



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.

GMJ CONTRACTING CORP. D/B/A GMJ
MASONRY,

Respondent.

OSHR Docket No. 17-0364

APPEARANCES:

Diane C. Sherman, Counsel for Occupational Safety and Health; Jeffrey S. Rogoff, Regional Solicitor; Nicholas C. Geale, Acting Solicitor of Labor; Donyell M. Thompson, Senior Trial Attorney; U.S. Department of Labor, Office of the Solicitor, New York, NY
For the Complainant

Heather Cummings; Joseph W. Rufolo, Sr.; JW Rufolo & Associates, Edison, NJ
For the Respondent

DIRECTION FOR REVIEW AND REMAND ORDER

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

BY THE COMMISSION:

An order issued by Administrative Law Judge William S. Coleman approving a settlement agreement between GMJ Contracting Corp. d/b/a GMJ Masonry and the Secretary became a final order of the Commission on August 7, 2017. For the reasons that follow, we set aside the final order under Federal Rule of Civil Procedure 60(a), direct review of the case, and remand it to the judge for further proceedings.

The Occupational Safety and Health Administration issued GMJ a one-item serious citation with a proposed penalty of \$8,149. On June 23, 2017, the Secretary submitted for approval a settlement agreement that addresses a different citation issued to GMJ, which is the subject of a separate case (Docket No. 17-0217). Because the settlement agreement did not

resolve the citation at issue here, the judge’s order approving it did not constitute a “final disposition of the proceedings” under Commission Rule 90(a), 29 C.F.R. § 2200.90(a). Nonetheless, the order was submitted for docketing and subsequently docketed on July 6, 2017, thereby commencing the thirty-day period before “[t]he report of the administrative law judge . . . become[s] the final order of the Commission.” 29 U.S.C. § 661(j); *see also* 29 C.F.R. § 2200.90(b)(2) (docketing of judge’s report by Executive Secretary). Because no Commissioner directed the case for review, the order became final on August 7, 2017.

On September 28, 2017, the Secretary filed with the Commission an Unopposed Motion for Relief Under Rule 60(b). The Secretary explained that he had inadvertently filed the wrong settlement agreement and requested that the Commission reopen the matter to allow the parties an opportunity to file the correct agreement. The Secretary cited Federal Rule of Civil Procedure 60(b)(1), which allows the Commission to set aside a final order due to “mistake, inadvertence, surprise, or excusable neglect,” and Federal Rule of Civil Procedure 60(b)(6), which allows the Commission to do so for “any other reason that justifies relief.”

Federal Rule of Civil Procedure 60(a)¹ permits the Commission to “correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record.” *See, e.g., True Value Co.*, 26 BNA OSHC 1659 (No. 16-0597, 2017) (setting aside final order approving settlement agreement that failed to resolve all citation items under Rule 60(a)); *Robert Lewis Rosen Assoc., Ltd. v. Webb*, 473 F.3d 498, 504 (2d Cir. 2007) (error in judgment resulting merely from oversight and not due to substantive mistake could be corrected under Rule 60(a)); *Hegger v. Green*, 91 F.R.D. 595, 597 (S.D.N.Y. 1981) (A “clerical mistake” under Rule 60(a) is “a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney.”) (internal citation omitted). Here, the mistake arose when, following the Secretary’s submission of the wrong settlement agreement, the judge submitted his approval order for docketing even though the settlement agreement did not resolve the citation at issue.²

¹ Because we find relief appropriate under Federal Rule of Civil Procedure 60(a), we need not address whether relief may also be appropriate under Federal Rule of Civil Procedure 60(b).

² This is not the first time the Commission has been compelled to address a final order involving a mistake regarding a settlement agreement. *See True Value Co.*, 26 BNA OSHC 1659 (No. 16-0597, 2017) (setting aside final order approving settlement agreement that did not fully resolve case); *Caldwell Coatings, LLC*, 26 BNA OSHC 1268 (No. 15-1216, 2017) (consolidated)

We thus set aside the final order under Federal Rule of Civil Procedure 60(a) and remand the case to the judge to consider the Secretary's unopposed motion for relief.

SO ORDERED.

/s/

Heather L. MacDougall
Chairman

/s/

Cynthia L. Attwood
Commissioner

/s/

James J. Sullivan, Jr.
Commissioner

Dated: November 6, 2017

(same); *Sterling Techs., Inc.*, 25 BNA OSHC 1891 (No. 15-1772, 2016) (same). Again, we remind the parties and their counsel that they should carefully review all documents before filing.

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EDWARD C. HUGLER, Acting Secretary of Labor,
United States Department of Labor,

Complainant,

v

GMJ Contracting, Corp.,

Respondent

Docket or Inspection No. 1159396

ORDER APPROVING SETTLEMENT

Respondent in Inspection No. 1159396, by letter dated 1/10/2017 contested citation issued to it by Complainant on 11/8/2016. In that letter, Respondent also contested the \$18,707.00 penalty proposed by Complainant for the citation. An executed Stipulated Settlement has been received from the parties, and this stipulation addresses all matters at issue between the parties in this proceeding. The Stipulation having been read and considered, it is

ORDERED: (1) That the terms of the Stipulated Agreement are approved and incorporated as part of this Order; and

(2) That this Order, pursuant to Section 12(j) of the Act, 29 U.S.C. Section 661(j),

will become the final order of the Commission at the expiration of thirty (30) days from the date of the docketing by the Executive Secretary, unless within

that time a member of the Commission directs that it be reviewed.

Dated this 5 day of July, 2017.

SO ORDERED:

/s/
William Coleman
Judge, Occupational Safety
And Health Review Commission