United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1215 **September Term, 2017**

FILED ON: MAY 11, 2018

DAVID E. HARVEY BUILDERS, INC., DOING BUSINESS AS HARVEY-CLEARY BUILDERS,
PETITIONER

v.

SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION AND OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION,
RESPONDENTS

On Petition for Review of a Final Order of the
Occupational Safety & Health Review Commission

Before: TATEL, KAVANAUGH and PILLARD, *Circuit Judges*.

JUDGMENT

The court considered this petition for review on the record from the Occupational Safety & Health Review Commission (Commission) and on the briefs filed by the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). We accorded the issues full consideration and determined they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the petition for review be denied.

I.

An Occupational Safety and Health Administration (OSHA) officer on February 14, 2017, inspected a worksite near Atlanta, Georgia, run by Harvey-Cleary Builders (HCB). Joint App'x (J.A.) 5. At the beginning of that inspection, the OSHA officer provided HCB superintendent Alan Essig with a "Company Information Sheet" with spaces for "Manager's Name" and "Main Office Address." J.A. 42, 43. Essig did not enter any name in the "Manager's Name" field and entered a Bethesda, Maryland, HCB address as the company's "Main Office." J.A. 43. As he was wrapping up the site inspection, the OSHA officer told Essig that HCB had violated an OSHA regulation requiring labeling of diesel storage tanks. *See* J.A. 42. OSHA followed up by issuing a citation via certified mail. OSHA sent the citation to the Maryland address Essig had supplied

as the company's "Main Office." J.A. 5, 40. The citation classified the violation as "Other-than-Serious" and imposed no monetary penalty. J.A. 10.

The citation arrived at HCB on March 13, 2017. Pet'r Br. at 4; J.A. 40. Pursuant to Section 10(a) of the Occupational Safety and Health Act (Act), 29 U.S.C. § 659(a), HCB had 15 business days, *i.e.* until April 3, 2017, to contest the violation before it became final. On April 19, 2017—12 business days after the statutory deadline—HCB filed with the Commission a Motion to Reopen, seeking relief from the citation on the ground that HCB missed the deadline due to "excusable neglect" under Federal Rule of Civil Procedure 60(b)(1). *See* J.A. 12-19. An ALJ reviewed and denied that motion. Because the Commission did not grant HCB's petition for discretionary review of the ALJ's decision, it became a final Commission order on August 28, 2017. *See* 29 U.S.C. § 661(j); J.A. 87.

II.

"Relief under Rule 60(b)(1) motions is rare," and its denial is subject to review only for abuse of discretion. *Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006). We assume Rule 60(b)(1)'s applicability to these proceedings because neither party contests it. *But see Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 228-29 (2d Cir. 2002) (holding Rule 60(b)(1) inapplicable to afford relief from a missed deadline for administrative review under the Act, because "[p]roceedings before the Commission never began here. To use Rule 60(b) to *establish* jurisdiction would be to bootstrap jurisdiction into existence."). Under *Pioneer Inv. Servs. v. Brunswick Assocs.*, 507 U.S. 380, 395 (1993), our evaluation whether neglect is "excusable" depends on: (1) the "danger of prejudice" to the opposing party; (2) the "length of the delay" and its "impact on judicial proceedings"; (3) the "reason for the delay, including whether it was within the reasonable control of the movant"; and (4) "whether the movant acted in good faith." *See also Cohen v. Bd. of Trustees*, 819 F.3d 476, 479 (D.C. Cir. 2016). HCB does not contest that standard. It challenges only the application of the factors to its case.

The ALJ correctly articulated the legal standard, J.A. 70, considered the *Pioneer* factors, recognized that some weighed in HCB's favor, J.A. 71-72, but ultimately found as a factual matter that HCB was at least "partly to blame for the delayed filing," J.A. 71. By HCB's own account, an unnamed project assistant in the Maryland office "emailed the citation to the project manager, presumably Essig," but neither the assistant nor Essig forwarded it to corporate headquarters. J.A. 71. The citation thus "did not come to the attention of" HCB's OSHA compliance officer at corporate headquarters "until the time to contest had passed." J.A. 71. The ALJ noted that HCB provided "no explanation why" the citation was not timely forwarded, and in "the absence of any such explanation or evidence," she concluded "the project assistant and Essig were simply negligent." *Id.* To the extent HCB may have had procedures in place for handling OSHA citations, she found that HCB failed to follow them; she further found that HCB failed to show that it had such procedures for offices other than its headquarters. J.A. 71-72.

HCB acknowledges that it missed the deadline "[d]ue to a miscommunication between HCB offices," but contends that the ALJ erred in focusing on whether the delay was within HCB's reasonable control. *See* Pet'r Br. at 2, 11-16. The ALJ's reliance on the delay having been within

HCB's reasonable control was neither legal error nor abuse of discretion. We have before recognized, in the context of an "excusable neglect" inquiry under Federal Rule of Civil Procedure 6(b)(1)(B), that a party's control over the circumstances accounting for the delay may be the "[m]ost important[]" consideration in an excusable neglect inquiry. *Cohen*, 819 F.3d at 480. Neither the law of other circuits nor the Commission's precedent conflicts with that rule. The Third Circuit's conclusion that the reasonable-control factor does not "necessarily" trump the others, *George Harms Constr. Co. v. Chao*, 371 F.3d 156, 164 (3d Cir. 2004), does not suggest it may never do so. The Commission itself has only granted Rule 60(b)(1) motions in cases involving neglect excusable by either external impediments or failure of otherwise-adequate compliance procedures, both of which are absent here. *See Sec'y of Labor v. Evergreen Envtl. Servs.*, 26 BNA OSHC 1982, 1984-85 (No. 16-1295, 2017); *Sec'y of Labor v. Nw. Conduit Corp.*, 18 BNA OSHC 1948, 1950-51 (No. 97-851, 1999) (delay "not due fundamentally . . . to deficient procedures at Northwest for handling important documents"). Where timely response was within the employer's reasonable control, the Commission has denied relief even to petitions filed only one or two days late, *see Sec'y of Labor v. Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185, 2186-87 (No. 01-0830, 2003) (one day late); *see also Sec'y of Labor v. A.W. Ross, Inc.*, 19 BNA OSHC 1147, 1148-49 (No. 99-0945, 2000) (11 days late). The Commission "has consistently denied relief" under Rule 60(b)(1) "to employers whose procedures for handling documents were to blame for untimely filings." *Sec'y of Labor v. NYNEX*, 18 BNA OSHC 1944, 1946-47 (No. 95-1671, 1999) (citation omitted). The ALJ committed no abuse of discretion in following that logic and precedent here. J.A. 71-72.

III.

None of HCB's remaining, notice-based arguments have merit. HCB contends that OSHA's notice was not sufficient under Section 10(a) of the Act, which requires that the Secretary "shall . . . notify the employer by certified mail of the penalty, if any, proposed to be assessed" pursuant to the citation. 29 U.S.C. § 659(a). Commission precedent, consonant with the requirements of due process, has long required that "service [be] reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty." *Sec'y of Labor v. B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1474 (No. 76-2165, 1979); *see also Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314-15 (1950). In this case, the OSHA inspector gave in-person notice of the violation to the HCB worksite superintendent, then sent the citation to the office that HCB's authorized agent listed as the company's "Main Office." Nothing in the record suggests that HCB ever alerted OSHA to the possibility that the company had some other main office or received mail elsewhere. An HCB employee at the "Main Office" in Maryland then received and signed for the citation, which had been sent by certified mail as the Act requires.

HCB does not dispute that the notice was "reasonably calculated" to inform it of the violation, but nonetheless argues that OSHA was legally required to send notice to its corporate headquarters. It invokes *Buckley & Co. v. Sec'y of Labor*, 507 F.2d 78 (3d Cir. 1975), as support. To the extent that *Buckley*'s requirement may differ from the Commission's "reasonably calculated" standard, and assuming we would follow *Buckley*, the notice also suffices under its approach. *Buckley* held notice insufficient where it was sent to a maintenance shop despite OSHA's knowledge of the address of corporate headquarters, and where comments by the

employee in charge of the maintenance shop during the inspection suggested he might "attempt to cover up any derelictions." *Id.* at 79-81. The Third Circuit held that "notification must be given to one who has the authority" to address the violation. *Id.* at 81. "As to this corporate employer"—*i.e.*, Buckley & Co.—that standard required notice to be sent to corporate headquarters. *Id.* In this case, OSHA did not send the citation to a worksite, and had no reason to believe that sending notice to the address that HCB itself had provided as its "Main Office" would fail to notify an HCB agent empowered to address it. We are unpersuaded by HCB's argument that OSHA should have addressed the notice to a specific employee, particularly given that HCB never informed OSHA which of its employees should have received the notice. *See* J.A. 43.

IV.

Because the decision under review comports with Commission precedent and our law, we deny the petition for review.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk