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

NOTICE

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

BY THE COMMISSION:

Before us is the Secretary's January 23, 2018 petition seeking interlocutory review of Administrative Law Judge John B. Gatto's order denying the Secretary's motion to dismiss the late Notice of Contest (NOC) of Randall Mechanical, Inc. Randall received a citation from the Occupational Safety and Health Administration on July 3, 2017, and had until July 25 to submit a timely NOC under the fifteen-working-day period specified in section 10(a) of the Occupational Safety and Health Act, 29 U.S.C. § 659(a) (if employer fails to notify Secretary within "fifteen working days" of receiving Notice of Citation that it intends to contest citation and/or proposed penalty, citation "deemed a final order of the Commission"). Randall waited until September 19, 2017, however, to submit its NOC.[1]

[1] Randall asserts in its opposition to the Secretary's petition that the petition, itself, was untimely. Commission Rule 73(b) states that "[w]ithin 5 days following the receipt of a Judge's ruling from which review is sought, a party may file a petition for interlocutory review with the Commission." 29 C.F.R. § 2200.73(b). Under Commission Rule 4(a), "the day from which the designated period begins to run shall not be included" and "[w]hen the period of time prescribed or allowed is less than 11 days, the period shall commence on the first day which is not a Saturday, Sunday, or Federal holiday, and intermediate Saturdays, Sundays, and Federal holidays

Following the Secretary's motion to dismiss, the judge issued an order allowing Randall fourteen days to respond, as Randall had not yet provided an explanation for its untimely NOC. Randall argued in its response that it was entitled to relief from a final order under Federal Rule of Civil Procedure 60(b)(1), (3), and (6).[2] The Secretary opposed each of these grounds for relief in a subsequent filing. The judge rejected Rule 60(b)(3) and (6) as grounds for relief, but he granted relief under Rule 60(b)(1), finding that Randall's failure to submit its notice in a timely fashion was due to "excusable neglect." In reaching this conclusion, the judge addressed factors identified as 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 is a basis for finding excusable neglect:

> [T]he determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . 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. *See, e.g., Evergreen Envtl. Serv.*, 26 BNA OSHC 1982, 1984-85 (No. 16-1295, 2017) (applying *Pioneer* factors to assess appropriateness of Rule 60(b)(1) relief).

In applying the *Pioneer* factors to the circumstances underlying Randall's untimely NOC, the judge determined that: granting relief would not result in prejudice to the Secretary; the length of delay would not adversely impact the judicial proceeding; and Randall acted in good faith. As to the reason for delay, and whether it was within Randall's reasonable control, the judge concluded that Randall's excuse—that its delay was due to OSHA not informing Randall that the NOC had to be in writing—lacked merit because the citation explicitly provided the relevant information (i.e., that the notice had to be in writing) in underlined, bold text. The judge nonetheless granted relief based on the other three factors favoring Randall and also on his

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shall likewise be excluded from the computation." 29 C.F.R. § 2200.4(a). Here, the judge issued his interlocutory order on January 16, 2018, and the Secretary timely filed his petition on January 23, which was the last day of the 5-day period given that January 20 and 21 (Saturday and Sunday) are excluded.

[2] Under Rule 60(b), "[o]n 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; . . . or (6) any other reason that justifies relief."

finding that Randall alleged a meritorious defense. *Evergreen Envtl. Serv.*, 26 BNA OSHC at 1985 (under Commission precedent, Respondent must allege meritorious defense to prevail on motion for relief under Rule 60(b)(1)).

Under Commission Rule 73(a)(1), the Commission has the discretion to grant interlocutory review where "the review involves an important question of law or policy about which there is substantial ground for difference of opinion and . . . immediate review of the ruling may materially expedite the final disposition of the proceedings . . . ." 29 C.F.R. § 2200.73(a)(1). We are of the view, as are the courts, that petitions for interlocutory review should be granted sparingly—in only a rare case exhibiting "exceptional circumstances" is interlocutory review preferable to waiting until the judge has issued a final order.[3] In many of the petitions for interlocutory review filed with the Commission, the issues presented are familiar and almost routine; these are no more worthy of immediate appeal than any other interlocutory rulings. Indeed, to grant interlocutory review in these cases would open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation. *Cf. Switz. Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 (1966) (as to federal statute concerning appeal of interlocutory injunction orders, noting that "federal law expresses the policy against piecemeal appeals" and that "[h]ence we approach this statute somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders").

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[3] Unlike the Commission's rule, the Federal courts' comparable interlocutory review provision, 28 U.S.C. § 1292(b), does not require that the question of law or policy be "important," but the courts nonetheless permit interlocutory review only "sparingly" and only if the petitioner "demonstrate[s] 'exceptional circumstances' justifying piecemeal appeal." *See Tolson v. United States*, 732 F.2d 998, 1002 (D.C. Cir. 1984) (noting in cited authority that section 1292(b) " 'is meant to be applied in relatively few situations and should not be read as a significant incursion on the traditional federal policy against piecemeal appeals' " (citing 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2658.2, at 80 (2d ed. 1983)); *Sai v. Dep't of Homeland Sec.*, 99 F. Supp. 3d 50, 59 (D.D.C. 2015) ("Because certification [of interlocutory review under section 1292(b)] runs counter to the general policy against piecemeal appeals, this process is to be used sparingly."); *Kennedy v. District of Columbia*, 145 F. Supp. 3d 46, 51 (D.D.C. 2015) ("Interlocutory appeals [under section 1292(b)] are 'infrequently allowed,' for the movant must demonstrate 'exceptional circumstances' justifying piecemeal appeal."); *Arias v. DynCorp*, 856 F. Supp. 2d 46, 53 (D.D.C. 2012) (under section 1292(b), "[t]he petitioner 'must meet a high standard to overcome the strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals' " (citation omitted)).

While the Commission's decision to permit interlocutory review is a discretionary one, the kind of error likely to warrant such review is typically one of law that involves an issue on which the Commissioners could reasonably disagree, as opposed to an incorrect application of law to facts. *Compare Consol. Rail Corp.*, No. 91-3133, 1992 WL 184541, at *1 (O.S.H.R.C. July 22, 1992) (consolidated) (granting interlocutory review where issue was whether Federal Railroad Administration's regulatory authority preempted OSHA's jurisdiction), *with Lewis County Dairy Corp.*, 20 BNA OSHC 1779, 1779-80, 1780 n.1 (No. 03-1533, 2004) (declining to grant interlocutory review where judge made "errors" with respect to discovery rulings, but petition did not satisfy Commission Rule 73(a)(1)'s criteria). Further, error alone, even if obvious, is typically not a basis for interlocutory review, as the Commission's discretion to grant review is limited to petitions that satisfy the criteria set forth in Commission Rule 73(a).[4] *See Lewis County Dairy Corp.*, 20 BNA OSHC at 1780 (recognizing strength of petition's arguments and errors in judge's rationale, but not granting petition). Under these circumstances and in application of these criteria to the petition here, we find that the standard for interlocutory relief has not been met. Accordingly, the petition will be denied by operation of law pursuant to Commission Rule 73(b) once the 30-day period expires on February 22, 2018. 29 C.F.R. § 2200.73(b) ("The petition is denied unless granted within 30 days of the date of receipt by the Commission's Executive Secretary.").

However, as noted in our colleague's dissent, all three members of the Commission agree 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.' " *See A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148

[4] Our dissenting colleague would have us draw a direct parallel between our interlocutory appeal rule and section 1292(b) to support her conclusion that our reading of "Commission Rule 73(a) simply cannot be squared with its principal purpose: judicial efficiency." Yet she acknowledges that the two provisions use different adjectives ("controlling" versus "important") to describe the nature of the issues ripe for interlocutory appeal, a difference she claims proves that "interlocutory review at the Commission is more expansive than in the federal courts." Our colleague cannot have it both ways: if our rule is broader than that of the federal courts, then judicial efficiency is not the "principal purpose" of our rule. Indeed, judicial efficiency is not its principal purpose—our rule as applied is narrower precisely because it contemplates considerations that extend beyond the case from which interlocutory appeal is sought: "an important question of law or policy about which there is substantial ground for difference of opinion[.]" 29 C.F.R. § 2200.73(a)(1).

(No. 99-0945, 2000) (emphasis added); *see, e.g., Evergreen Envtl. Serv.*, 26 BNA OSHC at 1984-85 (granting Rule 60(b)(1) relief where reason for delay—water damage to office—hampered normal mail handling procedures). While the judge here found the reason for delay was a factor that weighed against granting the requested relief, he ultimately concluded that Randall's failure to submit its notice in a timely fashion was due to "excusable neglect" and granted relief under Rule 60(b)(1).

We note—as does our colleague—that the Commission 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 . . . ." *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)). If the reason for the delay is, itself, inexcusable, then a late NOC cannot possibly be the result of *excusable* neglect.

/s/
Heather L. MacDougall
Chairman

/s/
James J. Sullivan, Jr.
Commissioner

Dated: February 22, 2018

ATTWOOD, Commissioner, dissenting from the denial of interlocutory review:

Because the judge's order flatly contradicts clear Commission precedent on an "important question of law or policy about which there is substantial ground for difference of opinion," I vote to grant the Secretary's Petition for Interlocutory Review. Commission Rule 73(a), 29 C.F.R. § 2200.73(a). My colleagues appear to agree that the judge's order is erroneous but nonetheless decline to grant interlocutory review presumably because there is not "substantial ground for difference of opinion" within the meaning of Commission Rule 73(a). In other words, my colleagues appear to have concluded that a judge's plain error cannot be corrected through interlocutory review even though such correction would result in dismissal of the case. I write separately to emphasize that such a narrow reading of Commission Rule 73(a) simply cannot be squared with its principal purpose: judicial efficiency. For the reasons explained below, I find the judge's decision here does raise "an important question of law . . . *about which there is substantial ground for difference of opinion*" and, because the Secretary's Motion to Dismiss should have been granted, interlocutory review would also "materially expedite the final disposition of the[se] proceedings."[1] 29 C.F.R. § 2200.73(a) (emphasis added).

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[1] In determining whether a Federal Rule of Civil Procedure 60(b)(1) motion should be granted, the Commission has long applied the four-factor test articulated by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993):

> [T]he determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . 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.

Here, the judge found that three of the factors weigh "strongly in favor of permitting the tardy NOC" because there was no evidence of prejudice to the Secretary, nor evidence "that the delay would impact these proceedings," and "there [was] no suggestion that Randall acted in other than good faith." Regarding the fourth *Pioneer* element—the reason for the delay, including whether it was within the reasonable control of the movant—the judge 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, according to the judge, 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**

The Commission first promulgated its "interlocutory appeal" rule as 29 C.F.R. § 2200.75 on September 28, 1972. Rules of Procedure, 37 Fed. Reg. 20,237, 20,242 (Sept. 28, 1972). The original rule was almost identical to 28 U.S.C. § 1292(b), which is the statutory provision still

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> **order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency."**

Because Randall did not establish any other reason for its failure to timely file its notice of contest, the judge essentially concluded that Randall had established *no* reason for its delay. Notwithstanding this finding, the judge then summarily concluded that Randall's neglect "was, under all the circumstances, 'excusable' " because granting the motion would prejudice neither the Secretary nor the interests of efficient judicial administration, and there was no evidence that Respondent acted in other than good faith. But this conclusion turns the Commission's longstanding excusable neglect analysis on its head—as the Commission has stated, a "*key factor"* in evaluating a party's untimely filing of a notice of contest is the reason for the delay, including whether it is within the reasonable control of the movant. *A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148 (No. 99-0945, 2000) (emphasis added). Indeed, the judge himself cited Commissioner Weisberg's footnote in *CalHar Constr. Inc.*, 18 BNA OSHC 2151, 2153 n.5 (No. 98-0367, 2000), which explains that, as a practical matter, the other three *Pioneer* factors will ordinarily have no relevance to Commission proceedings.

> [M]any 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.

I find it very troubling that the judge explicitly acknowledged Commissioner Weisberg's discussion of the *Pioneer* factors in the context of longstanding Commission precedent, but nonetheless concluded to the contrary. 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). Because the judge in this case obviously ignored binding Commission precedent, interlocutory review is warranted.

governing interlocutory appeals in federal district courts. Thus, under the original rule, interlocutory appeals at the Commission proceeded in essentially the same manner as in the district courts—prior to any interlocutory appeal, the judge was required to certify (1) that the judge's own decision or order involves "an important question of law concerning which there is substantial ground for difference of opinion" and (2) that "immediate appeal from the ruling will materially expedite the proceedings."[2] *Id.*

On September 8, 1986, the Commission revised its interlocutory appeal rule "to eliminate the [j]udge from the interlocutory review process," explaining that "[a]s a practical matter, the [j]udge's ruling is nothing more than advisory" and the "administrative burden on the parties of filing with the [j]udge . . . outweigh[s] any benefit of involving the [j]udge in the review process." Rules of Procedure, 51 Fed. Reg. 23,184, 23,190-91 (June 25, 1986) (proposed rule); 51 Fed. Reg. 32,002, 32,026 (Sept. 8, 1986) (final rule). Thus, under the revised—and still current—interlocutory review rule, the Commission, in addition to serving its review function, also assumes what was previously the judge's role and determines whether interlocutory review is appropriate using the same two elements.

Here, my colleagues appear to determine that interlocutory review cannot be granted because the judge's ruling is clearly in error, so it does not involve "an important question of law or policy *about which there is substantial ground for difference of opinion*."[3] 29 C.F.R.

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[2] My colleagues conclude that the Commission's interlocutory review rule is less permissive than section 1292(b) because it requires that the question of law or policy be "important." But in fact, just the opposite is true—section 1292(b) states that the issue of law or policy must be "controlling" whereas the Commission rule requires that it be "important." Thus, interlocutory review at the Commission is more expansive than in the federal courts—the question of law or policy need not be "controlling," but must only be "important." Moreover, this in no way conflicts with my conclusion that the principal purpose of the rule is judicial efficiency—it is self-evident that this purpose derives from the rule's final requirement that "immediate review of the ruling may materially expedite the final disposition of the proceedings." 29 C.F.R. § 2200.73(a)(1). My colleagues next conclude that the issue here is inappropriate for review because it involves a ruling that is "routine" in nature. But the case they cite in support of this conclusion is inapposite—the court did not account for the circumstance presented here: a judge resolving a "routine" issue in a manner that obviously conflicts with binding precedent.

[3] My colleagues express concern that if we were to grant interlocutory review in this case it "would open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation." Their concern is unfounded—the Commission always retains complete discretion under Commission Rule 73(a) to not grant a petition even if it meets the rule's requirements. 29

§ 2200.73(a)(1) (emphasis added). But this conclusion fails to account for the Commission's proper role in making that determination in light of the intent of the original rule—an intent that was preserved in the revised rule. Under the revised rule, the Commission is to consider this question from the standpoint of a Commission judge, i.e., it determines whether "there is substantial ground for difference of opinion" *with the judge's ruling*. Thus, the question is not, as my colleagues suggest, whether there is a "substantial ground for difference of opinion" as a general matter, but is instead whether there is a "substantial ground for difference of opinion" between the judge's ruling and the "appellate judge[s]" that will review it, i.e., the Commission. *See Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. at 624 (explaining that a "substantial ground for difference of opinion" exists where a "reasonable appellate judge could vote for reversal of the challenged order"). Put simply, under Commission Rule 73(a), agreement by the Commission that a judge's ruling was in error weighs in favor of, not against, granting interlocutory review. Because there is no real dispute that the judge erred, a "substantial ground for difference of opinion" clearly exists here.

My reading of the Commission's rule is cemented by the fact that the sole statutory purpose of section 1292(b), the statutory provision on which the rule is based, was to promote judicial efficiency. *See* H.R. REP. NO. 85-1667, at 1 (1958) (the purpose of section 1292(b) is "to expedite the ultimate termination of litigation and thereby save unnecessary expense and delay"); s*ee also Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. at 611 (explaining that "[t]he language chosen by the draftsmen—in particular the requirement that an interlocutory appeal 'materially advance the termination of litigation'—

C.F.R. § 2200.73(a) ("Interlocutory review of a Judge's ruling is discretionary with the Commission."). Moreover, in exercising this discretion, the Commission, like the federal appellate courts, can also consider other factors like the impact that granting review might have on Commission resources and efficiency in light of its existing docket or workload. *See Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 607 (1975) ("Denial of appeal is within the court of appeals' complete discretion—even on such a ground as a congested appellate docket."). Given that the judge's error here—apparent disregard of binding Commission precedent—is rare, granting interlocutory review would neither "open the floodgates to a vast number of appeals" nor pose a resource burden on the Commission. Finally, to the extent my colleagues' concern in this regard reflects a preference for discouraging the filing (and thus Commission review) of petitions for interlocutory review, this case, involving as it does a judge's apparent rejection of binding Commission precedent, would not seem to be the best vehicle for sending that message.

together with the emphasis in the Conference's deliberations on the trial judge's special ability to assess the future course of litigation and, therefore, the efficiency of allowing an immediate appeal, corroborate that the exclusive goal of section 1292(b) was greater judicial efficiency"). It is thus illogical, in my view, for my colleagues to interpret the "substantial ground for difference of opinion" requirement in a way that voids the most basic purpose of the rule. Indeed, the facts of this case demonstrate their error—absent interlocutory review by the Commission, these proceedings will be unnecessarily prolonged and, as a result, government and private resources will be wasted.

Finally, in light of my colleagues' finding that review is not permitted under Commission Rule 73(a), I vote to waive the rule. *See* 29 C.F.R. § 2200.107 ("In special circumstances not contemplated by the provisions of these rules and for good cause shown, the Commission or Judge may, upon application by any party or intervenor or on their own motion . . . waive any rule or make such orders as justice or the administration of the Act requires."). To the extent that my colleagues find Commission Rule 73(a) does not permit or "contemplate" interlocutory review under the extraordinary circumstances presented here—a judge resolving an issue in a manner that obviously conflicts with binding precedent—Commission Rule 107 should be invoked.

Accordingly, I vote to grant the Secretary's petition.

/s/
Cynthia L. Attwood
Commissioner

Dated: February 22, 2018