



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.

TH CONSTRUCTION GROUP,

Respondent.

OSHRC Docket No. 22-0739

REMAND ORDER

Before: ATTWOOD, Chairman and LAIHOW, Commissioner.

BY THE COMMISSION:

On December 12, 2022, Chief Administrative Law Judge Covette Rooney issued an order denying Respondent relief from a final order under Federal Rule of Civil Procedure 60(b) and finding Respondent in default for demonstrating contumacious conduct and a pattern of disregard for the Commission’s proceedings.¹ For the following reasons, we set aside the judge’s order and remand this case for further proceedings consistent with this opinion.

BACKGROUND

On July 26, 2021, the Occupational Safety and Health Administration issued Respondent a four-item serious citation with a total proposed penalty of \$15,214. On June 7, 2022, Respondent’s owner, Thomas Hazard, appearing pro se, filed a handwritten letter with the

¹ Rule 60(b)(1) provides in relevant part: “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; . . . [.]” *See* 29 U.S.C. §661(g) (“Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure.”); Commission Rule 2(b); 29 C.F.R. § 2200.2(b) (applicability of Federal Rules of Civil Procedure to Commission proceedings).

Commission, stating that he was “requesting a late notice of contest.”² In the letter, Hazard claims that the employees engaged in the alleged violative conduct at the cited worksite were employed by another contractor and that after receiving OSHA’s citation, he “immediately contacted the inspector” and sent an email with information about the other contractor. According to Hazard, he was told “not to worry” and to wait for OSHA’s call if more information was needed. He further claims that “they stated this happens all the time” and he “was never told that I still needed to contest the charges.”

After the case was docketed, the Secretary filed a motion for an extension of time to plead or otherwise move and to “allow OSHA sufficient time to attempt to settle this case.” The judge granted the motion on July 28, 2022, stating that pleadings shall be filed on or before September 26, 2022. The Secretary filed a complaint on September 22, 2022, asserting that “jurisdiction was established by section 10(c)” of the Occupational Safety and Health Act.³ On October 25, 2022, the judge issued Respondent an order to show cause for its failure to file an answer, which was due on October 13, 2022. The order gave Respondent until November 8, 2022, to respond and included a return receipt card with a different employer’s name and address.

Having received no response from Respondent to the show cause order, the judge issued her decision on December 12, 2022. The judge, noting only that Respondent had filed its notice of contest almost a year late, concluded that there was “no avenue for relief” under Rule 60(b) because this case arises in the Second Circuit, which has held that the Commission lacks jurisdiction over citations “deemed a final order” under section 10(a) of the Act, 29 U.S.C. § 659(a). *Chao v. Russell P. Le Frois Builders, Inc.*, 291 F.3d 219, 229-30 (2d Cir. 2002) (“[W]e conclude that the Commission may not exercise jurisdiction [over a late-filed notice of contest] based on Rule 60(b)(1).”). While acknowledging that the show cause order’s return receipt card had the wrong address, the judge found that even if Rule 60(b) relief was available, she would “nonetheless dismiss the Late Notice of Contest” as a sanction given Respondent’s failure to return the postcard included with the notice of docketing to the Commission, respond to the Secretary’s

² An employer has fifteen working days from receipt of the citation to notify the Secretary of its intent to contest. 29 U.S.C. § 659(a). A failure to do so results in the citation being “deemed a final order of the Commission” *Id.*

³ Jurisdiction is vested in the Commission once the Secretary receives a timely notice of contest and notifies the Commission accordingly. 29 U.S.C. § 659(c); *see also* Commission Rule 33, 29 C.F.R. § 2200.33 (notification requirements governing notices of contest).

request for consent on the motion for an extension of time, file an answer, and respond to the order to show cause.

In its petition for discretionary review, Respondent, now represented by counsel, repeats the assertions made by Hazard in his letter to the Commission and makes several other claims. According to emails attached to the petition, OSHA and Respondent's counsel engaged in settlement discussions from August through October 2022. Also attached to the petition are the documents Hazard claims he previously shared with OSHA, as well as the order to show cause Respondent received, which is captioned with another employer's name ("L&B Framing, LLC") and an incorrect docket number ("22-1043"). Respondent's counsel claims that he was unable to register with the Commission's e-filing system and that Respondent received neither the Commission's notice of docketing nor the Secretary's complaint. Finally, Respondent alleges that it is entitled to relief under Federal Rule of Civil Procedure 60(b), including under paragraph (b)(3) which the judge did not address,⁴ based on the misrepresentations it claims OSHA made to Hazard that he did not need to worry about the citation and OSHA's failure to return Hazard's phone calls until the Assistant Area Director became involved.

DISCUSSION

The Commission has long held that it has the authority under section 10(a) of the Act, 29 U.S.C. § 659(a), to grant Rule 60(b) relief from a final order. *See Randall Mech., Inc.*, 2020 WL 4514843 at *1 (No. 17-1595, 2020); *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1949 (No. 97-851, 1999); *Jackson Assocs. of Nassau*, 16 BNA OSHC 1261, 1263 (No. 91-0438, 1993). But as the judge noted, the Second Circuit has held that the Commission lacks jurisdiction to grant such relief, and the Commission generally applies the law of the circuit where it is probable a case will be appealed. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000); *Le Frois Builders*, 291 F.3d at 229-30; *see also HRH Constr. Corp.*, 19 BNA OSHC 2042, 2044 (No. 99-1614, 2002) (view of then Commissioner Rogers that where it is highly probable any decision to grant relief under Rule 60(b)(1) would be appealed by the Secretary to the Second

⁴ Rule 60(b)(3) provides in relevant part: "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: (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; . . . [.]"

Circuit, she would apply *LeFrois* and affirm without considering the merits of the parties' arguments).

Contrary to the judge's decision, however, the Second Circuit is not the only relevant circuit here. Respondent (but not the Secretary) could appeal this matter to the D.C. Circuit, which has not addressed whether the Commission has authority to grant Rule 60(b) relief. *See* 29 U.S.C. § 660(a) ("Any person adversely affected or aggrieved by an order of the Commission . . . may obtain . . . review . . . in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit."); 29 U.S.C. § 660(b) ("The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office."); *Burlington Capital PM Grp., Inc. d/b/a Post Woods Apartment Homes*, No. 20-0528, at 3 n.3 (OSHRC 2020) (noting D.C. Circuit has not specifically affirmed the Commission's authority to grant Rule 60(b) relief but has relied on Commission precedent in "assum[ing] Rule 60(b)(1)'s applicability to . . . proceedings [when] neither party contest[ed] it" and affirming the Commission's denial of Rule 60(b) relief (citing *David E. Harvey Builders, Inc. v. Sec'y of Labor*, 724 F. App'x 7, 8 (D.C. Cir. 2018) (unpublished)).⁵

Under these circumstances, the Commission's own precedent should be applied. *Burlington Capital*, No. 20-0528, at 3 n.3 (OSHRC 2020) (applying Commission precedent addressing claims for Rule 60(b) relief where one relevant circuit has affirmed Commission's authority to grant such relief but two other relevant circuits have not specifically ruled on the issue); *Sci. Applications Int'l Corp., d/b/a/ SAIC*, 2020 WL 1941193, at *10 (No. 14-1668, 2020) (applying Commission precedent where one relevant circuit conflicts with Commission precedent and the other has not directly addressed the issue); *Bethlehem Steel Corp.*, 9 BNA OSHC 1346, 1349 n.12 (No. 76-3444, 1981) (consolidated) (applying Commission precedent where relevant circuits were in direct conflict and explaining that "the Commission, as an agency with national

⁵ The D.C. Circuit has permitted Rule 60(b) relief in other administrative proceedings, including those before the Federal Mine Safety and Health Review Commission. *See, e.g., Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1163 (D.C. Cir. 2013) (acknowledging Federal Mine Safety and Health Review Commission's longstanding use of Rule 60(b) to reopen otherwise final orders).

jurisdiction, may find it difficult to apply the law of a single circuit where venue for an appeal would lie in several circuits”). Accordingly, we find that the judge erred by failing to consider whether, under Commission precedent, Respondent has established that it was entitled to Rule 60(b) relief.

We also set aside the judge’s ruling that Respondent exhibited contumacious conduct and a pattern of disregard for the Commission’s proceedings. In making this finding, the judge was apparently unaware of the parties’ settlement efforts or Respondent’s retention of counsel to address the citation. Nonetheless, the judge relied on Respondent’s failure to respond to the show cause order, which by her own admission included a return receipt card that is addressed to an entirely different employer. Likewise, the caption on the order signed by the judge names a different employer and includes the incorrect docket number.⁶ In these circumstances, we find the show cause order failed to provide Respondent with sufficient notice of the need to respond. And given the judge’s acknowledgment of the erroneous return receipt card, issuance of a corrected order would have been appropriate.⁷ In any event, the judge need not revisit this erroneous ruling given the current posture of the case.

On remand, the judge is directed to provide Respondent with an opportunity to present evidence regarding its claims that it attempted in good faith to participate in the Commission’s proceedings, including Hazard’s alleged communications with OSHA following receipt of the citation. Specifically, the judge should determine as an initial matter, whether Respondent, in fact, failed to file a timely notice of contest given Hazard’s assertions that he emailed OSHA “immediately” following receipt of the citation and was unaware that he “still needed to contest” it.⁸ *See, e.g., Bill Jones Repairs & Reroofs, Inc.*, 23 BNA OSHC 1594, 1595 (No. 11-1284, 2011) (construing employer’s letter sent to OSHA requesting an informal conference as a notice of

⁶ The judge appears to have also signed a correctly captioned show cause order, but in light of the incorrectly captioned order attached to Respondent’s petition, it was apparently not sent to Respondent.

⁷ We note that the judge’s reliance on Respondent’s failure to file an answer also appears misplaced given that Respondent would only be required to file an answer if the judge had first determined that it was entitled to relief from a final order under Rule 60(b).

⁸ It is not clear from the record whether the Secretary is even alleging that Respondent failed to file a timely notice of contest. While the complaint notes the notice of contest was not filed until June 7, 2022, it also asserts that “[j]urisdiction of this action is conferred . . . by section 10(c) of the Act.”

contest); *Herasco Contractors, Inc.*, 16 BNA OSHC 1401, 1402 (No. 93-1412, 1993) (“liberally” construing an “abatement letter” as a notice of contest). *But cf. Prime Roofing Corp.*, 22 BNA OSHC 1892, 1897 (No. 07-1409, 2009) (finding employer’s letter to OSHA was not a notice of contest because it simply contained another contractor’s contact information and did not convey a defense to the citation). If the notice of contest was in fact untimely, the judge is directed to then evaluate under Commission precedent whether Respondent has proven that it is entitled to relief under Rule 60(b)(1) or 60(b)(3).

For all these reasons, we set aside the judge’s order and remand this case for further proceedings consistent with this opinion.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: January 24, 2023