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. MISSOURI GAS ENERGY, Respondent.	OSHRC Docket No. 03-1778

REMAND ORDER

Before: RAILTON, Chairman; STEPHENS and ROGERS, Commissioners.

BY THE COMMISSION:

On April 11, 2003, as a result of an inspection by the Occupational Safety and Health Administration ("OSHA"), the Secretary of Labor issued two citations to Missouri Gas Energy ("Missouri"), with a total proposed penalty of $5,000. According to Missouri, the citations were received and signed for by a clerk of the company, but subsequently lost. After receiving a July 18, 2003, collection letter requesting payment of the $5,000 penalty, Missouri filed a notice of contest ("NOC") on August 5, 2003.

On October 20, 2003, the Secretary filed with Administrative Law Judge Stephen Simko a motion to vacate Missouri's NOC as untimely.[1] After a hearing on March 5, 2004, the judge granted the Secretary's motion on July 23, 2004. In his decision, the judge rejected several arguments raised by Missouri, including that (1) the Secretary's service of the citations was inadequate; (2) it was entitled to relief under Federal Rule of Civil Procedure 60(b) because OSHA's area director engaged in misconduct by deliberately

[1] Under section 10(a) of the Occupational Safety and Health Act, 29 U.S.C. § 659(a), an employer may contest a citation or proposed penalty by filing a notice of contest with the Secretary within fifteen working days after receiving notice of the citation.

mailing the citations to an incorrect address; and (3) it was entitled to Rule 60(b) relief because its failure to file a timely NOC was the result of excusable neglect. Missouri filed a petition for discretionary review with the Commission on August 4, 2004, raising essentially the same arguments. The case was directed for review on September 1, 2004.

On March 30, 2005, the Secretary filed with the Commission a motion to withdraw her motion to vacate Missouri's NOC, which had previously been granted, and remand this matter to Judge Simko. Her motion to the Commission states that the Secretary "no longer opposes further proceedings on respondent's notice of contest." The Secretary also states that she has consulted with Missouri's counsel, and Missouri does not oppose her withdrawal and motion for remand. As the Secretary now effectively asks for the very relief sought by Missouri on review before the Commission – reinstatement of Missouri's NOC and a remand for further proceedings – we no longer see any compelling basis to proceed with review of this case. Accordingly, we grant the Secretary's withdrawal and remand motion, set aside the judge's decision granting the withdrawn motion, reinstate Missouri's NOC, and remand to the judge for further proceedings.

SO ORDERED.

_/s/_____
W. Scott Railton
Chairman

_/s/_____
James M. Stephens
Commissioner

_/s/_____
Thomasina V. Rogers
Commissioner

Dated: April 6, 2005

Secretary of Labor, Complainant, v. Missouri Gas Energy, Respondent.	OSHRC Docket No. 03-1778

Appearances:

Rachel Parsons, Esq., and Susan J. Willer, Esq.
Office of the Solicitor, U. S. Department of Labor, Kansas City, Missouri,
For the Complainant

Mr. Truman K. Eldridge, Jr., Esq
Schlee, Huber, McMullen & Krause, Kansas City, Missouri
For the Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

The Secretary issued two citations to Missouri Gas Energy (MGE) on April 11, 2003[1]. An MGE employee signed the U. S. Postal Service certified mail receipt (referred to as "the green card") for the citations on April 14. MGE's notice of contest was due 15 days after the green card was signed, on May 5. MGE failed to file a notice of contest by that date. MGE eventually filed a notice of contest on August 5. The Secretary moved to vacate MGE's late notice of contest on October 20. MGE objected to the Secretary's motion, arguing that the Secretary failed to properly serve the citations.

A hearing was held regarding the Secretary's motion to vacate MGE' s late notice of contest on March 5, 2004, in Kansas City, Missouri. The parties have filed post-hearing briefs. For the reasons discussed below, the Secretary's motion to vacate MGE's late notice of contest is granted.

[1] Unless otherwise indicated, all dates referred to in this decision occurred in the year 2003.

BACKGROUND

MGE, a division of Southern Union Company, is a regulated public utility that distributes natural gas to public and private customers throughout western Missouri. Its corporate headquarters are located at 3420 Broadway in Kansas City, Missouri.

On April 2, 2003, Occupational Safety and Health Administration (OSHA) compliance officers Christine Stewart and Rick Roberts were on Walnut Street in Kansas City when they observed a work crew working in and around a trench. After videotaping the work site, the compliance officers approached the man who appeared to be supervising the work and presented their OSHA credentials. The man identified himself as Don Alexander, the foreman of the crew. Alexander told the compliance officers that he and the crew worked for MGE and that they were repairing a leak. After interviewing Alexander and taking measurements of the trench, Stewart informed Alexander that the Secretary would probably issue citations for violations of OSHA's excavation standards.

Alexander told Stewart that he and his crew worked out of MGE's construction maintenance department, located at 223 Gillis Street, Kansas Ctiy, Missouri. Alexander also told Stewart that his supervisor was Ron Hayes and he gave her Hayes's phone number. Stewart later spoke on the telephone with Hayes and told him that the Secretary would probably be issuing citations to MGE. She verified the Gillis Street address with him. Hayes informed Stewart that Gary Williams was MGE's general manager and that any OSHA correspondence should be directed to him.

On April 11, the Secretary issued two citations to MGE, alleging a serious violation of § 1926.652(a)(1) and other-than-serious violations of §§ 1926.651(c)(2) and (k)(2). The Secretary proposed a total penalty of $ 5,000.00.

The envelope containing the citations was addressed as follows (Exh. C-4):

MISSOURI GAS ENERGY
223 Gillis Street
Kansas City MO 64120

It was delivered to MGE's facility on Gillis Street on April 14, and the green card was signed by Bonnie Morris, an MGE clerk (Exh. C-4). Included with the citations was the OSHA 3000 booklet entitled "Employer Rights and Responsibilities Following an OSHA Inspection" (Exh. C-2). The booklet informs the employer, under "Employer Options," (Exh. C-2, p. 7):

> If you do not agree [to the citation and notification of penalty], you have 15 working days from the date you receive the citation to contest in writing any or all of the

following:

– Citation
– Proposed penalty, and/or
– Abatement date.

This information is also included, more emphatically, within the body of the Citation and Notification of Penalty form sent to MGE (Exh. C-1, p. 2, emphasis in original):

> **Unless you inform the Area Director in writing that you intend to contest the citation(s) within 15 working days after receipt, the citation(s) and 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.**

After Morris signed the green card acknowledging receipt of the citations, the citations were lost. There is no evidence that anyone at MGE, aside from Morris, ever knew of the receipt of the citations. Consequently, MGE did not respond to the citations received on April 14.

Not having received a timely notice of contest, the Secretary sent a collection letter to MGE's Gillis Street facility on July 18, requesting payment of the $ 5,000.00 penalty, plus $ 26.16 in interest and administrative costs. The letter was again addressed to 223 Gillis Street, but was directed this time to the attention of "Gary Williams, General Manager." The green card for the collection letter was signed on July 21 (Exh. C-5).

The collection letter was forwarded to Williams, who immediately notified Herman Loepp, MGE's attorney. Loepp told Williams to investigate what happened to the initial citations. On July 21, MGE attorney Truman Eldridge faxed Manuel Olmedo, OSHA area director for OSHA's Kansas City office, notifying him that MGE had no knowledge of the OSHA citations referred to in the collection letter. Eldridge's letter stated in pertinent part (Exh. C-6):

> As your files reflect, Missouri Gas Energy takes its responsibilities as a regulated public utility very seriously, and has always responded to inquiries and notices from your office in a timely fashion. Accordingly, we are surprised that your office did not contact the Company when it appeared not to respond to your initial communication. It should have been obvious to the staff person handling the matter that the Company had not received the communication.

An employee from Olmedo's office called Eldridge's office and notified Eldridge that an MGE employee had signed the green card for the citations on April 14. Eldridge faxed a request for a copy of the citation to be sent to him. The letterhead of Eldridge's faxed letter included the address of his law office (Exh. R-1). Olmedo faxed the requested documents to Eldridge on July 25 (Exh.

R-2).

On August 5, MGE, through Eldridge, filed its notice of contest with area director Olmedo (Exh. D to Secretary's Motion to Vacate Late Notice of Contest). MGE regards the faxed copy of the citations it received on July 25 to be the company's official notification of the citations. MGE's August 5 notice of contest is within 15 working days of July 25.

In a letter dated August 6, Olmedo informed Eldridge that, because MGE did not file its notice of contest by May 5, "your citation is deemed to be a final order by the Review Commission." Olmedo then directed Eldridge to file MGE's late notice of contest with the Commission in Washington, D. C. (Exh. C-7).[2] It is noted that by August 5, Olmedo had received several faxed and mailed communications from Eldridge, all of which were on his office letterhead containing his office address. Despite this, Olmedo mailed his August 6 letter, addressed by name to Eldridge, to MGE's Gillis Street address (Exh. C-7). The court recognizes August 5 as the date of MGE's notice of contest.

On October 20, the Secretary filed her motion to vacate MGE's late notice of contest. The Secretary argues that the Commission lacks jurisdiction over the matter, and that, even if it has jurisdiction, there is no basis for setting aside the final order under Rule 60(b). In its October 31 response, MGE states that its August 5 notice of contest was timely filed, due to the Secretary's failure to properly serve the original citations.

This case went to hearing on March 5, 2004, and is now ready for decision.

DISCUSSION

Jurisdiction

Section 10(a) of the Occupational Safety and Health Act of 1970 (Act) provides in pertinent part:

> 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, . . . within such time, the citation and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

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[2] Presumably this is why the Secretary states twice in her post-hearing brief (pp. 1 and 7) that MGE did not file its notice of contest until September 30. MGE's letter contesting the citations and penalty is dated August 5 and is included as Exhibit D to the Secretary's Motion to Vacate. According to the instructions included in the notification of citation and the OSHA 3000 booklet, MGE was correct in filing its notice of contest with the area director.

Under long-standing Commission precedent, relief for excusable neglect, inadvertence, or other specified circumstances resulting in filing a late notice of contest has been granted on a case-by-case basis under Federal Rule of Civil Procedure 60(b). The Secretary challenges this practice, arguing that the Commission lacks jurisdiction over late notices of contest because the citations have already become final orders. Under § 12(g) of the Act, the Federal Rules of Civil Procedure apply to Commission proceedings, but, the Secretary contends, in the case of a late notice of contest, there is no Commission proceeding to which Rule 60(b) can be applied. Under the Act, the failure to file a notice of contest within the 15-day period automatically results, by operation of law, in a final order of the Commission not subject to review by any court or agency.

To date, the only circuit court to defer to this interpretation of the Act is the Second Circuit, in *Chao v. Russell P. LeFrois Builder, Inc.*, 291 F. 3d 219, 229 (2nd Cir. 2002). In that case, the Court of Appeals for the Second Circuit held that the Commission lacks jurisdiction to grant an employer relief under Rule 60(b) for failing to file a timely notice of contest, noting that Rule 60(b) cannot be used to "bootstrap jurisdiction into existence."

The Third Circuit is the only other circuit to directly address this issue, and it came to the opposite conclusion. In *J. I. Hass Co. v. OSHRC*, 648 F. 2d 190 (3rd Cir. 1981), the Court of Appeals for the Third Circuit found that the Commission has jurisdiction to entertain a late notice of contest under Rule 60(b).

Although the Commission has referred to *LeFrois* in recent decisions, it has explicitly declined to address the merits of the decision. The Commission continues to adhere to the long-standing precedent that the Commission has jurisdiction to grant relief under Rule 60(b). *See HRH Construction Corp.*, 19 BNA OSHC 2042 (No. 99-1614, 2002), *and Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185 (No. 01-0830, 2003).

The present case arises in the Eighth Circuit, which has not ruled on the jurisdictional issue. Accordingly, despite the compelling argument made by the Secretary on this point, the court will follow Commission precedent and find that it has jurisdiction over this case, and may grant relief under Rule 60(b).

Service of Process

MGE's primary argument is that its notice of contest was not, in fact, late. MGE contends that the Secretary failed to properly serve MGE on April 14. MGE sets out its position in its post-hearing brief (MGE's brief, p. 6, footnote 4):

> MGE has never been served in this proceeding. However, its counsel of record herein requested and obtained a copy of the citations (Tr. at 43:7-45:2) and MGE has accepted this actual notice as the equivalent of service of process.

By MGE's calculation, its notice of contest was due on August 15, a deadline that it met by filing its notice on August 5.

MGE bases its argument on *Buckley and Co, Inc. v. Secretary of Labor*, 507 F. 2d 78, 81 (3rd Cir. 1975). In *Buckley*, the Secretary sent the citations to the maintenance shop where the investigated accident occurred, rather than to the company's corporate headquarters. The company failed to file a notice of contest within the 15-day period because, it said, it had not received notice of the citations until it received the collection letter. The Commission upheld the ALJ's granting of the Secretary's motion to dismiss the late notice of contest. The Court of Appeals for the Third Circuit reversed, holding that sending the citations to the superintendent of the maintenance shop was not sufficient notice to the company, even though the superintendent had represented the employer during the OSHA inspection and closing conference.

The Commission expressly rejected *Buckley* in *B. J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474 (No. 76-2165, 1979). In that case the Commission held that "the test to be applied in determining whether service is proper is whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest." The Commission ruled "that service upon an employee who will know to whom in the corporate hierarchy to forward the documents will satisfy this test. Accordingly, we accept as valid service upon an employee at a local worksite who will know to whom the documents should be forwarded."

In the present case, the Secretary mailed the citations to the Gillis Street address, where MGE maintains a permanent construction maintenance facility. It is the facility to which Alexander and his crew reported. Approximately 150 employees work there. MGE receives mail at the facility on a daily basis. The mail goes to the facility's operations center on the second floor, where it is sorted and distributed by any one of five employees. Barbara Morris does not routinely handle the incoming mail, but she helps out when needed and knows MGE's policy for handling the mail. She

was filling in for an employee who was on vacation when she signed the green card for the citations on April 14.

It is unusual to receive certified mail at the Gillis Street site. It is not unusual for the Gillis Street facility to receive mail for personnel at the corporate headquarters on Broadway. In the event that mail for someone on Broadway is received at the Gillis Street facility, the employees in the operations center know to forward it to the Broadway address.

In mailing the citations to the Gillis Street address, the Secretary effected service that was reasonably calculated to provide MGE with knowledge of the citation and provide it with an opportunity to contest the citation. The Gillis Street facility is an established worksite that receives and processes mail on a daily basis. The green card for the citations was not signed by a random employee untrained in the facility's mail handling procedures. Morris was assigned to handle the mail at this location while another employee was on vacation. That the citations were sent certified (an unusual event at the Gillis Street facility) and bore the return address of the Secretary's OSHA office (following a recent OSHA inspection) were sufficient grounds to alert Morris or any other employee who routinely handled the mail that the documents should be forwarded to someone in management.

It is determined that the Secretary properly served the citations on MGE.

Rule 60(b)

Federal Rule of Civil Procedure 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . .(3) fraud . . misrepresentation, or other misconduct of an adverse party; . . .or (6) any other reason justifying relief from the operation of the judgment.

It is the employer's burden to show that it is entitled to relief under Rule 60(b). *Craig Mechanical Inc.,* 16 BNA OSHC 1763 (No. 92-372, 1994, *aff'd without opinion,* 55 F.3d 633 (5th Cir. 19956). MGE's first claim under Rule 60(b) is that the Secretary engaged in misconduct in deliberately mailing the citations to the Gillis Street address, with the intent of depriving MGE of due process. This argument essentially reworks MGE's argument regarding service of process that was addressed in the previous section. As noted there, under *B. J. Hughes,* sending the citations by certified mail to a company's local worksite is acceptable and does not deny the employer notice and opportunity to be heard.

MGE also claims, presumably under Rule 60(b)'s "excusable neglect"rationale, that the Secretary has failed to show that it "was negligent in setting up or maintaining mail-handling procedures at its headquarters, where it expected to receive all service of process, because the citations were sent elsewhere" (MGE's brief, p. 12). As noted, it is not the Secretary's burden to establish MGE"s negligence; it is MGE's burden to establish that it is entitled to relief due to "mistake, inadvertence, surprise, or excusable neglect." The key factor in evaluating whether an employer's delay in filing its notice of contest was due to excusable neglect is "the reason for the delay, including whether it was within the reasonable control of the movant." *Pioneer Inv. Co. v. Brunswick Assocs. Ltd. Partnership,* 507 U.S. 380 (1993).[3]

At the hearing, little evidence was adduced to shed light on what became of the original citations sent to MGE. Williams testified that Morris told him that she remembered signing for the citations, but did not remember what she did with the letter. Morris did not testify at the hearing. Williams stated that he simply does not know what happened to the citations after Morris signed for them. When asked whether Morris routinely signs for certified mail, Williams replied, "Sometimes she does and sometimes she doesn't" (Tr. 144). When the mail handlers did receive certified mail, Williams stated, "Usually if they are unsure then they usually give it to me" (Tr. 145). Williams conceded that MGE does not have a written policy for handling mail. His testimony establishes that MGE's facility on Gillis Street processed mail in a haphazard manner, with no checks in place to ensure that important mail reached the appropriate person.

> The Commission expects employers to "maintain orderly procedures for handling important documents." *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 1987-90 CCH OSHD ¶ 28,409 (No. 86-1266, 1989). "The Commission has consistently denied relief to employers whose procedures for handling documents were to blame for untimely filings" of NOC's. *E. K. Construction Co.*, 15 BNA OSHC 1165, 1166, 1991-93 CCH OSHD ¶29,412, p. 39,637 (No. 90-2460, 1991).

NYNEX, 18 BNA OSHC 1967, 1970 (No. 95-1671, 1999).

MGE has failed to establish that its failure to file a timely notice of contest was the result of excusable neglect or any other rationale under Rule 60(b). Accordingly, the Secretary's motion to

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[3] While the present decision was under consideration, the Court of Appeals for the Third Circuit issued two opinions, *George Harms Construction Co. v. Chao,* No. 03-2215 (3d Cir. June 9, 2004), and *Avon Contractors, Inc. v. Secretary of Labor,* No. 03-1615 (3d Cir. June 9, 2004), that interpret the Supreme Court's *Pioneer* decision to greatly broaden the construction of the excusable neglect standard. In both cases the court vacated the ALJs' dismissals of the employers' late notices of contest. The court in *George Harms* (p. 8) notes that, due to *Pioneer*, "some courts have held it to be an abuse of discretion to not grant relief under Fed. R.Civ.P. 60(b)(1) in certain missed deadline situations."

vacate MGE's late notice of contest is granted.

ORDER

Based upon the foregoing decision, it is hereby ordered that the Secretary's motion to vacate MGE's late notice of contest is granted. MGE's notice of contest is vacated.

/s/ Stephen J. Simko, Jr.
STEPHEN J. SIMKO, JR.
Judge

Date: July 23, 2004