documents, the Court would note the Commission expects employers to "maintain orderly procedures for handling important documents." *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020 (No. 86-1266, 1989); *see also NYNEX*, 18 BNA OSHC 1967 (No. 95-1671, 1999) ("The

Commission has consistently denied relief to employers whose procedures for handling documents were to blame for untimely filings' of [Notices of Contest]." (quoting *E.K. Constr. Co., Inc.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991))). While Respondent's actions were clearly the product of neglect, the Court does not find that such neglect was excusable on the above basis.

The Court further finds Respondent did not act in good faith. Not having a business process in place coupled with the fact it took Respondent nine days after talking to the Area Director on October 9, 2019 to file its late NOC demonstrates Respondent's lack of good faith in wanting to timely act to protect its interests.

While there is no evidence Respondent's late NOC filing was prejudicial to Complainant or negatively impacted the Commission proceedings, the undisputed facts disclose that the reason for the delayed filing was within Respondent's reasonable control. *See CalHar Constr.*, 18 BNA OSHC at 2153 n.5. Respondent's delay in filing the NOC was a result of Respondent's lack of diligence in failing to carefully read and act upon the information contained in the Citation regarding filing a timely contest. This factor is dispositive. There is no justification for granting Rule 60(b)(1) relief in this case.

ORDER

The Court finds Respondent failed to file a timely NOC and no relief under Rule 60(b)(1) is justified.

The Complainant's Motion is GRANTED. Respondent's late NOC is dismissed, with prejudice. as untimely filed, and the Citation, classification and penalty are AFFIRMED in all respects.

SO ORDERED.

/s/

Patrick B. Augustine
Judge - OSHRC

Date: August 24, 2020
Denver, CO