



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
100 Alabama St. S.W
Building 1924 Room 2R90
Atlanta, GA 30303-3104

SECRETARY OF LABOR,
Complainant,

v.

RANDALL MECHANICAL, INC.,
Respondent.

OSHRC Docket No. 17-1595

DECISION AND ORDER OF DISMISSAL

In the Occupational Safety and Health Act of 1970 (“Act”), 29 U.S.C. §§ 651–678, Congress established a deadline to appeal the issuance of a citation or proposed penalty by the Secretary of Labor. Thus, “the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.” 29 U.S.C. §659(a). In the present case, the Secretary issued a citation and proposed penalty to Randall Mechanical, Inc. (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 (NOC) was July 25, 2017. By operation of law, the citation and proposed penalty became a final order of the Commission on July 26, 2017.

Randall filed a late NOC with the Secretary on September 19, 2017. In response to the late NOC, the Secretary filed a motion to dismiss the NOC. Randall subsequently sought relief under Federal Rule of Civil Procedure 60(b)(1), (3), and (6).¹ In *Elan Lawn & Landscape Serv., Inc.*, 22 BNA OSHC 1337, 1338 (No. 08-0700, 2008), the Commission held “[u]nder ‘long-standing

¹ Rule 60(b) provides in relevant part that “[on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[;] ... (3) ... misrepresentation, or other misconduct of an adverse party [;] ... or (6) any other reason justifying relief from the operation of the judgment.” Fed.R.Civ.P. 60(b).

Commission precedent,' relief may be granted under Rule 60(b) from a final judgment that is due to a late-filed NOC."²

Although this Court rejected Rule 60(b)(3) and (6) as grounds for relief, it granted relief under Rule 60(b)(1), finding that Randall's failure to submit its NOC in a timely fashion was due to "excusable neglect." In reaching this conclusion, this Court addressed factors identified as

² 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 of an administrative law judge that became final pursuant to section 12(j) of the Act, but it could not grant Rule 60(b) relief to modify a citation and penalty that became a final order pursuant to section 10(a) of the Act. In holding that it could not provide Rule 60(b) relief to modify such an order, the Commission stated 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 in *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981) when the Commission held that even in late notice of contest cases, the employer may be granted relief under Rule 60(b). The Court notes *Branciforte* appears to be inconsistent with subsequent Supreme Court precedent, which would mandate a late NOC be dismissed for want of jurisdiction.

In *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017), the Supreme Court recently reminded us that "an appeal filing deadline prescribed by statute will be regarded as 'jurisdictional,' meaning that late filing of the appeal notice necessitates dismissal of the appeal." *Hamer*, 138 S. Ct. at 17 (citing *Bowles v. Russell*, 551 U.S. 205, 210–213 (2007)). "[I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." *Id.* (citing *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978)); see also, *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941) (noting "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute"). "Accordingly, a provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time." *Hamer* 138 S. Ct. at 17.

In cases **not** involving the transfer of adjudicatory authority from one Article III court to another, such as in Commission cases, the Supreme Court applies the following rule: a statutory limitation on coverage is jurisdictional "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006). "This is not to say that Congress must incant magic words in order to speak clearly. We consider 'context, including this Court's interpretations of similar provisions in many years past,' as probative of whether Congress intended a particular provision to rank as jurisdictional." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010). Here, Congress set the time to appeal in the OSH Act by mandating that an employer notify the Secretary within fifteen working days from its receipt of an OSHA citation if it wishes to contest the citation and proposed penalty. 29 U.S.C. § 659(a). Traditional tools of statutory construction also plainly show that Congress imbued a procedural bar with jurisdictional consequences since it mandated if a NOC is not filed by the employer 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." *Id.* Therefore, Congress clearly intended this particular provision to rank as jurisdictional.

"Failure to comply with a jurisdictional time prescription, we have maintained, deprives a court of adjudicatory authority over the case, necessitating dismissal—a 'drastic' result." *Hamer*, 138 S. Ct. at 17 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). "[W]hen an 'appeal has not been prosecuted ... within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.'" *Bowles*, 551 U.S. at 213 (citation omitted). The jurisdictional defect is not subject to waiver or forfeiture and may be raised at any time in the court of first instance and on direct appeal. *Kontrick*, 540 U.S., at 455. In contrast to the ordinary operation of our adversarial system, courts are obliged to notice jurisdictional issues and raise them on their own initiative. *Shinseki*, 562 U.S. at 434. In light of the Supreme Court's holdings in *Hamer*, *Shinseki*, *Bowles*, *Kontrick*, and *Sibbach*, if this Court were not bound by the Commission's *Branciforte* holding, it would dismiss the late NOC for lack of jurisdiction.

pertinent by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993), and relied on in Commission cases, to assess whether there was a basis for finding excusable neglect.

The Secretary filed a petition seeking interlocutory review of this Court's order granting Rule 60(b)(1) relief and the Commission subsequently issued a Notice on the petition, which found the standard for interlocutory relief has not been met. Nonetheless, the Commission noted 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.'" Commission Notice, p. 4 (February 22, 2018) (emphasis in original) (*quoting A. W. Ross, Inc.*, 19 BNA OSHC 1147, 1148 (No. 99-0945, 2000) (emphasis added)). The Secretary has now moved the Court to reconsider its order granting Rule 60(b)(1) relief in light of the Commission's Notice.

This Court is compelled to follow Commission precedent since a Commission judge is not free to decide cases in ways that directly conflict with Commission precedent. *See Gulf & W. Food Prods. Co.*, 4 BNA OSHC 1436, 1439 (No. 6804, 1976) (consolidated) (orderly administration of Act requires that administrative law judges follow Commission precedent). *See also Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188 (No. 4409, 1976) (Commission requires its judges to follow precedents established by the Commission, unless reversed by the Supreme Court); *Maxwell Well Serv. Inc., d/b/a Circle M Well Servicing*, 13 BNA OSHC 2109, 2110 (No. 87-1534, 1989) ("Commission's judges are bound by Commission precedent."). *Accord Accu-Namics, Inc. v. Occupational Safety & Health Review Comm'n*, 515 F.2d 828, 834 (5th Cir. 1975) (the statutory scheme contemplates that the Commission is the fact-finder, and the judge is an arm of the Commission for that purpose).

This Court already found no merit in Randall's assertion it was delayed in filing its NOC due to its inability to obtain relevant procedural information. This was so because the explicit terms of the citation issued to Randall informed Randall in underlined and bold text: "**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.**"

As the Commission noted in its notice, it “has previously rejected Rule 60(b)(1) relief where the Respondent's excuse ‘boil[ed] down to an admission that [the company president] failed to read the citation’; the Commission held in that case that ‘[e]mployers have an obligation to read a citation with sufficient care’ and that ‘[h]andling important business matters in this manner cannot be considered excusable neglect[.]’” Commission Notice, p. 5 (*quoting A. W. Ross, Inc.*, 19 BNA OSHC at 1149) (employer's failure to read citation does not constitute excusable neglect under Rule 60(b)(1)).

Applying the Commission's longstanding excusable neglect analysis that a “*key factor*” is the reason for the delay, including whether it was within Randall’s reasonable control, the Court concludes the reason for the delay is, itself, inexcusable, since it *was* within Randall’s reasonable control. This Court is required to apply the Commission’s “*key factor*” analysis, even though this Court agrees with Randall that under Eleventh Circuit precedent, where this case is likely to be appealed, “[t]he Supreme Court held that excusable neglect encompasses situations of negligence within the defaulting party's control and placed *primary importance* on the prejudice prong of the analysis.” *Coniglio v. Bank of America, NA*, 638 F. App'x 972 (11th Cir. 2016) (emphasis added). Accordingly,

IT IS HEREBY ORDERED THAT the Secretary’s motion for reconsideration and his motion to dismiss Randall’s late NOC are **GRANTED** and Randall’s late NOC is **DISMISSED**.
SO ORDERED.

/s/
JOHN B. GATTO, Judge

Dated: April 11, 2018
Atlanta, GA