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.	OSHRC 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

DECISION

Before: ATTWOOD, Chairman; MACDOUGALL, Commissioner.

BY THE COMMISSION:

In an order issued on April 22, 2016, Administrative Law Judge John H. Schumacher was directed to submit an affidavit to the Commission addressing specific assertions made by Richard Kaposy, who has appeared pro se for Respondent throughout this matter. Mr. Kaposy's assertions related to statements purportedly made by the judge during a mandatory settlement conference. As stated in the Commission's order, the affidavit would "provide the Commission with the facts necessary to review the judge's determination[,]" following a remand from the U.S. Court of Appeals for the Third Circuit, that Respondent was not entitled to relief from a final order under Federal Rule of Civil Procedure 60(b)(6). *Richard Kaposy d/b/a Treeman Landscaping,* Decision and Order on Remand, No. 10-2333, December 14, 2015.

The judge submitted an affidavit to the Commission on May 16, 2016. Upon consideration of the information contained in the affidavit, we see no basis to disturb the judge's

determination denying Mr. Kaposy's claim for relief.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Heather L. MacDougall
Commissioner

Dated: June 16, 2016

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Complainant, v. RICHARD KAPOSY d/b/a TREEMAN LANDSCAPING, Respondent.	OSHRC No. 10-2333 Inspection No. 314108036

DECISION AND ORDER ON REMAND

This case is on remand from the United States Court of Appeals for the Third Circuit. *Secretary of Labor v. Kaposy*, 607 Fed. Appx. 230 (3d Cir. 2015). That Court directed the undersigned to determine whether the Respondent, Richard Kaposy d/b/a Treeman Landscaping, has presented "extraordinary circumstances" entitling him to relief from a Commission order that became final over four years ago. *See* Fed. R. Civ. P. 60(b)(6).

As discussed below, the a review of the entire record supports the finding that the Respondent, Richard Kaposy d/b/a Treeman Landscaping, has failed to present sufficient evidence of "extraordinary circumstances" entitling him to relief from an Order of the Occupational Safety and Health Review Commission.

I. Background

In October 2010, OSHA issued to Richard Kaposy d/b/a Treeman Landscaping, a Citation and Notification of Penalty, ("Citation") in which it alleged that Respondent committed two "willful" and five "serious" violations of OSHA standards at a worksite where his

employees were engaged in a tree removal project. The Citation followed OSHA's investigation of an April 20, 2010 accident in which one of Kaposy's employees (who was also his cousin), Eric Arnold, was electrocuted when a tree branch he was cutting contacted an overhead power line. The proposed penalties totaled $119,700.00.

Mr. Kaposy, proceeding *pro se*, contested the Citation and filed an Answer to the Secretary's Complaint. As an affirmative defense, Mr. Kaposy alleged that Mr. Arnold "was impaired at the time of the incident on or about April 20, 2010, and that his impairment was the cause of the accident that resulted in his death."

The case was assigned to the mandatory settlement calendar. On February 3, 2011, the undersigned presided over a settlement conference in Pittsburgh, Pennsylvania. Mr. Kaposy was accompanied by his mother and a female friend. Representatives for the Secretary of Labor were also present. On February 8, 2011, following the settlement conference, Mr. Kaposy filed a withdrawal of his Notice of Contest. The undersigned issued an Order Approving Withdrawal of Notice of Contest on February 11, 2011. That order stated, in relevant part, that the citation was being affirmed, and that "[t]he total penalty associated with the affirmed Citation amounts to $119,700.00." The undersigned's Order became a final Commission Order on April 7, 2011.

Sixteen months later, on August 10, 2012, Eric Arnold's estate filed a civil action against Mr. Kaposy, *et al.,* in the Court of Common Pleas of Allegheny County, Pennsylvania. The complaint alleged, *inter alia*, that Mr. Kaposy's negligence was a proximate cause of Eric Arnold's death, and demanded damages from him and the other defendants. In response, Mr. Kaposy wrote a letter to the Court of Common Pleas dated August 16, 2012, in which he stated: "I am representing myself in this case. [Redacted]

On September 13, 2012— a full 17 months after the undersigned's Order became final, but only a month after the state civil action was filed—Mr. Kaposy sent a letter to the Commission's Executive Secretary, asking that the OSHA contest be re-opened. In that letter, Kaposy claimed that the undersigned had promised during the settlement conference that if he withdrew his Notice of Contest, he would not have to pay any penalties. Mr. Kaposy did not serve this letter upon the Secretary; consequently, counsel for the Secretary was not aware that Mr. Kaposy had asked the Commission to reopen his contested case. Nor did Mr. Kaposy reveal the existence of the civil actions to the Commission or to counsel for the Secretary.

For the next 16 months, the Executive Secretary did not act upon Mr. Kaposy's September 2012 letter. Nor, as far as the Secretary is aware, did Mr. Kaposy ever inquire as to the status of the letter. Then, on January 28, 2014, the Executive Secretary informed Mr. Kaposy that the September 2012 letter was being construed by the Commission as a motion to reopen the case. The letter also requested that Kaposy "inform the Commission if you have served the Secretary of Labor a copy of your letter," as required under Commission Rule 7, 29 C.F.R. § 2200.7. Mr. Kaposy sent a copy of his September 2012 letter to counsel for the Secretary by facsimile on February 14, 2014. That was the first time that counsel for the Secretary received the letter.

By order dated March 6, 2014, the Commission announced that it was treating Mr. Kaposy's September 2012 letter as a motion for relief from judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure. The Commission remanded the matter to the undersigned to develop an evidentiary record and to determine whether Mr. Kaposy was entitled to relief under Rule 60(b)(6). In doing so, the Commission specifically noted that Mr. Kaposy was not entitled

to relief under Rule 60(b)(1) because he had not submitted his motion within the time limit to bring such motions.[1]

On remand, the undersigned directed the parties to submit affidavits from the participants at the mandatory settlement conference regarding their recollections of that conference. In his affidavit, Mr. Kaposy stated that, during the settlement conference, the undersigned had promised him that the penalties would "go away" if he withdrew his notice of contest, and that he withdrew his notice of contest based on the undersigned's representation. [Redacted]

On May 6, 2014, the undersigned issued a Decision on Evidentiary Review, in which I granted Mr. Kaposy's motion and vacated the withdrawal of the notice of contest. The undersigned stated that the basis for relief was "mistake"; specifically, "Respondent was mistaken as to the ultimate consequences of his *Withdrawal of Notice of Contest* dated February 8, 2011." The undersigned found that Mr. Kaposy's decision to withdraw his notice of contest was influenced by grief at the death of his cousin (Mr. Arnold) and his lack of legal counsel. The undersigned recommended that the case proceed to a hearing *de novo* before a different ALJ.

The Secretary unsuccessfully sought interlocutory review by the Commission, and then filed a petition for review with the U.S. Court of Appeals for the Third Circuit. On July 20, 2015, the Third Circuit vacated the undersigned's decision and remanded it for further proceedings. *Secretary of Labor v. Kaposy*, 607 Fed. Appx. 230 (3d Cir. 2015). That Court held that the undersigned 's reliance on "mistake" as a ground for relief was error, because mistake is

---

[1]. Fed. R. Civ. P. 60(b)(1) allows for relief from a final judgment based upon "mistake; inadvertence; surprise; or excusable neglect[.]" Motions for relief under that provision must be brought within one year after the final judgment was entered. *See* Fed. R. Civ. P. 60(c)(1).

an enumerated ground under Rule 60(b)(1), and Mr. Kaposy was not entitled to relief under Rule 60(b)(1) per the Commission's March 6, 2014 order. That Court thus remanded for the Commission to consider whether Mr. Kaposy was entitled to relief under the equitable factors that govern relief pursuant to Rule 60(b)(6). By order dated September 24, 2015, the Commission remanded the case to the undersigned for further proceedings consistent with the Third Circuit's decision.

By an Order dated October 7, 2015, the undersigned directed each party to submit briefs within 45 days. Counsel for the Secretary timely submitted a lengthy brief with attachments. Respondent, acting *pro se,* submitted a one-page handwritten letter containing six sentences. His letter is appended hereto as Exhibit 1.

II. Argument

In the Decision on Evidentiary Review, the undersigned determined that Mr. Kaposy was entitled to relief from the April 7, 2011, final Commission order because he was "mistaken as to the ultimate consequences" of his decision to withdraw his notice of contest, and that his mistake stemmed from the grief he had experienced as a result of his cousin's death, coupled with his *pro se* status. However, because relief on the basis of mistake is foreclosed by the Third Circuit's decision, the undersigned may not rely on those same grounds to grant relief under Rule 60(b)(6). That is because Rules 60(b)(1) and 60(b)(6) are mutually exclusive. *Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 393 (1993); *Stradley v. Cortez*, 518 F.2d 488, 493–94 (3d Cir. 1975).

In his one-page responsive pleading, Respondent made no relevant legal or factual arguments. He did, however, opine on several matters in his personal life.

The Secretary makes the following arguments.

A. *Mr. Kaposy's pro se status is not grounds for relief under Rule 60(b)(6).*

A party seeking relief under Rule 60(b)(6) must show "extraordinary circumstances," and "extraordinary circumstances rarely exist when a party seeks relief from a judgment that resulted from the party's deliberate choices." *Budget Blinds, Inc. v. White*, 536 F.2d 244, 255 (3d Cir. 2008); *see also Ackermann v. United States*, 340 U.S. 193, 212 (1950) ("free, calculated, deliberate choices are not to be relieved from"). The Secretary has opined that Mr. Kaposy made a deliberate choice to withdraw his notice of contest. Mr. Kaposy has not claimed, let alone established, that any grief he may have suffered deprived him of the ability to make deliberate choices. And his decision to attend the settlement conference with a friend and his mother, rather than with an attorney, does not justify relief. These facts militate in favor of concluding that Mr. Kaposy's motion should be denied.

B. *Mr. Kaposy's grief resulting from his cousin's death is not a ground for relief under Rule 60(b)(6).*

Regarding whether Mr. Kaposy's grief from his cousin's death justified relief under Rule 60(b)(6), the Secretary observed that Mr. Kaposy did not assert his grief in his motion or at any other time in this matter. That is problematic, because it deprived the Secretary of an opportunity to introduce evidence on the question, and it had the effect of relieving Mr. Kaposy of his burden of proof: "To justify relief under subsection (6), *a party* must show 'extraordinary circumstances' suggesting that the party is faultless in the delay." *Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 393 (1993) (emphasis added).

The Secretary avers that he is aware of no cases, moreover, which support the proposition that a party's grief can be a basis for relief under Rule 60(b)(6). A few cases suggest that a mental or physical condition may justify relief when the movant can show that the condition

impaired his ability to understand the consequences of his own decisions. *See*, *e.g.*, *Barrs v. Sullivan*, 906 F.2d 120, 122 (5th Cir. 1990) (denying Rule 60(b)(6) relief where movant "filed no medical documentation to support his argument that his mental condition was so deficient as to excuse him from complying" with limitations period applicable to his suit); *New Jersey Bldg. Constr. Laborers' Dist. Council v. Robert DeForest Demolition Co.*, 2012 WL 5304700 at *2 (D.N.J. 2012) (widow's grief at husband's death was not ground for relief under Rule 60(b) to vacate arbitration decision); *Aghassi v. Holden & Co., Inc.*, 92 F.R.D. 98, 100 (D. Mass. 1981) (denying Rule 60(b)(6) relief where the "[p]laintiff has not alleged much less proven, that his mental state prevented him from physically appearing in court, or that his mental distress was so severe as to cause him to fail to appreciate the consequences of his own conduct").

The Secretary's position is that Mr. Kaposy never claimed, let alone proved, that his grief prevented him from fully participating in the mandatory settlement conference and making decisions regarding litigation strategy. In fact, as Mr. Kaposy stated in his affidavit, during the mandatory settlement conference [Redacted]

Second, Mr. Kaposy was clear-thinking enough to pursue the same defense – unpreventable employee misconduct – that almost every employer raises during Commission settlement conferences. In other words, his thought process was entirely rational. Absent a showing that Mr. Kaposy was actually impaired in his decision-making capacity, any grief he suffered is not a ground warranting relief under Rule 60(b)(6).

C. *Mr. Kaposy's strategic decision to withdraw his notice of contest did not constitute "extraordinary circumstances," and therefore is not a ground for relief under Rule 60(b)(6).*

The Secretary asserts that Mr. Kaposy's decision to represent himself in this matter is not

an "extraordinary circumstance" that should relieve him from the consequences of his own strategic decision to withdraw his notice of contest. *See Provident Sav. Bank v. Popovich*, 71 F.3d 696, 700 (7th Cir. 1995) ("If Popovich's pro se status does not protect him from operation of the ordinary rules of waiver, it certainly does not rise to the level of an extraordinary circumstance entitling him to relief under Rule 60(b)(6)"). Mr. Kaposy chose to enter a highly hazardous industry and to employ persons in an effort to make that endeavor profitable. In doing so, he accepted the responsibility of complying with the OSH Act and the standards promulgated thereunder. An employee was killed as a result of Mr. Kaposy's business activities. Mr. Kaposy could have hired an attorney or other experienced representative to advise him at the settlement conference. *See* 29 C.F.R. § 2200.22(a). He chose to bring a friend and his mother instead. Who Mr. Kaposy looks to for advice is his own affair, but he and only he should bear the consequences of that choice.

The Secretary believes that a grant of Rule 60(b)(6) relief based upon Mr. Kaposy's *pro se* status would also undermine the Commission's mandatory settlement conference program. *See* 29 C.F.R. § 2200.120(b). Such conferences require all participants to make a significant investment of resources and to participate in good faith to reach a fair resolution of the matter under consideration. If an employer can reach an agreement during a mandatory settlement conference and then rely on his *pro se* status to upset that agreement many months later, then the Secretary will have to carefully weigh that risk when participating in mandatory settlement conferences with *pro se* employers. Instead of placing that additional cost on the mandatory settlement conference program, the Commission should insist that bargains struck at settlement conferences be adhered to, whether an employer chooses to be represented or not. *Cf. United States v. Bank of New York*, 14 F.3d 756, 760 (2d Cir. 1994) ("A failure to properly estimate the

loss or gain from entering a settlement agreement is not an extraordinary circumstance that justifies relief under Rule 60(b)(6).").

D. Mr. Kaposy did not file his motion within a reasonable period of time.

Rule 60(b) relief cannot be granted unless the motion was brought within a reasonable time. *See Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 863 (1988). The moving party bears the burden of establishing that he acted within a reasonable time. *See Kontoulas v. A.H. Robins Co.*, 745 F.2d 312, 316 (4th Cir. 1984). Mr. Kaposy has not met that burden here. Mr. Kaposy sought relief from the Commission's order about 16 months after that order became final. He has not yet explained the delay, and any grief he might have suffered during the settlement conference does not explain it either. Thus, Mr. Kaposy cannot meet his burden of proving that the delay was reasonable.

The Secretary concludes that Mr. Kaposy's timing is also questionable because his motion for relief came less than a month after Eric Arnold's estate brought suit against him in the Court of Common Pleas. An affirmed OSHA citation might have adversely affected his defense in that lawsuit, so the filing of the suit gave Mr. Kaposy a further incentive to undo the final Commission order. *See Rolick v. Collins Pine Co.*, 975 F.2d 1009, 1014–15 (3d Cir. 1992) (under Pennsylvania law, OSHA standards may be evidence of standard of care in negligence suit); *cf. Moore v. Allied Chem. Corp.*, 480 F.Supp. 377, 383 (E.D. Va. 1979) (applying Virginia law, court holds that litigant was collaterally estopped from re-litigating issues that were resolved against him in OSHA proceeding). It is unknown whether Mr. Kaposy was aware of that fact, or whether it influenced his decision to seek relief from the Commission. At the very least, however, Mr. Kaposy should have made the Commission and the Secretary aware of the state court lawsuit, which would have allowed them to explore whether it had any impact on his

decision to seek Rule 60(b) relief. Rule 60(b)(6) is grounded in equity. *See Cox v. Horn*, 757 F.3d 113, 124 (3d Cir. 2014). A party seeking equity must do equity. *See Freck v. IRS*, 37 F.3d 986, 996 (3d Cir. 1994). Mr. Kaposy's failure to disclose the state court lawsuit is an additional reason why he is not entitled to equitable relief.

III. Conclusion

The final order in this case is now over four years old. Neither the grounds that Mr. Kaposy raised in his motion, nor the reasons for the delay in resolving that motion, can be attributed to the Secretary.

The Secretary's pleading has sufficiently articulated evidence and arguments, which logically support the inescapable conclusion that Respondent is not entitled, as a matter of law, to the relief sought. The Secretary's articulated evidence clearly establishes:

A. That Mr. Kaposy's *pro se* status did not constitute "extraordinary circumstances," and therefore is not a ground for relief under Rule 60(b)(6).
B. That Mr. Kaposy's grief resulting from his cousin's death is not a ground for relief under Rule 60(b)(6).
C. That Mr. Kaposy's strategic decision to withdraw his notice of contest did not constitute "extraordinary circumstances," and therefore is not a ground for relief under Rule 60(b)(6).
D. That Mr. Kaposy did not file his motion within a reasonable period of time. "To justify relief under subsection (6), a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay." *Pioneer Inv. Servs. Co., supra.*

The Court has thoroughly reviewed the record before it, including the Secretary's Motion and all the exhibits attached thereto, as well as Respondent's responsive pleading.

The Court finds that Respondent's arguments and responsive pleading were less than persuasive, and that the record demonstrates that Respondent has failed to sufficiently carry his burden of persuasion as to the existence of extraordinary circumstances, or any other grounds.

Respondent's Motion is DENIED.

The Court finds that the cited case law, arguments and evidence adduced thus far in the record demonstrate that the Secretary has sufficiently carried his burden of persuasion.

The Secretary's Motion is GRANTED.

SO ORDERED

/s/
HON. JOHN H. SCHUMACHER
Administrative Law Judge

Date: December 14, 2015

Denver, Colorado

[Redacted]

Exhibit 1