SECRETARY OF LABOR, Complainant, v. MONTGOMERY SECURITY DOORS & ORNAMENTAL IRON, INC., Respondent.	OSHRC Docket No. 97-1906

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

The issue in this case is whether relief from a final order should be granted to Montgomery Security Doors & Ornamental Iron, Inc. ("Security Doors") under Federal Rule of Civil Procedure Rule 60(b)(1).[1] That order resulted from Security Doors' failure to file a notice of contest ("NOC") within fifteen working days after it received a citation issued by the Secretary of Labor's Occupational Safety and Health Administration ("OSHA"). The

[1]That rule provides:

> 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.

Security Doors is appearing without an attorney, and it has not specifically requested Rule 60(b) relief. Nonetheless, because it requests relief from a final Commission order based on mistake, inadvertence, or excusable neglect, we construe its request for relief as being under Rule 60(b)(1), as did the judge.

citation and proposed penalty are deemed a final order of the Commission if the employer fails to notify the Secretary within that period that it intends to contest them. Section 10(a) of the Occupational Safety and Health Act ("the Act"), 29 U.S.C. § 659(a).[2] For the reasons that follow, we affirm the judge and conclude that relief is not warranted.

I. BACKGROUND

Security Doors' Vice President, Robert Darran Wood ("Wood Jr."), received the citation and proposed penalties on September 26, 1997, at Security Doors' workplace in Montgomery, Alabama. At the same time, he received the OSHA 3000 Publication ("Employer Rights and Responsibilities Following an OSHA Inspection") which, like the citation, includes full information about the NOC deadline and its importance. The citation alleged five serious violations of standards under the Occupational Safety and Health Act ("the Act"), 29 U.S.C. §§ 651-678, and it proposed penalties totaling $5150.

After discussions with OSHA's Assistant Area Director, Security Doors received OSHA's letter dated October 14, 1997, which enclosed a proposed tentative settlement

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[2]Section 10(a) states:

> If, after an inspection or investigation, the Secretary issues a citation under section 9(a) of this Act, he shall, within a reasonable time after the termination of such inspection or investigation, *notify the employer by certified mail* of the penalty, if any, proposed to be assessed under section 17 of this Act and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. *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, and no notice is filed by any employee or representative of employees under subsection (c) of this section within such time, *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*.

(Emphasis added.)

agreement.[3] OSHA's letter stated: "**The agreement must be signed on or before 10/20/97,** which is the last day of the 15 working day contest period, provided for by the Occupational Safety and Health Act." The letter also stated that should Security Doors "decide not to sign the proposed settlement agreement, the citations, penalties and abatement dates as previously issued will become a final and unappealable order unless you file, before the date of the final order, a written notice of your intent to contest . . . ." Nevertheless, Security Doors did not file (mail) its NOC until October 29 (OSHA received it on Friday, October 31).

At the hearing before the judge on this issue, Wood Jr. testified that he signed the proposed agreement, but that it disappeared from his desk before he had an opportunity to ask the company's clerical assistant to mail it. Thus, it was never returned to OSHA. He testified that he suspected that a disgruntled employee (whom he did not name) removed the agreement. Wood Jr. suspected that the same employee, who left the company soon afterward, made the anonymous complaint which led to OSHA's inspection, and that he sabotaged the office in other ways before resigning. Wood Jr. testified, however, that "we have no proof as to who took" the proposed agreement and that he "could never prove" that the former employee was responsible for any of the suspected sabotage.

Wood Jr. further testified that when he realized that the informal agreement was missing, "either the day after or the second day after it was to be in" to OSHA, he called Assistant Area Director Gail Davis. When they spoke (he recollected that "it was right on the weekend"), Ms. Davis told him that filing a late NOC was his only alternative to paying the proposed penalties. He testified that he drafted the NOC "the first thing Monday morning" (October 27), but that it took a day or two to be reviewed, revised, and completed, because of his limited writing skills. It was postmarked October 29, nine days after the October 20 deadline. Wood Jr. testified that other "than the paperwork going missing, the only other excuse for any delay would be that we still had to run our business and keep the

[3]There is no copy of that proposed settlement agreement in the record. The Secretary's counsel detached it from the letter, with Security Doors' consent, before submitting the letter in evidence.

doors open."[4] Security Doors' office is small, and its managers primarily worked away from their desks, doing sales and/or installations. The Woods also expressed concern that the $5150 in penalties would bankrupt their business if not reduced.

Commission Administrative Law Judge Ken Welsch denied relief to Security Doors from the final order. The judge stated that "Security Doors does not allege and the record does not show that the Secretary did not follow proper procedures or deceived Security Doors in delaying the filing of the notice of contest." The judge found:

> The record in this case does not show that any of the factors mentioned in Rule 60(b) are present. Security Doors was aware of the 15-working day requirement to contest. It knew that the proposed settlement agreement needed to be signed and returned to OSHA prior to October 20, 1997. Security Doors also knew that there was a short period [of] time (5 days) to accept the settlement agreement or file its notice of contest (Tr. 28).
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> . . . Security Doors' procedures were not adequate to ensure the informal settlement agreement was timely signed and returned to OSHA. The record shows a breakdown of business procedures. The failure to return the informal settlement agreement does not excuse Security Doors from timely filing its notice of contest. While I am not unsympathetic to Security Doors' financial situation and its intention to sign the informal settlement agreement, the circumstances are insufficient to establish that it is entitled to relief under Rule 60(b).

II. DISCUSSION

Under the Commission's long-standing precedent, relief from a final order based on a late-filed NOC may be granted under Fed. R. Civ. P. 60(b), in appropriate circumstances. *See, e.g.*, *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1999 CCH OSHD ¶ 31,949 (No.

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[4]When Judge Welsch mentioned that Security Doors had been informed that the citation had to be contested within 15 working days, Wood Sr. stated: "We did that by phone." When the judge further noted that the NOC must be in writing, Wood Sr. stated that Ms. Davis "didn't tell us that." As mentioned, however, OSHA's citation, and its letter accompanying the settlement agreement, clearly stated the requirement for a *written* NOC. *See* 29 C.F.R. § 1903.17(a) (NOC must be in writing).

97-851, 1999).[5] The relevant portion of Rule 60(b) in this case is subsection (1), which, as

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[5]The Secretary argues that Fed. R. Civ. P. 60(b) relief is not available for untimely NOC's, because section 10(a) is "in the nature of a statute of limitations," citing *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990), and the language of section 10(a) and 12(g) of the Act. Chairman Rogers believes the Secretary raises a substantial argument, for the reasons the Chairman stated in *Northwest Conduit Corp.*, 18 BNA OSHC at 1950 n. 7, 1999 CCH OSHD at p. 47,457 n. 7. Nevertheless, she believes that as a practical matter it is not necessary to address the Secretary's argument here, because relief is not warranted for Security Doors even under Rule 60(b). That rule is a broader relief provision than equitable tolling or estoppel, which are the only grounds for relief the Secretary perceives as applicable to late notices of contest. *See Irwin*, 498 U.S. at 96 (relief not warranted under equitable tolling or estoppel for what is "at best a garden variety claim of excusable neglect."). As noted, Rule 60(b) permits relief for "excusable neglect."

Commissioner Weisberg notes that in 1997 and 1998 he directed review in six different cases involving requests for relief under Rule 60(b) from a final order based on a failure to file a timely notice of contest: *Northwest Conduit Corp.*; *Adanlock Office Environments*, 1999 CCH OSHD ¶ 31, 936 (No. 98-1134, 1999); *NYNEX*, 18 BNA OSHC 1867 (No. 95-1671, 1999); *Russell B. LeFrois Builder, Inc.*, 18 BNA OSHC 1978, 1999 CCH OSHD ¶ 31,950 (No. 98-1099, 1999), *appeal filed*, No. 00-4057 (2d Cir., March 13, 2000); *CalHar Construction, Inc.*, No. 98-367 (April 27, 2000); and *Montgomery Security Doors & Ornamental Iron, Inc.*, No. 97-1906 (April 27, 2000). In March 1999, the Commission voted to hold oral argument in two of those cases, *Northwest Conduit* and *NYNEX*, to resolve specific questions such as: (1) whether based on *Irwin* the Commission should re-examine its position concerning Rule 60(b) relief; (2) whether, as the Secretary argues, under the OSH Act Section 10(a) final orders are not subject to Rule 60(b) relief; and (3) whether the Supreme Court's interpretation of "excusable neglect" in *Pioneer Investment Serv. v. Brunswick Assoc. Lim. Part.*, 507 U.S. 380 (1993), a 1993 decision which involved a Bankruptcy Act rule, significantly lowered the bar for relief under Rule 60(b). Those two cases were selected for oral argument, an interactive means for exploring and focusing on significant issues, because the parties in those cases were not small companies and were represented by experienced counsel. Commissioner Weisberg notes that during his 8-month absence from the Commission, his colleagues chose not to hold oral argument and issued decisions in four of those cases without resolving some of these issues. Commissioner Weisberg notes with disappointment that with the Commission's decision in this case and its decision today in *CalHar Construction*, neither of which were conducive to oral argument or necessitated addressing these unresolved issues, the Commission will have disposed of all six cases without resolving several important and recurring issues. Moreover, it appears that the statutory issue of whether Rule 60(b) does not apply to Section 10(a) final

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noted, permits discretionary relief from final orders that have been entered due to the party's "mistake, inadvertence, surprise, or excusable neglect."

As recently stated in *Northwest*,[6] the Commission applies the meaning of "excusable neglect" enunciated by the Supreme Court in *Pioneer Investment Serv. v. Brunswick Assoc. Lim. Part.*, 507 U.S. 380 (1993), to Rule 60(b)(1).[7] Here, we find that Security Doors' delay

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[5](...continued)
orders will be resolved by the circuit court in *Russell B. LeFrois Builder* (petition for review was filed by the Secretary in the Second Circuit on March 13, 2000), without any timely input from the Commission. *See Northwest Conduit Corp.*, 18 BNA OSHC 2072, 2076 n.4, 1999 CCH OSHD ¶ 32,027, p. 47,856 n.3 (No. 97-851, February 16, 2000) (Weisberg, Commissioner, dissenting).

[6]Commissioner Weisberg was not a member of the Commission at the time *Northwest Conduit* was decided.

[7]Commissioner Weisberg agrees that under *Pioneer* a determination of whether a party's neglect of a deadline is excusable under Rule 60(b)(1) is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." 507 U.S. at 395. However, he believes that many of the circumstances noted by the Court in *Pioneer* are inapplicable or have little relevance to Commission proceedings under the Occupational Safety and Health Act. For example, in cases involving requests for relief under Rule 60(b) from a final order based on a failure to file a timely notice of contest, it would be extremely rare to find that the Secretary suffered prejudice (was deprived of a fair opportunity to present her case) as a result of a late filing. Similarly, it is unlikely that a late filing in an individual case would have an adverse impact on or disrupt Commission judicial proceedings. Also, it would be hard to imagine a late filing case where an employer willfully acts in bad faith, such as where a company delays filing a notice of contest in order to somehow gain an advantage. Thus, in almost all 60(b) late filing cases before the Commission, it is a given that there is a lack of prejudice to the Secretary or to the interests of efficient judicial administration, combined with a lack of bad faith by the employer. These 60(b) cases involve neglect, and a determination as to whether that neglect is excusable must focus principally on the reason for the delay, including whether it was within the control of the employer.

Commissioner Weisberg does not fault his dissenting colleague, Commissioner Visscher, for expressing a policy preference that cases be decided on their merits. However, Commissioner Weisberg is concerned about the factors that his colleague relies on to support granting 60(b) relief in this case. In addition, he believes that according relief here based on
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in filing its NOC, which OSHA received eleven days after the final order date, was within Security Doors' reasonable control. Its reasons for the delay are unavailing -- even assuming that OSHA's tentative settlement agreement was removed from Wood Jr.'s desk by an unauthorized person, as he suspects. First, the citation itself clearly notified Security Doors that it must file an NOC within fifteen working days of its receipt, as did the OSHA 3000 publication that accompanied the citation. Moreover, Security Doors had the benefit of a subsequent reminder from OSHA in the cover letter to the settlement agreement that specifically reiterated in bold print that action must be taken before October 20, 1997, the

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[7](...continued)
an application of those factors is inconsistent with Commissioner Visscher's position in *NYNEX* (Visscher, concurring), where the Commission declined to grant relief under 60(b). The general policy "in favor of allowing employers an opportunity for a full hearing on the merits" seemingly applies equally to both cases. In *NYNEX*, at the closing conference following OSHA's inspection of the NYNEX local office in Braintree, MA, the company representative specifically requested that OSHA send the citation to the attention of a particular named individual at the Braintree office. OSHA mailed the citation to NYNEX at its Braintree office, *without addressing it to the requested individual.* As a result, the citation was forwarded to the branch office in New York City, rather than to NYNEX's corporate headquarters, apparently at the direction of a NYNEX employee in Braintree. The notice of contest was filed 20 days late.

In *NYNEX* there was no suggestion that the company acted in bad faith or that it attempted to avoid its obligations to respond to the citation. In fact, the company took action pre-citation to assure that the citation was timely and properly handled by asking OSHA to mail the citation to the attention of a particular individual, something which OSHA failed to do. There was also no evidence in *NYNEX* that the Secretary was prejudiced by the late filing or that it impeded efficient judicial administration, a factor that Commissioner Visscher here suggests is "the principal issue." In many ways *NYNEX* is a stronger case for relief than *Security Doors.* Arguably, it is easier to misplace or misdirect a letter or citation at a large company that receives hundreds or perhaps thousands of letters a day than at a small company. Yet the Commission denied NYNEX its "day in court" simply because the company had failed to provide evidence as to its procedures for handling important documents in its New York City branch office, the location to which the citation was incorrectly forwarded *solely* as a result of OSHA's failure to address the citation *in the manner specifically requested by the company. Compare Russell B. LeFrois* (Commission granted 60(b) relief notwithstanding flawed mail procedure, finding highly unusual, inadvertent error by company employee who picked up mail to be excusable neglect).

end of the 15-working-day contest period. *Compare Pioneer*, 507 U.S. at 398 (relief granted where deadline notice suffered from "dramatic ambiguity"). Security Doors gives no reason why any of those documents were not sufficient to remind it of the deadline in time to file a timely NOC -- regardless of what happened to the settlement agreement. Also, Wood Jr. knew that he had yet to take the final step in filing the "signed" settlement agreement -- he had to mail it, or give it to the company's secretary and instruct her to do so.

The Commission has denied Rule 60(b) relief where the employer's procedures for handling documents were to blame for the untimely filing of its NOC -- even where, as here, the employer was a small entity and appeared *pro se*. *E.g.*, *E. K. Constr. Co.*, 15 BNA OSHC 1165, 1166, 1991-93 CCH OSHD ¶ 29,412, p. 39,637 (No. 90-2460, 1991) (only reason offered by *pro se* employer for lateness of NOC was "prolonged illness" of employee E. K. assigned to schedule informal conference with OSHA); *Roy Kay, Inc.*, 13 BNA OSHC 2021, 1989 CCH OSHD ¶ 28,406 (No. 88-1748, 1989) (*pro se* employer failed to complete investigation and file NOC on time due in part to "vacation season" difficulties). Although deficient office procedures are not *per se* inexcusable under *Pioneer*, we find that the circumstances here weigh against according relief to Security Doors.[8] In this regard, we also

[8]Because this case arises within the jurisdiction of the Eleventh Circuit U. S. Court of Appeals, that circuit's precedent regarding the grounds for Rule 60(b) relief is relevant. In *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996), the Eleventh Circuit found that counsel's failure to file a timely demand for trial *de novo* of an age discrimination claim, following an arbitrator's adverse decision, was "excusable neglect" warranting Rule 60(b) relief where it was due to "a failure in communication between the associate attorney and the lead counsel." *Id.* at 850. Due to the particular miscommunication, both attorneys had a basis for assuming that the other had met the deadline. *Id.* The court termed the mixup "negligence" (*id.*), but it found that the district court had abused its discretion in denying Rule 60(b)(1) relief. The mistake was "an innocent oversight by counsel," the delay was only six days, and there was no prejudice to the other party or to efficient judicial administration. *Id.*

Unlike *Cheney*, this case does not involve a good faith assumption that a legal deadline had been met. Wood Jr. knew that he had to take another step to comply with the deadline. This case also involves more than a simple miscommunication. As mentioned, it involves a

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note that all Security Doors ever sought was a chance to finalize the settlement agreement. Nonetheless, it appears to have completely ignored OSHA's efforts to settle the case "along the lines previously discussed," which continued into the briefing period while the case was on review before the Commission.[9]

III. ORDER

Accordingly, we affirm the judge's finding that Security Doors is not entitled to relief from the final order caused by the lack of a timely NOC in this case.

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[8](...continued)
failure to heed the explicit notice of the NOC deadline contained in both the citation and in the letter accompanying the settlement agreement. In these circumstances, the absence of prejudice or bad faith alone do not compel us to grant Rule 60(b) relief. *See Advanced Estimating System, Inc. v. Riney*, 77 F.3d 1322, 1325 (11th Cir. 1996) ("nothing about *Pioneer* changed the excusable neglect decision into a mechanical one devoid of any room for the exercise of discretionary judgment.")

[9]When Commissioner [then Chairman] Weisberg directed this case for review on March 23, 1998, he stated in a footnote that according to the judge's decision the employer's vice president had signed an informal settlement agreement but had failed to submit either the signed agreement or a notice of contest to OSHA's area office within the required 15-day period. Accordingly, he noted that he "anticipates that this case may be resolved before the Respondent's [case] can be considered by a quorum of the Commission." The record indicates substantial efforts by the Secretary, while this case was pending before the Commission, to pursue settlement and a lack of response by Security Doors to the Secretary's settlement overtures apparently contained in letters to the company dated April 6, April 22, and April 24, 1998. In response to his dissenting colleague, Commissioner Visscher, who argues that it is unfair to penalize this employer because it declined to settle the citations while the case was pending before the Commission, Commissioner Weisberg notes that the employer's vice president testified that he signed OSHA's proposed settlement agreement to pay "a reduced figure" but that the agreement was removed from his desk before he could send it. Yet, given a second chance to submit a signed settlement agreement to OSHA and, in effect, an opportunity "to turn back the clock," it is not simply that the employer chose not to enter into a settlement but rather, and of more significance, that the employer chose not to even respond to OSHA's settlement efforts. Commissioner Weisberg believes that it is proper to take into account all relevant circumstances when exercising discretion and making, what is at bottom, an equitable determination under Rule 60(b).

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Thomasina V. Rogers
Chairman

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Stuart E. Weisberg
Commissioner

Dated:

* * DISSENTING OPINION ATTACHED * *

VISSCHER, Commissioner, dissenting:

As I have emphasized in previous "late notice of contest" cases, the Commission's long-standing precedent is that Federal Rule of Civil Procedure 60(b) applies to section 10(a) final orders. I therefore agree with the majority's decision to apply rule 60(b)(1) to Security Doors' motion for relief. For the reasons stated below, however, I disagree with the majority's decision to deny Security Doors relief.

Security Doors is a family-owned small business that manufactures ornamental ironwork at a facility in Montgomery, Alabama. In addition to three members of the Wood family, Security Doors employed three people at the time of this complaint inspection, which was conducted on July 23-24, 1997. Thereafter OSHA issued citations alleging various violations and proposing a total of $5,150 in penalties. These citations were received by Robert Darran Wood, Security Doors' vice-president, who signed the return receipt on September 26.

After several discussions with Gail Davis at OSHA's Area Director's Office, Mr. Wood agreed to pay "a reduced figure" and was then sent a proposed informal settlement agreement by cover letter dated October 14. Mr. Wood testified that he signed the agreement "so that we could go ahead and finish with everything and be done with it as proposed by OSHA" but that the agreement was removed from his desk before he could send it. He testified that he suspected a former employee, who he also suspected of filing the complaint that resulted in this inspection. Once he realized that he was not going to find the agreement, Mr. Wood called Ms. Davis, though this was "the day after or the second day after" the final order date of October 20. Mr. Wood then prepared and filed a notice of contest dated October 29.

The Commission traditionally gave a very restricted reading to the term "excusable neglect" in rule 60(b)(1). As a result, employers filing late notices of contest were rarely granted rule 60(b) relief. *See, e.g.*,*Craig Mechanical Inc.*, 16 BNA OSHC 1763, 1993-95 CCH OSHD 30,442 (No. 92-372, 1994), *aff'd without opinion*, 55 F.3d 633 (5th Cir. 1995) and cases cited therein. This reading was significantly relaxed, however, by our recent decisions granting such relief in *Russell B. Le Frois Builder, Inc*., 18 BNA OSHC 1978,

1999 CCH OSHD ¶ 31,950 (No. 98-1099, 1999) and *Northwest Conduit*, 18 BNA OSHC 1948, 1999 CCH OSHD ¶ 31,949 (No. 97-851, 1999). In both cases, we declined to apply the Commission's traditional analysis in light of the more flexible interpretation of "excusable neglect" the Supreme Court provided in *Pioneer Investment Serv. v. Brunswick Assoc. Lim. Part.*, 507 U.S. 380 (1993) ("*Pioneer*"). The *Pioneer* Court offered the following guidelines for determining when a party's neglect can be excused:

> With regard to [whether] a party's neglect of a deadline is excusable, . . . we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395.[1]

The Eleventh Circuit Court of Appeals, to which this case is appealable, applied *Pioneer's* interpretation of excusable neglect to a request for relief under rule 60(b)(1) in *Cheney v. Anchor Glass Container Corp*., 71 F.3d 848 (11th Cir. 1996) ("*Cheney*"). That case involved a failure to file which was a result of miscommunication among two of the plaintiff's attorneys. Quoting *Pioneer's* statement that "excusable neglect is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence," *Cheney* at 850, the Eleventh Circuit reversed a district court decision denying relief. Although the majority attempts to narrow *Cheney's* holding, the words of the court establish relatively broad discretion to grant relief for excusable neglect for late filing:

> In *Pioneer*, the Supreme Court accorded primary importance to the absence of prejudice to the nonmoving party and to the interest of efficient judicial administration in determining whether the district court had abused its discretion. (cites omitted) In the instant case, the lack of prejudice to Anchor Glass is similarly key. Anchor Glass does not argue that it suffered any prejudice because Cheney filed his request for a trial de novo six days late.

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[1] *See also Stutson v. U.S.*, 516 U.S. 193, 194 (1996)(Court reversed and remanded a filing question to the Eleventh Circuit, stating that an attorney's "inadvertent failure to file" can be excusable neglect under "*Pioneer's* liberal understanding" of that term).

> We see nothing indicating Anchor Glass was lulled or otherwise prejudiced by the untimely filing . . . Furthermore, we see no adverse impact on the district court or its resources by permitting the case to be tried as it would have been had Cheney complied with [local pleading rules].
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> The reason for the delayed filing was a failure in communication between the associate attorney and the lead counsel. The circumstances of the error were obviously within the counsel's control, but their noncommunication and resulting inaction amounts only to an 'omission[] caused by carelessness.' [*Pioneer* at 388] In other words, their failure to comply with the filing deadline is attributable to negligence. There is no indication that counsel deliberately disregarded [local pleading rules]. Anchor Glass has not argued that Cheney intended to delay the trial, or that he sought an advantage by filing late. The nonfiling was simply an innocent oversight by counsel. We find no bad faith that would warrant forfeiture of Cheney's right to a full trial of his cause.

Id.[2]

There is little doubt that the currently recognized standard for excusable neglect, as provided by the *Pioneer* Court and applied to rule 60(b)(1) by the Eleventh Circuit Court of Appeals in *Cheney ,* allows the Commission to grant relief in this case. Mr. Wood contacted OSHA within a day or two of the final order date of October 20, alerting OSHA to the fact that he could not find the settlement agreement. The notice of contest itself was filed a few days later. As the court noted in *Cheney,* the principal issue is whether the delay caused prejudice to the other party, and the majority acknowledges that the Secretary was not prejudiced by Security Doors' delay.

The majority states that, while deficient office procedures are not *per se* inexcusable, Security Doors' neglect was not "excusable" because it received adequate notice of the deadline for filing its notice of contest from the OSHA citation and the OSHA 3000

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[2]*But see Advanced Estimating System, Inc*., 130 F.3d 996, 997-98 (11th Cir. 1997)(in reversing district court, Eleventh Circuit held that a lawyer's misunderstanding of unambiguous procedural rules was not excusable neglect under the standards set forth in *Pioneer*); and *Sosa v. Airprint Systems, Inc*., 133 F.3d 1417, 1418 (11th Cir. 1998)(district court did not abuse its discretion by denying plaintiff's motion to amend her complaint where her attorney failed to amend within time set out in court's scheduling order).

publication. It was reasonable, however, for Security Doors to focus on settling the citations rather than the date stated for filing a notice of contest. Security Doors' failure to file the notice of contest before the deadline in order to preserve its rights may have been an "omission caused by carelessness" but it did not amount to bad faith or deliberate delay in order to gain advantage. Certainly, Security Doors' attempts at settlement indicate that the company was not dealing with the citations in bad faith, and the judge did not find that Security Doors' account lacked credibility. Indeed, if Security Doors was simply trying to delay the case, it is unlikely that Mr. Wood would have contacted OSHA within a day or two of the final order date.[3]

The Commission has often stated that it prefers to decide cases on their merits. *See e.g. Better Baked Foods, Inc*., 10 BNA OSHC 1382, 1383, 1982 CCH OSHD ¶ 25,873, p. 32,366 (No. 80-3089, 1982)("a decision on the merits rather than on a procedural flaw is favored"). Indeed, when addressing a late-filed notice of contest, the Commission has explicitly stated a policy "in favor of allowing employers an opportunity for a full hearing on the merits." *Elmer Constr. Corp*., 12 BNA OSHC 1002, 1003, 1984-85 CCH OSHD ¶ 27,050, p. 34,845 (No. 83-40, 1984) (rationale for accepting late-filed notice of contest). Nonetheless, though changes in the interpretation of excusable neglect have allowed the Commission greater discretion in granting rule 60(b)(1) relief, the majority has chosen not to follow this preference for allowing cases to be decided on their merits.

In short, rule 60(b) allows us to grant Security Doors' motion for relief, and I believe doing so would be consistent with the Commission's policy of preferring decisions on the merits over procedural dismissals. I would therefore grant Security Doors' motion.

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[3]The majority cites the fact that Security Doors did not respond to settlement overtures while the case was pending before the Commission as further reason to deny the motion. Whatever the reasons that Security Doors declined to respond, in my view it is unfair to penalize Security Doors because it declined to settle citations on which the notice of contest to these citations is pending before the Commission.

/s/_____

Gary L. Visscher

Commissioner

Date: April 27, 2000