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. RANDALL MECHANICAL, INC., Respondent.	OSHRC Docket No. 17-1595

APPEARANCES:

Karen E. Mock, Counsel; Amy S. Tyron, Senior Attorney; Tremelle I. Howard, Regional Solicitor; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, D.C. and Atlanta, GA
For the Complainant

Anthony D. Tilton, Esq.; Travis S. McConnell, Esq.; Cotney Construction Law, LLP, Tallahassee, FL
For the Respondent

REMAND ORDER

Before: SULLIVAN, Chairman; ATTWOOD and LAIHOW, Commissioners.

BY THE COMMISSION:

On June 27, 2017, the Occupational Safety and Health Administration issued Randall Mechanical, Inc. a one-item serious citation alleging a violation of 29 C.F.R. § 1926.350(a)(10). Randall failed to file a timely notice of contest, which resulted in the citation becoming a final order. 29 U.S.C. § 659(a) (failure to contest citation "within fifteen working days" results in citation being "deemed a final order of the Commission"). The company subsequently sought

relief from the final order under Federal Rule of Civil Procedure 60(b)(1), (3) and (6).[1] On April 11, 2018, Administrative Law Judge John B. Gatto denied all three of these grounds for relief and dismissed the case. *Randall Mech., Inc.*, No. 17-1595, 2018 WL 2326109 (O.S.H.R.C.A.L.J., Apr. 11, 2018). Randall timely filed a petition for discretionary review of the judge's decision. The petition was not granted, and the decision became a final order of the Commission. 29 U.S.C. § 661(j).

On appeal, the United States Court of Appeals for the Eleventh Circuit vacated the judge's decision and remanded with instructions that the judge apply "Supreme Court and Eleventh Circuit precedent" to Randall's "Rule 60(b)(1) motion."[2] *Randall Mech., Inc. v. Sec'y of Labor*, 798 F. App'x 604, 605 (11th Cir. 2020) (unpublished). On remand, the judge dismissed the case again, this time on jurisdictional grounds, finding that under section 10(a) of the Occupational Safety and Health Act, 29 U.S.C. § 659(a), the Commission lacks jurisdiction to grant Rule 60(b) relief from a final order.[3] Once again, Randall timely filed a petition for discretionary review and this time, it was granted.

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[1] As relevant, Rule 60 states as follows:

> (b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> . . .
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> . . .
>
> (6) any other reason that justifies relief.

[2] In seeking review of the judge's decision, Randall raised all three grounds of relief that the judge rejected. The Eleventh Circuit limited its instructions on remand, however, to Randall's request for relief under paragraph (1) of Rule 60(b). Accordingly, the scope of our remand decision is likewise limited.

[3] Notably, this issue was neither raised by a party, nor mentioned by the Eleventh Circuit during oral argument or in its remand order. *See Coleman Hammons Constr. Co.*, 942 F.3d 279, 282 n.1 (5th Cir. 2019) (assuming "that Rule 60(b) applies because the parties do not contest its applicability"); *David E. Harvey Builders, Inc. v. Sec'y of Labor*, 724 F. App'x 7, 8 (D.C. Cir. 2018) (unpublished) ("We assume Rule 60(b)(1)'s applicability to these proceedings because neither party contests it.").

We agree with Randall that the judge's decision is erroneous. Neither the Supreme Court nor the Eleventh Circuit has considered the Commission's jurisdiction to grant Rule 60(b) relief under section 10(a), and the only two circuits that have done so—the Second Circuit and the Third Circuit, neither of which are relevant here—are split on the issue.[4] Under these circumstances, the judge was bound by the Commission's longstanding precedent that it has the authority under section 10(a) to grant Rule 60(b) relief from a final order. *Gulf & W. Food Prods. Co.*, 4 BNA OSHC 1436, 1439 (No. 6804, 1976) (consolidated) ("[T]he orderly administration of [the OSH Act] requires that the Commission's administrative law judges follow precedents established by the Commission."); *see McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1110 (No. 97-1918, 2000) (noting that Commission generally applies law of circuit to which appeal is likely, but concluding judge properly applied Commission precedent where pertinent circuit "neither decided nor directly addressed" issue). Indeed, the Commission has explicitly agreed "with the Third Circuit's holding in *J.I. Hass Co. v. OSHRC* that, in cases where an employer files a late notice of contest, the employer may be granted relief from the final order under the terms of Rule 60(b)." *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981); *see O'Harra's Complete Plumbing Serv., LLC*, No. 18-1225, 2018 WL 4491707, at *1 (O.S.H.R.C., Sept. 11,

[4] The Second Circuit and the Third Circuit disagree on whether the Commission has authority to grant relief under Rule 60(b) following an untimely notice of contest. *Compare Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 228-29 (2d Cir. 2002) (holding that section 10(a) of OSH Act precludes Commission from "exercising jurisdiction [over late-filed notice of contests] based on Rule 60(b)(1)"), *with J.I. Hass Co. v. OSHRC*, 648 F.2d 190, 194-95 (3d Cir. 1981) (holding "that the Commission has jurisdiction to entertain a late notice of contest under [R]ule 60(b)" and that "the Commission must have had jurisdiction at some point" since "[s]ection 10(a) . . . states that uncontested citations become final orders of the Commission"), *and Chao v. Roy's Constr., Inc.*, 517 F.3d 180, 183 n. 1 (3d Cir. 2008) (noting that in *George Harms Construction Co. v. Chao*, 371 F.3d 156 (3d Cir. 2004), circuit reaffirmed its "earlier holding in [*Hass*], and declined to follow the Second Circuit's contrary holding in [*Le Frois*]").

Two Fifth Circuit cases, which were issued before the circuit was split and are therefore binding precedent in the Eleventh Circuit, *see Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981), address circumstances in which relief from a final order under the OSH Act was considered, but neither case specifically addresses whether the Commission has jurisdiction under section 10(a) to grant Rule 60(b) relief. *See Atl. Marine, Inc. v. OSHRC*, 524 F.2d 476, 478 (5th Cir. 1975) (remanding for evidentiary hearing to determine "if the Secretary's deception or failure to follow proper procedures is responsible for the late [notice of contest]" but neither citing nor discussing Rule 60(b)); *Brennan v. OSHRC (S.J. Otinger Constr.)*, 502 F.2d 30, 34 (5th Cir. 1974) (holding that Commission could not use Rule 60(b) to extend 30-day period under section 12(j) of the OSH Act for considering whether to grant discretionary review).

2018) ("[B]y operation of law [under section 10(a) of the OSH Act], an uncontested or untimely contested citation and proposed penalty must be deemed a final order of the Commission, unless entitlement to relief is demonstrated under Federal Rule of Civil Procedure 60(b)."). We therefore vacate the judge's order and remand the case to the judge once again.

On remand, the judge shall, in accord with the Eleventh Circuit's instructions, "apply Supreme Court and Eleventh Circuit precedent" and determine whether the company is entitled to relief under Rule 60(b)(1). *Randall Mech., Inc.*, 798 F. App'x at 605. The four factors for making this determination were articulated by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993), and include: (1) "the danger of prejudice to the [nonmoving party]," (2) "the length of the delay and its potential impact on judicial proceedings," (3) "the reason for the delay, including whether it was within the reasonable control of the movant," and (4) "whether the movant acted in good faith." In its evaluation of the *Pioneer* factors, the Eleventh Circuit has "accorded primary importance to the absence of prejudice and to the interest of efficient judicial administration," though the court has emphasized that "a determination of excusable neglect is an equitable one that necessarily involves consideration of all" the factors.[5] *In re Worldwide Web Sys., Inc. v. Feltman*, 328 F.3d 1291, 1297 (11th Cir. 2003);

[5] We note that with regard to the reason for delay, the Eleventh Circuit has held "as a matter of law, that an attorney's misunderstanding of the plain language of a rule cannot constitute excusable neglect such that a party is relieved of the consequences of failing to comply with a statutory deadline." *Advanced Estimating Sys., Inc. v. Riney,* 130 F.3d 996, 998 (11th Cir. 1997); *see United States v. Davenport*, 668 F.3d 1316, 1325 (11th Cir.) (finding that "Government's written notice of forfeiture and existing law were sufficient to alert [attorney] of the applicable deadline for filing a third-party petition on [his client's] behalf," and therefore his "misinterpretation of the deadline could not, as a matter of law, constitute excusable neglect to warrant relief under Rule 60(b)(1)"), *cert. denied*, 566 U.S. 1035 (2012). In contrast, the court has held that a factual misunderstanding by an attorney does not necessarily preclude a finding that a party's neglect was excusable under Rule 60(b)(1). *See Davenport*, 668 F.3d at 1324 ("While an attorney error based on a misunderstanding or misinterpretation of the law generally cannot constitute excusable neglect, a mistake of fact, such as miscommunication or a clerical error, may do so under the pertinent factors."); *Conn. State Dental Ass'n v. Anthem Health Plans, Inc.*, 591 F.3d 1337, 1356-57 (11th Cir. 2009) (finding relief was warranted under Rule 60(b)(1) where reason for delay resulted from "counsel's erroneous assumption that its previous appearance had been filed in the tag along cases," and "there is no discernable prejudice" to nonmoving party or "reason to conclude that allowing . . . untimely response . . . would adversely affect the judicial proceedings"). Here, Randall's president asserts in his submitted declaration that he informed the OSHA assistant area director on the day after the late notice of contest was filed that Randall had hired an attorney, but it is unclear on the current record when Randall's attorney first became involved in this matter.

see Cheney v. Anchor Glass Container Corp., 71 F.3d 848, 850 (11th Cir. 1996) (finding excusable neglect under Rule 60(b)(1) where nonmovant did not argue it suffered prejudice, delay was "minimal," and reason for delay—"failure in communication between the associate attorney and lead counsel"—was "attributable to negligence"). In addition, in the context of a default judgment, in which the defaulting party is seeking relief under Rule 60(b), the Eleventh Circuit also requires that party to show it has "a meritorious defense that might have affected the outcome." *In re Worldwide Web Sys., Inc.*, 328 F.3d at 1295.

Having reviewed the record, we find an evidentiary hearing is necessary for the judge to determine whether—under Supreme Court and Eleventh Circuit precedent—Randall's late notice of contest was due to excusable neglect. Both parties have submitted written declarations in support of their positions. These declarations contain conflicting assertions that bear directly on both Randall's reason for the delay in filing its notice of contest and whether the company acted in good faith. Indeed, the declaration submitted by OSHA's assistant area director asserting that he twice informed Randall of the deadline to file its notice of contest directly conflicts with the declarations submitted by Randall that assert the assistant area director never mentioned the deadline. The evidentiary hearing, however, should not be limited to resolving this one conflict—a full record must be developed so that the judge can properly evaluate whether Randall is entitled to relief from the final order under Rule 60(b)(1).

For all these reasons, we vacate the judge's order dismissing the case and remand for further proceedings consistent with this opinion.

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: July 30, 2020

United States of America
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SECRETARY OF LABOR, Complainant, v. RANDALL MECHANICAL, INC., Respondent.	OSHRC Docket No. 17-1595

ORDER OF DISMISSAL

This case is on remand from the United States Court of Appeals for the Eleventh Circuit. *Randall Mechanical, Inc. v. Sec'y of Labor*, 798 F. App'x 604 (11th Cir. 2020) (unpublished). Section 10(a) of the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. §§ 651–678, mandates that "[i]f, 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). There is no dispute the Secretary issued a citation and proposed penalty to Randall on June 27, 2017, which was received by Randall on July 3, 2017. Therefore, the last day for Randall to timely file a notice of contest was July 25, 2017. There is also no dispute that Randall filed its notice with the Secretary on September 19, 2017. Therefore, by operation of law, the citation and proposed penalty was "deemed a final order of the Commission and not subject to review by any court or agency." *Id.*

The company subsequently sought relief under Federal Rule of Civil Procedure 60(b)(1) from the resulting final order. On April 11, 2018, this Court issued an order denying relief and dismissing the case. *Randall*, Docket No. 17-1595, 2018 WL 2326109 (O.S.H.R.C.A.L.J., Apr. 11, 2018). Randall timely filed a petition for discretionary review with the Commission, which was not granted, and this Court's order became a final order of the Commission. On appeal, the

Eleventh Circuit remanded the case with "instructions to apply Supreme Court and Eleventh Circuit precedent with respect to Randall's Rule 60(b)(1) motion." *Randall*, 798 F. App'x at 605.[6]

Although not couched in terms of a "jurisdictional" issue, the Secretary raised subject-matter jurisdiction as an issue in his motion to dismiss Randall's late notice of contest when he asserted Randall's notice of contest was untimely and must be dismissed. (Sec'y's Mot. Dismiss at 4). And even if he had not raised a jurisdictional issue, "courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party," since "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (citation omitted). Even assuming a*rguendo*, the Secretary's motion to dismiss did not raise a jurisdictional issue, this Court notices a jurisdictional issue and raises it *sua sponte*. Further, this Court must address the jurisdictional issue before it can reach the merits of Randall's motion for Rule 60(b) relief since "[f]ailure to comply with a jurisdictional time prescription … deprives a court of adjudicatory authority over the case, necessitating dismissal—a 'drastic' result." *Hamer v. Neighborhood Hous. Servs. of Chi.*, ––– U.S. ––––, 138 S. Ct. 13, 17 (2017) (*quotation omitted*).

In *Plessey, Inc.*, 2 BNA OSHC 1302 (No. 946, 1974), the Commission held that it could apply Rule 60(b) to modify a decision and order that became final after a proceeding held pursuant to section 12(j) of the Act, 29 U.S.C. § 661(j), but it could *not* grant Rule 60(b) relief to modify a citation and penalty that was "deemed" a final order pursuant to section 10(a). In holding that it could not provide such Rule 60(b) relief under section 10(a), the Commission concluded that since the employer failed to file a timely notice of contest, the Commission did not have subject-matter jurisdiction and, thus, was barred by the express language of section 10(a) from affording relief.

The *Plessey* rule was abrogated by the Commission in *Branciforte Builders, Inc.*, 9 BNA OSHC 2113 (No. 80-1920, 1981) when it agreed with the Third Circuit's holding in *J. I. Hass Co.*

[6] The history of this case is somewhat unique. After the Secretary filed his motion to dismiss, this Court issued an order holding the Secretary's motion in abeyance and directing Randall to file a motion requesting Rule 60(b) relief, which Randall did, and on January 16, 2018, this Court entered an Order granting Rule 60(b) relief and denying the Secretary's motion to dismiss. The Secretary sought interlocutory review of that Order, which was denied by the Commission vis-à-vis a written "Notice," wherein the Commission reminded this Court that under long-settled Commission precedent, a "key" factor in evaluating whether a party's delay in filing was due to excusable neglect is "the reason for the delay, including whether it was within the reasonable control of the movant." The Secretary thereafter filed a motion for reconsideration with this Court and this Court issued its April 11, 2018, Order vacating its previous Order granting Rule 60(b) relief and dismissing the case, which is now on remand.

v. Occupational Safety & Health Review Comm'n, 648 F.2d 190 (3d Cir. 1981), that the Commission has jurisdiction to reconsider its section 10(a) orders under Rule 60(b). *Branciforte*, 9 BNA OSHC at 2117. In *J.I. Hass*, the Secretary took the same position as he does here, that the final clause of section 10(a) is jurisdictional and prohibits review of citations if an employer does not file a timely notice of contest. The Third Circuit held that under this interpretation of section 10(a), "if an employee signed for citations and then was killed while returning from the post office, and the letter destroyed, an employer with a meritorious defense could still get no relief if 15 working days elapsed before he learned of the citations. We do not believe Congress intended such a harsh result." *J.I. Hass*, 648 F.2d at 194. However, as the Supreme Court has admonished, "a court must [enforce the dismissal] even if equitable considerations would support extending the prescribed time period." *United States v. Kwai Fun Wong*, 575 U.S. 402, 409 (2015) (*citation omitted*).

After *Branciforte*, the Supreme Court set out in *Arbaugh* a "readily administrable bright line" to determine jurisdiction: "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh*, 546 U.S. at 502. Thus, time limits to file an appeal are jurisdictional if they appear in a statute, *Bowles v. Russell*, 551 U.S. 205, 206–07 (2007), but not if they appear in a court-made rule. *Hamer*, ––– U.S. ––––, 138 S. Ct. at 16–17]. While the *Arbaugh*, *Bowles*, and *Hamer* cases involved review by Article III courts, in *Henderson ex rel. Henderson v. Shinseki*, the Supreme Court distinguished Article III cases with those involving review by an Article I tribunal, such as the Veterans Court, which are "as part of a unique administrative scheme." *Shinseki*, 562 U.S. at 437–38. "Instead of applying a categorical rule regarding review of administrative decisions, we attempt to ascertain Congress' intent regarding the particular type of review at issue in this case." *Id.* at 438.

Litigation before the Commission, unlike cases involving veterans benefits, has all the hallmarks of ordinary civil litigation. The Act mandates that "[u]nless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure[,]" 29 U.S.C. § 661(g), and the Federal Rules of Evidence are applicable in such proceedings. 29 C.F.R. § 2200.71. The employer must commence its notice of contest within the time specified by statute, see § 659(a), the Secretary of Labor must thereafter file a complaint with the Commission no later than 21 days after receipt of the notice of contest, see 29 C.F.R. § 2200.34(a), the employer

must file an answer within 21 days after service of the complaint that must also include all affirmative defenses being asserted, see 29 C.F.R. § 2200.34(b), and the litigation is adversarial, see § 659(c). The Secretary must gather the evidence that supports his claims and generally bears the burden of production and persuasion, see *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1314 (11th Cir. 2013) ("the employer bears the burden on affirmative defenses only if the Secretary proves a prima facie case first."). Both parties may appeal an adverse trial-type Commission decision to an applicable circuit court of appeals, see § 660, and a final judgment may be reopened only in narrow circumstances, see Fed. Rule Civ. Proc. 60. Thus, the type of review Congress established is more akin to the ordinary type of civil litigation in *Arbaugh*, *Bowles*, and *Hamer* rather than the unique administrative scheme at issue in *Shinseki*.

The Supreme Court has cautioned that even though time bars "cabin a court's power only if Congress has 'clearly state[d]' as much," that "does not mean 'Congress must incant magic words,'" but "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Kwai*, 575 U.S. at 409-10 (*quoting Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). Here, the time limit to file an appeal does speak in jurisdictional terms. Congress set a "fifteen working days" time bar in section 10(a). § 659(a). Congress also imbued a procedural bar with jurisdictional consequences. If the employer fails to meet the time limit, the citation shall "not subject to review by any court or agency." *Id.* Thus, section 10(a) does *not* read "like an ordinary, run-of-the-mill statute of limitations, spelling out a litigant's filing obligations without restricting a court's authority." *Kwai*, 575 U.S. at 411. Rather, section 10(a) specifically spells out an employer's filing obligations *and* if the employer fails to meet the filing obligations, section 10(a) expressly restricts the authority of any court or agency to review the citation and proposed assessment deemed a final order under section 10(a).

Applying the Supreme Court's precedent after *Branciforte*, this Court concludes Congress "imbued a procedural bar with jurisdictional consequences," *Kwai*, 575 U.S. at 410, and Randall's failure to timely file its notice of contest in accordance with the section 10(a) deprived this Court of subject-matter jurisdiction. *Hamer*, ––– U.S. at ––––, 138 S. Ct. at 17; *Bowles*, 551 U.S. at 213. As the Second Circuit has noted, and this Court agrees, "§ 661(g) provides for application of the Federal Rules of Civil Procedure only when the Commission has already commenced 'proceedings.' Proceedings before the Commission never began here. To use Rule 60(b) to establish jurisdiction would be to bootstrap jurisdiction into existence[.]" *Chao v. Russell P. Le*

Frois Builder, Inc., 291 F.3d 219, 228–29 (2d Cir. 2002). And as the *Hamer* Court admonishes, "it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." *Hamer*, ––– U.S. ––––, 138 S. Ct. at 17 (*citation omitted*). Accordingly,

IT IS HEREBY ORDERED THAT the Secretary's motion to dismiss is **GRANTED** and Randall's notice of contest is **DISMISSED** with prejudice.[7]

SO ORDERED.

/s/
First Judge John B. Gatto

Dated: June 10, 2020
Washington, D.C.

[7] Any pending motions that have not been ruled on have been considered and are **DENIED**.