SECRETARY OF LABOR, Complainant, v. B. A. WARD, INC., Respondent.	OSHRC Docket No. 98-1651

DECISION

Before: ROGERS, Chairman; and VISSCHER, Commissioner.

BY THE COMMISSION:

At issue before us is whether B. A. Ward, Inc. ("Ward") should be granted relief from an order issued by Chief Administrative Law Judge Irving Sommer that dismissed its notice of contest on the grounds that it had failed to file initially an answer to the Secretary's complaint and subsequently a response to the judge's show cause order. Because no Commissioner directed review of the judge's dismissal order within thirty days of its docketing with the Commission, that order became the final order of the Commission pursuant to section 12(j) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 661(j). For the reasons stated below, in particular, because of the failure of Ward or Ward's representative to receive the show cause order, we conclude that relief from this final order can and should be granted, but only conditionally, under Fed. R. Civ. P. 60(b)(1). We therefore remand this case to the judge with instructions to reinstate Ward's notice of contest if and when Ward satisfies the conditions that we set forth herein.

Background

As a result of an inspection of a workplace in Pataskala, Ohio, where Ward was engaged in construction (apparently as a general contractor on a multi-employer worksite), the Occupational Safety and Health Administration ("OSHA") issued a citation to Ward alleging serious violations of five OSHA construction standards and proposing penalties that totaled $4050. This citation was sent to Ward at its principal place of business in Washington, Illinois, and it was timely contested.[1] The notice of contest was filed on Ward's behalf by a non-lawyer employer representative, Linda Radcliff of LRR and Associates. After stating that Ward was contesting all five of the alleged violations and proposed penalties, Radcliff requested that "all information" in the case be sent both to her, at a post office box in Buckeye Lake, Ohio, and to Ward at its Washington, Illinois office.

When the Secretary filed first a motion for extension of time to file her complaint and later the complaint itself, she complied with Radcliff's request by serving copies of the documents on Ward at both of the listed addresses.[2] The Commission's Executive Secretary and Chief Judge Sommer, however, served the Commission's various notices and orders in this case on Ward by mailing only a single copy of each document, addressed to Ward's designated representative, Linda Radcliff.[3] According to the sworn affidavit of corporate

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[1]Under sections 11(a) and (b) of the Act, 29 U.S.C. §§ 660(a) & (b), the Commission's final order in this case will be appealable to either the Sixth Circuit, where the inspected workplace was located, or the Seventh Circuit, where Ward maintains its principal place of business. (Ward has the additional option, under section 11(a), of appealing the final order to the D.C. Circuit). We therefore look primarily to the case law of the Sixth and Seventh Circuits in deciding whether relief under Federal Rule 60 is warranted. *See Jackson Assocs. of Nassau*, 16 BNA OSHC 1261, 1993-95 CCH OSHD ¶ 30,140 (No. 91-0438, 1993) (Rule 60(b) issues in case appealable to the Second Circuit decided in accordance with Second Circuit precedent).

[2]Ward accordingly acknowledges receiving these two documents, but no others, prior to the date when the judge's dismissal order became the final order of the Commission.

[3]The Commission's Rules of Procedure provide, at Rule 7(b), 29 C.F.R. § 2200.7(b), that "[s]ervice upon a party or intervenor who has appeared through a representative shall be

(continued...)

secretary Jewel A. Ward, which accompanied Ward's late-filed PDR, Radcliff failed to provide Ward with copies of any of those documents and even failed to inform Ward that the documents had been issued.

Corporate secretary Ward further avers that her company had made "numerous requests of L.R.R. and Associates" over an eight-month period, beginning shortly after the Secretary filed her motion for extension of time to file the complaint, "demanding to know the status of the Complaint and L.R.R.'s response to it." In reply, Ward "was repeatedly told that L.R.R. was working on the matter and that documents would be [forthcoming]." Despite these assurances, however, "no information regarding this proceeding was ever provided to Respondent by L.R.R. and Associates." After filing Ward's notice of contest, LRR and Associates filed no other documents (such as an answer to the complaint or a motion for extension of time) with the Commission, and it neither informed Ward nor provided Ward with copies of any of the documents issued by the Commission. It was only after OSHA sent a letter to Ward demanding payment of the $4050 penalty that Ward learned that Chief Judge Sommer had issued a show cause order, that he had thereafter issued an order dismissing the notice of contest, and that his dismissal order had subsequently become the Commission's final order.

Analysis

In opposing Ward's request for relief from this final order, which she correctly construes to be a motion for relief from judgment under Fed. R. Civ. P. 60(b), the Secretary

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[3](...continued)
made only upon such representative." The Secretary correctly points out, in her response to arguments presented in Ward's petition for discretionary review ("PDR"), that the Commission's Executive Secretary and Chief Judge Sommer both followed this rule in serving their notices and orders on Ward's representative and that the Secretary accordingly cannot be held responsible for the Commission's failure to comply with Radcliff's request that a second copy of each document be served on the company itself.

expressly argues that Ward is not entitled to relief under Rule 60(b)(1), which provides, as follows:

> **Rule 60. Relief From Judgment or Order.**
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> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ....

Citing Commission precedent based on *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489 (1993) ("*Pioneer"),*[4] the Secretary argues that, in determining whether Ward's failure to either file an answer or respond to the show cause order was "excusable neglect" within the meaning of this Rule, we must look "at the conduct of both the party and its representative." Here, the Secretary correctly points out, Ward "has made no showing whatsoever that the conduct of its chosen representative was excusable."

While we do not take issue with the Secretary's argument that "clients must be held accountable for the acts and omissions of their attorneys [or other chosen representatives]," *see Pioneer*, 507 U.S. at 396, 113 S. Ct. at 1499, we disagree with her conclusion that relief cannot be granted under Federal Rule 60(b)(1). In addition to providing relief on the ground of "excusable neglect," Rule 60(b)(1) also provides for relief from judgment based on "mistake" or "inadvertence." In the Seventh Circuit at least, it is clear that the mistake or inadvertence warranting relief "can be on the part of the court rather than the parties." *Buggs v. Elgin, Joliet & Eastern Ry. Co.*, 852 F.2d 319, 322 (7th Cir. 1988). *Compare Barrier v. Beaver*, 712 F.2d 231, 234 (6th Cir. 1983) ("[T]he word 'mistake' as used in Rule 60(b)(1) encompasses any type of mistake or error on the part of the court, including judicial mistake as to applicable law"; however "reconsideration of a point of law under Rule 60(b)(1)" is

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[4]Specifically, the Secretary cited *Spectrum Builders, Inc.*, OSHRC Docket No. 92-2427 (March 1, 1994)(unpublished Commission order), and *Byrd Produce Co.*, 16 BNA OSHC 1268, 1269, 1993-95 CCH OSHD ¶ 30,139, pp. 41,447-48 (No. 91-0823, 1993).

allowable only "when relief from judgment is sought within the normal time for taking an appeal").

Here, we conclude, based on the admittedly sparse record that is before us, that the judge's order dismissing Ward's notice of contest was issued as the result of a "mistake" or "inadvertence" on the part of the judge. In his dismissal order, the judge correctly noted that, approximately a month earlier, he had issued an order requiring Ward to show cause why its notice of contest "should not be dismissed for failure to file an answer to the complaint as required by the Commission Rules of Procedure." *See* Commission Rule 34(b), 29 C.F.R. § 2200.34(b). He then noted, again correctly, that Ward had not responded to his show cause order. Based on this failure to respond, the judge concluded that Ward's "actions demonstrate either that [it] has abandoned the case or [that it] treats the Rules of Procedure of the Commission with disdain" and that "[t]his cannot be countenanced as it seriously impedes the administration of justice." He therefore dismissed the notice of contest.

The record does not establish, however, that Ward failed to respond to the show cause order either because it had abandoned its case or because it was treating the Commission's Rules with disdain. Rather, Ward *never received* the show cause order. As indicated, the judge served his order on Ward by mailing a single copy of the order to Ward's designated representative, Linda Radcliff of LRR and Associates, at the address given in the notice of contest, that is, the post office box in Buckeye Lake, Ohio. As he was expressly required to do under Commission Rule 41(d), 29 C.F.R. § 2200.41(d), he sent this copy of the order to Radcliff "by certified mail, return receipt requested." However, fifteen days after the post office gave notice of this certified mail to Radcliff, it returned the document to the Office of the Chief Judge, noting on the envelope that it had been "Unclaimed."[5]

[5]We do not know the reason the show cause order was unclaimed. We do know that the copy of the show cause order that the judge attempted to serve on Ward is currently contained in the Commission's official file in this case. The unsigned return receipt that accompanied the document is still attached to the envelope.

Based on the language of the judge's dismissal order, as quoted above, we consider it more likely than not that he based his decision to dismiss Ward's notice of contest on the mistaken belief that Ward had been served with the show cause order. The judge apparently concluded that Ward had either abandoned the case or was treating the Commission's rules with disdain based upon the mistaken belief that the show cause order had been served and was ignored -- a mistake that resulted from the fact that the judge was apparently unaware that the post office had returned the certified mail marked as "Unclaimed." We consider it unlikely that the judge's dismissal order would have omitted any mention of the post office's return of the show cause order if the judge had been aware of that fact.

While the case law in the Sixth Circuit seems to be somewhat unclear, we have little doubt that the Seventh Circuit would view the "mistake" or "inadvertence" that occurred in this case as the type of judicial error that falls within the scope of Federal Rule 60(b)(1). *See, e.g.*, *Brandon v. Chicago Bd. of Educ.*, 143 F.3d 293 (7th Cir. 1998) ("mistake" of the court in failing to serve documents on a party's attorney, based on the clerk's error in entering the wrong attorney on the docket sheet as the party's attorney of record); *Wesco Prods. Co. v. Alloy Automv. Co.*, 880 F.2d 981 (7th Cir. 1989) ("mistake," based on "lack of access to information" about critical events, in dismissing a collateral adversary proceeding for lack of prosecution rather than dismissing it without prejudice); *Buggs v. Elgin, Joliet & Eastern Ry. Co.* ("inadvertence," based on court's failure to "apprehend the extent of the relief that was necessary to make Buggs 'whole' in light of his discriminatory discharge," in failing to include retroactive seniority and fringe benefits within the scope of its order); *Bank of California v. Arthur Anderson & Co.*, 709 F.2d 1174 (7th Cir. 1983) ("inadvertence," in order dismissing federal claims on ground the cited laws did not apply, in also dismissing a pendent claim on its merits when in fact the merits of that claim had not been determined). We therefore conclude that the record in this case establishes grounds for relief under Fed. R. Civ. P. 60(b)(1).

The Secretary argues, however, that relief cannot be granted in this case because Ward's request for relief did not include (a) a showing of compliance with Commission Rule

40(a), 29 C.F.R. § 2200.40(a), and (b) a showing that it has meritorious defenses to the contested citation.[6] While we have treated Ward's request for relief as a motion for relief from judgment under Federal Rule 60(b), the request was not in fact presented in a motion. It was presented in a late-filed PDR, which included a generalized request for waiver of the Commission's rules (presumably meaning to the extent they would bar consideration of Ward's request for relief) under Commission Rule 107, 29 C.F.R. § 2200.107.[7] Since Ward filed a PDR rather than a motion, it was not required to comply with Commission Rule 40(a), which applies only to motions.

Ward's failure to make any showing that it has meritorious defenses to the citations is a more troublesome problem. Both the Sixth and the Seventh Circuit require such a showing as a prerequisite to the granting of relief from a default judgment under Federal Rule 60(b)(1). *See, e.g., Mfrs.' Indus. Relations Assn. v. East Akron Casting Co.*, 58 F.3d 204 (6th Cir. 1995); *Jones v. Phipps*, 39 F.3d 158 (7th Cir. 1994). While this burden does

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[6]It should be noted that the Secretary was undoubtedly unaware of the decisive fact in this case -- the fact that neither Ward nor its representative had received the show cause order, which was returned without delivery.

[7]Over the years, the Commission has considered requests for relief from judgment that have been presented in a variety of forms. *E.g., Badger Underground Constr., Inc.*, 17 BNA OSHC 1696, 1995-97 CCH OSHD ¶ 31,096 (No. 94-3251, 1996) (request in document captioned "Appeal of Decision to Proceed with Penalty Collection," a proceeding that does not even exist under the Act); *Carolyn Manti d/b/a Manti Homes*, 16 BNA OSHC 1458, 1993-95 CCH OSHD ¶ 30,265 (No. 92-2222, 1993) (request in PDR erroneously filed with the Department of Labor); *Ardyce Carlson, M.D.*, 1993-95 CCH OSHD ¶ 30,230 (No. 93-885, 1993) (not reported in BNA OSHC) (request in letter to the Commission). Particularly when an employer is appearing *pro se*, the Commission has consistently taken the approach that the form of the request does not preclude it from looking at the substance of the employer's claim. In this case, Ward has only recently retained legal counsel to assist it in dealing with this difficult procedural issue and that counsel appears to be unfamiliar with Commission case law and procedures. Under these circumstances, we decline to reject Ward's request for relief on the technical ground that it would have been more properly presented in a 60(b) motion.

not appear to be particularly heavy in either circuit,[8] it clearly has not been met in this case. Nevertheless, we conclude that it would not be equitable to deny Ward's request for relief *at this time* because of its failure to meet the meritorious-defense requirement. We note in particular that we have decided this case based on a fact that undoubtedly was unknown to Ward and its counsel (the fact that the show cause order sent to LRR and Associates was returned without delivery) and a legal theory that was not advanced by Ward and its counsel ("mistake" or "inadvertence" under Federal Rule 60(b)(1)). Ward accordingly had little, if any, reason to foresee that its request for relief would turn on a showing that it had meritorious defenses to the contested citations.

Order

We therefore remand this case to Chief Judge Sommer, while ordering Ward to file both an answer to the Secretary's complaint and any supplemental documents it may deem to be necessary to meet its burden of showing that it has meritorious defenses to the contested citations. Ward is further ordered to file these submissions with the judge and within thirty (30) days of the date of this order. If the judge determines that Ward has met these conditions and that Ward has made a sufficient showing of meritorious defenses, he shall reinstate

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[8]In *Jones v. Phipps*, the Seventh Circuit stated that "[a] meritorious defense is not necessarily one which must, beyond a doubt, succeed in defeating a default judgment, but rather one which at least raises a serious question regarding the propriety of a default judgment and which is supported by a developed legal and factual basis." 39 F.3d at 165. In *Amernational Indus., Inc. v. Action-Tungsram, Inc.*, 925 F.2d 970, 977 (6th Cir. 1991), the Sixth Circuit stated (case citations to prior Sixth Circuit decisions omitted): "In evaluating the asserted defense, '[l]ikelihood of success is not the measure .... [r]ather, if *any* defense relied upon states a defense good at law, then a meritorious defense has been advanced.' .... 'The key consideration is 'to determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.'" *Compare Jackson Assocs. of Nassau*, *supra* note 1, 16 BNA OSHC at 1267, 1993-95 CCH OSHD at pp. 41,454-55 (Commission's observations about the meritorious-defense requirement).

Ward's notice of contest and proceed accordingly. If not, he shall reinstate his order of dismissal.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

Date: September 28, 1999