



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.

OSHRC Docket No. 18-1225

O'HARRA'S COMPLETE PLUMBING
SERVICE, LLC,

Respondent.

APPEARANCES:

Susan J. Willer, Attorney; H. Alice Jacks, Associate Regional Solicitor; Christine Z. Heri, Regional Solicitor; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Office of the Solicitor, Kansas City, MO
For the Complainant

Jamie O'Harra; O'Harra's Complete Plumbing Service, LLC, Topeka, KS
For the Respondent

DIRECTION FOR REVIEW AND REMAND ORDER

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

BY THE COMMISSION:

An order issued by Chief Administrative Law Judge Covette Rooney approving an informal settlement agreement between O'Harra's Complete Plumbing Service, LLC and the Secretary was docketed on August 15, 2018. O'Harra's filed a petition for discretionary review of the Judge's order on September 4, 2018. For the following reasons, we direct this case for review and remand for further proceedings consistent with this order.

The Occupational Safety and Health Administration issued a citation to O'Harra's on May 1, 2018. The record does not establish when O'Harra's received the citation, so we are unable to determine the date on which the 15-day period for filing a notice of contest expired. *See* 29 U.S.C. § 659(a); Commission Rule § 2200.33, 29 C.F.R. § 2200.33. However, it appears

that the contest period had expired by the time the Commission received, on July 27, 2018, a letter from O’Harra’s, dated July 20, 2018, contesting the citation. In the letter, Jamie O’Harra claims he should be exempt from OSHA standards because he had no employees and that he felt pressured into signing the settlement agreement.¹

We consider the July 20 letter filed by O’Harra’s to be a late notice of contest. Absent a timely notice of contest, the Commission lacks any authority to act. *See* 29 U.S.C. § 659(a) (failure to file a timely notice of contest results in citation and proposed penalty becoming a final order of the Commission “not subject to review by any court or agency”). Therefore, by operation of law, 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).² *See* 29 U.S.C. § 661(g) (Commission proceedings conducted in accordance with Federal Rules of Civil Procedure unless Commission has adopted different rule); *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981) (late notice of contest may be excused under Rule 60(b)). As such, we also construe the July 20 letter as a motion for Rule 60(b) relief from a final order.

In light of our reading of the July 20 letter, we remand the matter to the judge to consider whether O’Harra’s is entitled to Rule 60(b) relief, which if found warranted would also result in

¹ On August 3, 2018, the Secretary filed a motion seeking an extension of time to file a motion to vacate the late notice of contest. The judge has not ruled on the Secretary’s motion.

² Federal Rule of Civil Procedure 60(b) states:

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;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

a decision that the settlement agreement was erroneously approved. The mutually-executed settlement agreement may be relevant to the issue of whether O’Harra’s is entitled to that relief.

Accordingly, we set aside the judge’s order approving the settlement agreement and remand for consideration of whether relief from a final order is warranted.

SO ORDERED.

/s/
Heather L. MacDougall
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
James J. Sullivan, Jr.
Commissioner

Dated: September 11, 2018

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**ORDER
APPROVING STIPULATED SETTLEMENT**

The Commission has jurisdiction over the subject matter of the case and over the parties by virtue of the filing of a timely notice of contest.

The stipulated settlement between the parties filed on **May 24, 2018** has been considered. The parties certify that affected employees were properly notified of the settlement on **May 24, 2018**. No objection to the settlement has been filed.

The settlement is approved under 5 U.S.C. § 554(c)(1) and Commission Rule 100.¹ The terms of the stipulated settlement are incorporated, in their entirety, by reference in this order.

/s/
COVETTE ROONEY
Chief Judge, OSHRC

Dated: August 13, 2018
Washington, D.C.

¹ Rules of Procedure of the Occupational Safety and Health Review Commission, 29 C.F.R. §§ 2200.1-.212 (1991).