

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 17, 2016 Session

**MR. BULT’S, INC. v. TENNESSEE DEPARTMENT OF LABOR &
WORKFORCE DEVELOPMENT**

**Appeal from the Chancery Court for Davidson County
No. 13-1769-I Ben H. Cantrell, Senior Judge**

No. M2015-01867-COA-R3-CV – Filed October 11, 2016

A long haul waste carrier was cited for violating safety regulations by the Tennessee Department of Labor and Workforce Development, Division of Occupational Safety and Health Administration (the “Division”). The waste carrier informed the Division that it had corrected the alleged violations and received an automated reply that the Division had ceased operations due to the federal government’s suspension of funding. The waste carrier intended to contest the citations but failed to notify the Division of its intent within the statutory twenty-day period. Once the Division was operating again and the waste carrier informed the Division of its intent to contest the citations, the Division responded that the waste carrier had waited too long and that the citations had become final orders by operation of law. The waste carrier filed a petition for judicial review in chancery court, and the trial court remanded the case back to the Division to allow the waste carrier to seek relief pursuant to Rule 60.02(1) of the Tennessee Rules of Civil Procedure. The Division appealed, claiming the chancery court lacked subject matter jurisdiction to consider the petition. We affirm the trial court’s judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed
and Remanded**

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS and W. NEAL MCBRAYER, JJ., joined.

Herbert H. Slatery, III, Attorney General and Reporter; Andrée Blumstein, Solicitor General; and Alexander S. Rieger, Assistant Attorney General, Nashville, Tennessee, for the appellant, Tennessee Department of Labor & Workforce Development.

David Terence Hooper, Brentwood, Tennessee, for the appellee, Mr. Bult’s, Inc.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Bult's, Inc. ("MBI") is a specialized long haul bulk waste carrier. On August 9, 2013, the Division conducted an inspection of MBI's workplace at a transfer station located on the Tullahoma Highway in Estill Springs, Tennessee. Following the inspection, the Division issued a "Citation and Notification of Penalty" to MBI based on three alleged employee safety violations. The Division provided MBI a date by which it was required to correct the alleged violations and informed MBI that the proposed penalties totaled \$11,450.00. The issuance date of the citation was September 27, 2012, and MBI was directed to submit its payment by October 27, 2013, unless it filed a notice of contest. A document titled "Penalty Notice" stated:

To avoid the addition of interest and delinquent fees, payment of this penalty is due in full no later than thirty (30) calendar days from the date you received this Citation and Notification of Penalty unless a notice of contest is filed.

On the page titled "Employer Rights," the Division informed MBI of its contest rights:

You have the right to contest any or all parts of this Citation and/or the penalties before the Tennessee Occupational Safety and Health Review Commission. If you choose to contest, you must submit written notification to the Commissioner of Labor and Workforce Development stating what parts of this Citation and Notification of Penalty you are contesting. Notification **must be received within twenty (20) calendar days of receipt of this Citation and Justification of Penalty.** If you do not contest within the twenty (20) calendar day period, this Citation and Notification of Penalty shall be deemed a final order and not subject to further review by any agency or court (T.C.A. §§ 50-3-307(b) and 50-3-407, and Tennessee Department of Labor and Workforce Development Rules Chapter 0800-01-04).

On October 11, 2013, MBI contacted the Division by electronic mail to report that it had corrected the violations the Division had identified, and MBI received an automatically-generated response from the Division stating that a majority of its services "have ceased operation" due to the "suspension of Federal Government funding." On October 28, 2013, an attorney for MBI contacted a Division administrator by telephone to contest the citation of violations and assessed penalties. The administrator informed MBI's attorney that the contest period had passed because more than twenty days had passed since the citation had been issued to MBI. On October 31, 2013, MBI paid the penalties it was assessed but

informed the Division that it was making the payment “under full protest, and with full reservation of rights of Mr. Bult’s, Inc. to oppose each of these Citations, and further to oppose and object to each of the three proposed Penalties.”

In response to MBI’s counsel’s letter dated October 31, 2013, the Division responded by letter dated November 5, 2013, stating:

Mr. Bult’s did not timely contest the citation and penalty within twenty (20) calendar days of receipt of the Citation and Notification of Penalty. Accordingly, per Tenn. Code Ann. §§ 50-3-307(a)(6) and 50-3-407(b) the citation and penalty became a final order of the Commissioner on October 21, 2013. You may be able to appeal this final order by filing a petition for judicial review per Tenn. Code Ann. § 4-5-322 with the Chancery Court of Davidson County within sixty (60) days of the order becoming final.

MBI then filed a petition for judicial review in chancery court on December 20, 2013, pursuant to Tenn. Code Ann. § 4-5-322. In its petition, MBI argued that the Division had exceeded its authority in issuing the citation because it sought to enforce safety rules on a commercial motor vehicle business that is governed by the Department of Transportation, a federal agency. The Division argued that by failing to appeal in a timely manner, the citation became a final order and MBI lacked standing to petition the chancery court for relief.

The trial court held a hearing on May 19, 2015. Based on the ruling of *Alman Construction Company v. Tennessee Department of Labor*, No. 01-A-019111-CH-00420, 1992 WL 151434 (Tenn. Ct. App. July 2, 1992), the court allowed MBI to request that the matter be remanded back to the Division for the purpose of allowing MBI to seek relief pursuant to Tenn. R. Civ. P. 60. The trial court did not mandate a hearing; instead, it simply permitted the matter to return to the Division to allow it to determine whether MBI is entitled to Rule 60 relief.

The Division appealed the trial court’s judgment remanding the case back to the Division. It argues the chancery court lacked subject matter jurisdiction to review the citations because MBI failed to exhaust its administrative remedies and the citations had become final orders pursuant to Tenn. Code Ann. § 50-3-307(a)(6) and § 50-3-407(b). MBI contends that once it received the automatic response on October 11, 2013, it could not know when the Division would reopen for business, and thus, it was entitled to relief pursuant to Tenn. R. of Civ. P. 60.02(1) for failing to notify the Division of its intent to contest the citations within the twenty-day period set forth in the statutes.

II. ANALYSIS

The standard of review we apply to a party that is aggrieved by an administrative agency's final decision in a contested case is set forth in Tenn. Code Ann. § 4-5-322(h):

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.
- (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

The Division contends this is not a "contested case" because MBI failed to notify it of its intent to contest the citations before the expiration of the twenty-day period. However, because MBI sought to contest the citations, albeit late, we treat the case as contested.

A review of the *Alman Construction* case will explain the reason for the trial court's decision. In *Alman Construction*, the Division of Occupational Safety and Health Administration issued citations to the plaintiff, Alman Construction ("Alman"), alleging violations of employee safety regulations. *Alman Construction*, 1992 WL 151434, at *1. Alman requested an informal conference through its attorney, and after the conference, the Division issued amended citations. *Id.* The Division mailed the amended citations to Alman, but it failed to send the amended citations to Alman's attorney. By the time the Division issued the amended citations, it was aware that Alman was represented by counsel. *Id.* Assuming its attorney had received the amended citations, Alman took no steps to contest them. *Id.* After the amended citations were sent, Alman's attorney sent a letter to the Division stating his understanding that amended citations would be issued and confirming

that the time period for contesting the citations would restart. *Id.* Neither Alman nor its attorney filed a notice of contest within the statutory twenty-day period. Then, a few weeks after the deadline for contesting the notice had passed, the Division notified Alman that the period for contesting the citations had passed and sought payment of the penalties it had assessed. *Id.*

After receiving this letter from the Division, Alman's attorney sent a letter to the Commissioner of Labor to request a hearing to contest liability on the amended citations, explaining why Alman had inadvertently failed to contest the amended citations in a timely manner. *Id.* Alman filed a request for a hearing with the review commission to determine whether it should be allowed to contest the amended citations. *Id.* The Commissioner of Labor denied Alman's request because the notice of intent to contest the citations was not timely filed. *Id.* Alman then filed a petition for judicial review. *Id.* at *2.

The chancery court denied Alman's petition, and Alman appealed the denial to the Court of Appeals. *Id.* On appeal, the Court of Appeals recognized that the amended citations and penalties that were assessed became "final orders by default" when Alman failed to file a notice of intent to contest the amended citations before the twenty-day statutory period passed. *Id.* at *3 (citing Tenn. Code Ann. § 50-3-407, and Tenn. Dep't of Labor R. 0800-1-4-.18). However, the Court also recognized that the Tennessee Rules of Civil Procedure govern hearings before the review commission unless a different rule is adopted by the commission. *Id.* at *4 (citing Tenn. Code Ann. § 50-3-803(g) and Unif. R. of P. for Hearing Contested Cases Before State Admin. Agencies 1360-04-01-.01(3)). The Court then determined that Alman was entitled to seek relief pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure¹ based on its inadvertence or excusable neglect. *Id.* The *Alman* Court wrote:

[T]here is nothing in the record indicating that the review commission has adopted any rule that would preclude the application of Rule 60.02(1). The clear import of Tenn. Code Ann. § 50-3-803, then, is that the review commission was obligated to apply Rule 60.02(1) in considering Alman's request.

Id. The Court then rejected the State's argument that the commission was without jurisdiction to consider a Rule 60.02 motion once the citations became "final orders":

¹Tennessee Rule of Civil Procedure 60.02(1) provides:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect.

We are persuaded that the Tennessee Occupational Safety and Health Review Commission . . . has jurisdiction to consider motions, under Rule 60.02, Tenn. R. Civ. P., to set aside citations and/or penalties which have become “final orders of the commission” by default due to the cited employer’s failure to meet the deadline for filing notice of contest.

Id. at *5.

Based on the reasoning set forth in *Alman Construction*, we affirm the trial court’s judgment remanding MBI’s appeal to the Division to provide the Division an opportunity to determine whether MBI is entitled to relief pursuant to Tenn. R. of Civ. P. 60.02(1).

III. CONCLUSION

The trial court’s judgment is affirmed and the case is remanded back to the Division for further proceedings in accordance with this opinion. Costs of the appeal shall be assessed against the appellant, Tennessee Department of Labor & Workforce Development.

ANDY D. BENNETT, JUDGE