



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.

RICHARD KAPOSY d/b/a TREEMAN
LANDSCAPING, and its successors,

Respondent.

OSHRD Docket No. 10-2333

APPEARANCES:

Michael P. Doyle, Esquire, U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania

For the Complainant

Richard Kaposy, Jr., *pro se*, Aliquippa, Pennsylvania

For the Respondent

ORDER

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

Respondent, appearing *pro se*, has filed a letter asking the Commission to reopen this case, which became a final order on April 7, 2011. For the reasons stated below, we construe Respondent's letter as a motion for relief under Federal Rule of Civil Procedure 60(b)(6) and refer the matter to Administrative Law Judge John H. Schumacher for him to rule on the motion.

BACKGROUND

On October 19, 2010, after investigating a workplace fatality in Bethel Park, Pennsylvania, the Occupational Safety and Health Administration issued Respondent three citations alleging a number of violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, and proposing penalties totaling \$119,700. Richard Kaposy, appearing for the Respondent, timely contested the citations and penalties. On January 5, 2011, after the parties had filed their initial pleadings, the case was assigned to the Commission's Settlement Part, as required by Commission Rule 120(b), 29 C.F.R. § 2200.120(b).¹

Judge Schumacher, who was designated the Settlement Judge for this case, scheduled a mandatory settlement conference with the parties on February 3, 2011, in Pittsburgh, Pennsylvania. *See* Commission Rules 120(b)(2), 120(d), 29 C.F.R. §§ 2200.120(b)(2), 120(d). At some point during that conference, Mr. Kaposy decided to withdraw his notice of contest. According to a letter filed with the judge on February 8, 2011, by Julie Mullaney, a self-described witness for Mr. Kaposy, a "verbal agreement [was] reached through mediation overseen by OSHRC Judge John H. Schumacher on the morning of 2/3/11 [at] the informal conference conducted in . . . Pittsburgh[.]"² In the letter, which accompanied Mr. Kaposy's Withdrawal of Notice of Contest, Ms. Mullaney states that it is her "sincere desire that all parties involved are confident and assured of the deep gratitude and appreciation this agreement brings with it from Mr. Kaposy." On February 11, 2011, the judge issued an order approving the withdrawal of Respondent's notice of contest. The order states that the citations are affirmed and "[t]he total penalty associated with the affirmed Citations amounts to \$119,700." The order was docketed with the Commission's Executive Secretary on March 8, 2011, and became a final order of the Commission on April 7, 2011.

On September 13, 2012, the Commission's Executive Secretary received documents from Mr. Kaposy that included a letter asking "for reconsideration [and] opening this case back up." In the letter, Mr. Kaposy makes the following claims:

¹ Under Rule 120(b), an employer-contested case with an aggregate penalty of over \$100,000 is assigned to mandatory settlement proceedings. 29 C.F.R. § 2200.120(b)(1).

² Ms. Mullaney states in the letter that she and Mr. Kaposy, along with Barbara Dennis, were in attendance at the settlement conference for Respondent. For the Secretary, she identifies Michael Doyle, Robert Szymanski, and a "Mr. Vance" as being in attendance.

I was told by Judge Schumacher that I had 2 choices. Plan (A) which was a trial, Plan (B) was to withdraw my [contest]. He assured me it would go away over a period of time. Meaning the fines against me. I took his word on that. He said not to open or look at any paper work that I got in the mail. I trusted him and took his word as a Federal Judge. Now 18 months have passed and he did nothing of the sort. My OSHA fines are in collections with [the] Department [of] Treasury.

Mr. Kaposy also asserts that the judge's statement to him can be verified by a witness in attendance at the settlement conference.

DISCUSSION

In certain circumstances, relief from a final order may be sought under Federal Rule of Civil Procedure 60(b).³ Because Mr. Kaposy's letter came more than a year after the judge's order became final, relief under reasons (1), (2), and (3) of Rule 60(b) is not available to Respondent. *See* Rule 60(c)(1) (requiring that a motion seeking relief under these three reasons be made "no more than a year after the entry of the judgment or order or the date of the proceeding"). And reasons (4) and (5) do not apply here. But a late filing may be excused under Rule 60(b)(6), "for any other reason that justifies relief[.]" such as when "absence, illness, or a similar disability prevent[s] a party from acting to protect its interests." *Branciforte Builders*, 9 BNA OSHC 2113, 2116-17, 1981 CCH OSHD ¶ 25,591, p. 31,922 (No. 80-1920, 1981). "A party seeking relief under Rule 60(b)(6) must show 'extraordinary circumstances' suggesting that the party is faultless in the delay." *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'Ship*, 507

³ Federal Rule 60 governs "Relief from a Judgment or Order" and subsection (b), as relevant here, states:

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. 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;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

U.S. 380, 393 (1993) (internal citation omitted). “A showing of extraordinary circumstances involves a showing that without relief from the judgment an extreme and unexpected hardship will result.” *Budget Blinds, Inc. v. White*, 536 F.3d 244, 255 (3d Cir. 2008).

The party seeking relief under Rule 60(b) has the burden of demonstrating that it is entitled to relief. *Burrows Paper Co.*, 23 BNA OSHC 1131, 1132, 2009-2012 CCH OSHD ¶ 33,064, p. 54,574 (No. 09-1559, 2010). In this case, Mr. Kaposy is not represented by legal counsel and, based on the current record, appears unaware of how to proceed. Under these circumstances, we construe his letter asking for reconsideration as a formal motion to set aside the final order under Rule 60(b)(6). *See Bywater Sales & Serv., Byco -MCS Div.*, 13 BNA OSHC 1268, 1269, 1986-1987 CCH OSHD ¶ 27,896, p. 36,597 (No. 86-1214, 1987) (treating *pro se* employer’s unsworn letter as a request for a formal motion). And because none of the representations made in Mr. Kaposy’s letter, the other materials he has submitted with that letter, and Ms. Mullaney’s letter, can be accepted as fact, we refer this matter to Judge Schumacher for him to rule on the motion. *See Dore & Assocs. Contr. Inc.*, 19 BNA OSHC 1438, 1439, 2001 CCH OSHD ¶ 32,369, p. 49,698 (No. 01-0067, 2001) (remanding to allow judge to conduct appropriate evidentiary proceeding).

The judge shall (1) provide the Secretary with an opportunity to respond to Mr. Kaposy’s letter; (2) take evidence in the form of sworn affidavits from all those persons who attended the February 3, 2011, settlement conference; and (3) determine upon consideration of these affidavits, his own recollection of the settlement conference, and any other evidence as he deems necessary, whether Mr. Kaposy is entitled to relief under Federal Rule 60(b)(6).⁴ If the judge determines that Mr. Kaposy is entitled to relief, he shall grant such relief and submit the case to the Chief Judge for further appropriate action. *See* Commission Rule 120(f)(2), 29 C.F.R. § 2200.120(f)(2). If the judge determines that Mr. Kaposy is not entitled to relief, he shall issue

⁴ Under the Commission’s rules governing Settlement Part, “[a]ll statements made and all information presented during the course of settlement proceedings under this section shall be regarded as confidential and shall not be divulged outside of these proceedings except with the consent of the parties.” Commission Rule 120(d)(3), 29 C.F.R. § 2200.120(d)(3). Likewise, the Settlement Judge is prohibited from “divulg[ing] any statements or information presented during private negotiations with a party or his representative during settlement proceedings except with the consent of that party.” *Id.* In considering Mr. Kaposy’s motion, we authorize the judge to waive the requirements of the Settlement Part Rules where necessary to address the narrow question presented here. *See* Commission Rule 107, 29 C.F.R. § 2200.107 (permitting waiver of rules in special circumstances after notice to parties).

an order setting forth the reasons for his ruling and submit it to the Executive Secretary. At that time, Mr. Kaposy may file a petition for discretionary review of the judge's ruling. *See* Commission Rule 91(b), 29 C.F.R. § 2200.91(b).

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: March 6, 2014