



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

REMAND ORDER

Before: ATTWOOD, Acting Chairman; MACDOUGALL, Commissioner.

BY THE COMMISSION:

This case is before the Commission on remand from the United States Court of Appeals for the Third Circuit. *Secretary of Labor v. Kaposy*, 607 F.App'x 230, 25 BNA OSHC 1469 (3d Cir. 2015). On appeal, the court reviewed Administrative Law Judge John H. Schumacher's Decision granting Respondent relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6).¹ In an opinion dated July 20, 2015, the court vacated the judge's decision.

By mandate issued September 10, 2015, the court has remanded the case to the Commission. We, in turn, remand this case to the Chief Judge so that she may reassign the matter from Judge Phillips to Judge Schumacher for further proceedings in accordance with the court's opinion.

SO ORDERED.

/s/

Cynthia L. Attwood
Acting Chairman

/s/

Heather L. MacDougall
Commissioner

Dated: September 24, 2015

¹ Subsequent to the issuance of Judge Schumacher's decision, the case was reassigned to Administrative Law Judge Dennis L. Phillips for a hearing on the merits. *See* 29 C.F.R. § 2200.120(f)(2) (reassignment of case from settlement judge to different judge). The Secretary filed a Petition to Stay Proceedings Pending Judicial Review and Judge Phillips granted the stay "until the Court of Appeals adjudicates the Secretary's petition[.]"

**UNITED STATES OF AMERICA
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LANDSCAPING and its successors,)	OSHRC Docket No. 10-2333
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DECISION ON EVIDENTIARY REVIEW

I. BACKGROUND

On March 6, 2014, the Occupational Safety and Health Review Commission (Hereafter, the “Commission” or “OSHRC”) issued an Order concerning the above-styled case. The Order related that on September 13, 2012, the Commission’s Executive Secretary received documents from Mr. Richard Kaposy that, *inter alia*, included a letter asking for “reconsideration [and] opening this case back up.” In his letter, Mr. Kaposy makes the following claims:

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 that 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 paperwork 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 now in collections with [the] Department [of the] Treasury.

Mr. Kaposy also asserted that the judge’s statement to him could be verified by a witness in attendance at the settlement conference. In addition to his letter, Respondent also included a Compact Disc (hereafter, “CD-1”). This CD consisted of religious sermon conducted by a female pastor/evangelist, lasting for approximately 60 minutes. I listened to CD-1 in its entirety,

but found the content unhelpful, irrelevant and not germane to the issues before me. Therefore, as the finder of fact, I determined that CD-1 will be afforded no weight.

II. DISCUSSION

The Commission's Order also related that the Commission considered Respondent's letter as a motion for relief under Federal Rule of Civil Procedure 60(b)(6). On pp. 3-4 of its Order, the Commission has exhaustively discussed Rule 60 and all its subparts. Given the thoroughness of this discussion, the Court finds no need to reiterate the Commission's detailed analysis here. Succinctly, the Commission concluded that:

- a. Rule 60(b), subparts (1) through (5) are not available to this Respondent;
- b. Respondent bears the burden of persuasion that there are "extraordinary circumstances showing that Respondent is faultless in the delay;"
- c. The party seeking relief under Rule 60(b) has the burden of demonstrating that it is entitled to relief.

III. DIRECTIONS TO THE PARTIES

By an Order date March 13, 2014, the Court directed all parties to comply as follows:

1. All parties who were present at the original Mandatory Settlement Conference (hereafter, "MSC") in Pittsburgh, PA, on February 3, 2011, were directed to file, by close of business on April 18, 2014, sworn affidavits attesting to their personal recollection of the events that occurred at this MSC. By "all parties," this included Richard Kaposy, Barbara Dennis, Julie Mullaney,² Michael Doyle, Esq., Vance Delsignore and Robert Szymanski.³
2. In addition to the Order to the Parties in paragraph 1 immediately above, the Secretary's representative was permitted leave to file with this Court, by close of business on April 30, 2014, a Brief articulating the Secretary's position in this matter. This Brief was to include all matters that the Solicitor deemed germane. In addition, the Solicitor was free to provide any legal citations bearing on the matter of Rule 60(b) relief under the facts of this case.
3. In addition to the Order to the Parties in paragraph 1 immediately above, Richard Kaposy was to specifically include in his sworn affidavit, detailed factual and legal references

² As the Court had no addresses for Ms. Mullaney or Ms. Dennis, two additional copies of this Order were sent to Mr. Kaposy. The Court directed Mr. Kaposy to timely forward a copy of the Order to Ms. Mullaney and Ms. Dennis.

³ The Court understood that Mr. Szymanski had retired from federal service. The Solicitor was requested to locate Mr. Szymanski and determine whether he consented to provide an affidavit.

that supported his burden of persuasion under Rule 60(b)(6) to prove “any other reason that justifies relief.” His affidavit was to include, but not be limited to, his recollection of all the events that occurred at the MSC, his experience with the Pittsburgh Area Office during any informal settlement discussions, any contact with the OSHA Area Office after the MSC was concluded, and any other matters that he deemed germane. Additionally, in his sworn affidavit Mr. Kaposy was to certify that he had forwarded copies of the Order to Ms. Dennis and Ms. Mullaney. Mr. Kaposy was also state whether there was any relationship of any nature between himself and Ms. Mullaney or Ms. Dennis, including but not limited to employment, business partnership, marriage, blood, familial, in-law, significant other, etc.

4. In addition to the Order to the Parties in paragraph 1 immediately above, the affidavits of Ms. Mullaney and Ms. Dennis were to include, but not be limited to, their recollections of all the events that occurred at the MSC, their recollections of any experience with the Pittsburgh Area Office during any informal settlement discussions, any contact with the Pittsburgh Area Office after the MSC was concluded, and any other matters they may have deemed germane. Additionally, Ms. Mullaney and Ms. Dennis were, in their sworn affidavits, to state whether there was any relationship of any nature between themselves and Mr. Kaposy, including but not limited to employment, business partnership, marriage, blood, familial, in-law, significant other, etc.

IV. RESPONSES FROM THE PARTIES

A. Responses from Respondent

1. On March 26, 2014, this office received a written response from Richard Kaposy in the form of a one-page typed letter, dated March 24, 2014. However, header portion of this letter contained a handwritten three line sentence, dated March 25, 2014. Additionally, this letter had four pages attached:
 - A. A email dated March 24, 2014 titled *God Is at Work*;
 - B. A one-page advertisement for *Country Boyz Cuttin' City Trees, showing Rick Kaposy--Owner/Operator*;
 - C. A one-page advertisement for *The All New Country Boyz Cuttin' City Treez* (sic) advising “Get ‘Er Down—Get ‘Er Done;”
 - D. An undated photograph from a newspaper known as the *Observer-Reporter* (presumably published in the area of Washington, PA). The caption on this photograph says: “*Rich Kaposy, owner of Country Boys (sic) Cutting City Trees, goes out on a limb to secure a branch before cutting it Saturday. Wayne Blumling Crane Service assisted with the removal. The large maple tree is in the yard of Don and Joan Amon on Allison Avenue in Washington.*”
2. Affidavit of Richard Kaposy dated April 10, 2014. (With attachments).

3. Affidavit of Barbara Dennis (Mother of Richard Kaposy), dated April 10, 2014.

4. It should be noted that Ms. Mullaney failed to supply an affidavit.

B. Responses from Complainant

1. Affidavit from Robert Szymanski; former Pittsburgh Area Director.

2. Affidavit of Vance Delsignore, Compliance Safety & Health Officer (Pittsburgh).

3. The Solicitor filed his Brief on May 2, 2014. The Brief contained the Secretary's arguments as to these salient points:

a. Mr. Kaposy's Rule 60(b)(6) motion should be denied.

b. Mr. Kaposy did not make his motion within a reasonable time; i.e., within one year.

c. Mr. Kaposy demonstrated a lack of diligence in perfecting his appeal.

d. Granting Mr. Kaposy's motion would frustrate the purposes of the OSH Act.

V. DISCUSSION

This Court has carefully considered the entirety of the written record, especially the well-drafted Solicitor's brief and the recently filed affidavits of those who participated in the Mandatory Settlement Conference. In addition, I have relied upon my personal recollections of the events that transpired that day.

On balance, and considering the rights of all parties hereto, this Court concludes that the Respondent has carried his burden of showing, by preponderance of the evidence, the grounds necessary for the Court establish "mistake" as the basis of relief. The requested relief is therefore justified under Federal Rule of Civil Procedure 60(b)(6). Respondent has established that he is entitled to relief from the "...final judgment, order, or proceeding" surrounding the Mandatory Settlement Conference that took place February 3, 2011, in Pittsburgh, PA. The basis for this conclusion is that of "mistake" on Respondent's part.

I am convinced that at the time of the Mandatory Settlement Conference, this *pro se* Respondent was mistaken as to the ultimate consequences of his *Withdrawal of Notice of Contest* dated February 8, 2011. I personally observed his demeanor at arm's length during the Mandatory Settlement Conference, both during the general session with all parties present, as well as in the private caucus with Respondent, Ms. Dennis and Ms. Mullaney present. My recollection is that he appeared to be consumed with remorse at the electrocution death of his cousin and that he was also somewhat aloof in affect. On one occasion Mr. Kaposy made a comment [redacted]. Upon reflection, I am convinced that his grief, coupled with the lack of legal counsel, contributed to Respondent's decision to withdraw his Notice of Contest.

The interests of justice require that in accordance with Federal Rule of Civil Procedure 60(b)(6), Respondent be relieved from the "...*final judgment, order, or proceeding*"

surrounding the Mandatory Settlement Conference, and further that he be afforded a *de novo* opportunity to contest the Citations and Items at a hearing before a different Judge.

Good cause having been established, it is Ordered the Respondent's *Withdrawal of Notice of Contest* dated February 8, 2011, is hereby vacated. Further, it is my recommendation that this case should be set for a hearing before a different Judge.

THEREFORE, this case will be returned to the Office of the Chief Administrative Law Judge for further processing as she may deem appropriate.

SO ORDERED.

/s/
Honorable John H. Schumacher
U.S. OSHRC Judge

Date: May 6, 2014
Denver, CO