UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>BYRD PRODUCE COMPANY,<br><br>Respondent. | OSHRC Docket Nos. 91-0823 & 91-0824 |

***DECISION***

BEFORE: FOULKE, Chairman, and MONTOYA, Commissioner.

BY THE COMMISSION:

A November 30, 1990 inspection of two of Byrd Produce Company's ("Byrd") ranches in Guadalupe, California led to the issuance of two serious citations on February 14, 1991. The proposed penalties associated with the citations, for failure to provide water cups and wash water, amounted to $640.

Testimony at the December 5, 1991 hearing indicated that upon receiving the citations on February 20, 1991, Byrd had contacted its attorney and brought the citations to the attorney's office within a day or two of receiving them. The attorney neglected to file a notice of contest until March 18, 1991, nineteen business days after the clients had received the citations, by which time they had been deemed a final order under section 10(a) of the Act.[1]

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[1] Section 10(a) of the Act provides:

> If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed

(continued...)

At the hearing, Byrd sought relief from this final order and in a December 13, 1991 order, the judge granted Byrd summary relief under Fed. R. Civ. P. 60(b)[2] and directed the Secretary to file his complaint. The Secretary, however, declined to file a complaint, requesting instead that the judge reconsider his ruling. Upon reconsideration, the judge issued a "Final Order" on January 28, 1992 confirming that Byrd was entitled to relief under Rule 60(b). In accordance with the Secretary's deliberate refusal to file a complaint, the judge declared the Secretary in default for failure to plead under Commission Rule 41. The citations and proposed penalties were vacated. The Secretary petitioned for review.

***Secretary's Section 10(a) Arguments***

The Secretary argues that section 10(a) of the Act precludes the Commission from exercising jurisdiction over cases in which the employers have attempted to file their notice of contest after the statutory 15-day deadline has passed. He maintains that since the Commission has no jurisdiction to review such matters in the first place, Federal Rule 60(b) does not offer an "escape hatch" in late notice of contest cases.[3] For the reasons explained in our decision in *Jackson Associates of Nassau* (No. 91-0438), also issued today, we reaffirm our holding that section 10(a) of the Act does not prevent the Commission from asserting jurisdiction over such cases and applying Rule 60(b).

***Relief under Rule 60(b)***

The Ninth Circuit, to which this case may be appealed, has set forth three factors to consider in Rule 60(b) motions: (1) whether the Secretary will be prejudiced, (2) whether the respondent has a meritorious defense, and (3) whether culpable conduct of the

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[1](...continued)

> assessment of penalty, and no notice is filed by any employees or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be *deemed a final order of the Commission and not subject to review by any court or agency.*

(Emphasis added.)

[2] Fed. R. Civ. P. 60(b) provides in relevant part that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgement, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.

[3] Section 12(g) of the Act provides that "[u]nless the commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure."

respondent led to the default. *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1449 (9th Cir. 1991), citing *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984). This tripartite test is disjunctive, *Cassidy v. Tenorio*, 856 F.2d 1412, 1415 (9th Cir. 1988), so a finding of culpable conduct on the part of the respondent is a sufficient basis on which to deny a motion for Rule 60(b) relief.

The judge set forth the three-pronged test in his decision, but failed to recognize that the attorney's conduct, which the judge found to be culpable, was fatal to Byrd's case for Rule 60(b) relief. Instead, he found that "Byrd acted diligently entrusting the citations to its attorney," and "[i]ts notice of contest was untimely due to the lack of the attorney's diligence, conduct it did not control, acquiesce in or have knowledge of." The result in this case, he believed, was "dictated by Commission precedent, as established in *P & A Constr. Co.*, 10 BNA OSHC 1185, 1981 CCH OSHD ¶ 25,783 (No. 80-3848, 1981)." In that case, the Commission granted Rule 60(b) relief to an employer whose late filing of its notice of contest was due solely to a mistake made by personnel in the employer's lawyer's office. The lawyer had dictated a notice of contest before traveling out of town, and had called his office daily, diligently inquiring about the notice of contest. A secretary who had inadvertently deleted the notice instead of printing it out assured him that it had been mailed. The Commission found that these actions constituted mistake, inadvertence or excusable neglect.

In *Link v. Wabash R.R.*, 370 U.S. 626 (1962), the Supreme Court rejected a client's claim that he should not be held accountable for his attorney's behavior:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent . . . .

370 U.S. at 633-34. The Court noted in *Link* that the party never sought to avail himself of the "escape hatch" provided by Rule 60(b) and that the *sua sponte* dismissal was based on all the circumstances in the case, including earlier dilatory tactics, but the case continues to

be cited for the proposition that client and lawyer are treated as a single entity for many purposes. *E.g.*, *Irwin v. Veterans Admin.*, 111 S.Ct. 453, 456 (1990) (no relief for client of attorney whose conduct constituted "garden variety neglect."); *Toth v. Trans World Airlines*, 862 F.2d 1381 (9th Cir. 1988) (sanctioning both lawyer and client), *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143 (10th Cir. 1990) (parties desiring relief must particularize, and generally do not acquit themselves of responsibility by showing merely that they placed the case in the hands of an attorney, citing *Moore's Federal Practice* ¶ 60.22[2] at 60-184 (2d Ed. 1987)). The *Link* Court expressed no sympathy for a client whose counsel's "*unexcused* conduct" causes the client to suffer. *Link* at 633 (emphasis added).

The Secretary has also drawn to our attention a recent United States Supreme Court case, *Pioneer Inv. Servs. v. Brunswick Assoc.*, 61 U.S.L.W. 4263 (U.S., Mar. 24, 1993) ("*Pioneer*"), for the proposition that the Commission must examine the conduct of the attorney as well as that of the client. In *Pioneer*, a case interpreting the term "excusable neglect" in a bankruptcy rule, the Court chastised the court below for focusing solely on the diligence of the client, to the exclusion of the activities of the attorney himself. That the party itself was blameless is not enough. The attorney's conduct must be excusable, *i.e.*, the party must show that the attorney did all he reasonably could to comply with the deadline.

Citing the *Link* case, the *Pioneer* Court held first that parties must be held accountable for the acts and omissions of their chosen counsel. *Id.* at 4268. The Court then examined the nature of the attorney's neglect. Of interest is that the Court gave little weight to the attorney's personal problems ("experiencing upheaval in his law practice") and found that more significant was the bankruptcy court's ambiguous notice describing the deadline. *Id.* at 4268. The case thus contains an element of government misconduct missing from *Byrd* and other attorney negligence cases. Concluding that "the determination is at bottom an equitable one," *id.* at 4267, the Court ultimately allowed the party to file its claim late because its counsel's neglect was "excusable."

The Secretary correctly points out that the judge in this case made a finding that the neglect was the attorney's and not Byrd's. Based on the attorney's representations at the hearing, we find that his negligence was not excusable:

> To the best that I can recall, what happened on this particular matter is that I received a call from my -- from the client indicating that -- acknowledging that they had received these citations. I instructed them to send them over to my office. They came over to my office and they were placed in the in-basket. And the first I can recall seeing them was on Monday morning, which was the 18th, which was the date that the letter was submitted. They could have come in the week before sometime, and I saw it on Monday morning. . . . I don't want to try to fabricate anything that's not true. . . . That's all I can really remember. . . . [A]ll I can say is there was a neglect in not meeting the 15-day requirement. And I would ask the Commission to find that it was excusable and allow us to proceed under the merits of our contentions.

The judge addressed the attorney during the hearing: "Mr. Quandt, I have to say *your activities would bear dismissal.* But for the respondent . . . I'm going to grant relief under Rule 60. I'm going to reinstate that notice of contest solely because, in this case, the respondent acted diligently in getting the notice of contest to the attorney. I'm not going to hold the respondent responsible for the activities of the attorney." (Emphasis added). Neither Byrd nor its attorney provided any reason for Byrd's failure to file a timely notice of contest that would rise to the level of excusable neglect required by Rule 60(b).[4] Accordingly, no relief is warranted under Rule 60(b) in this case.[5]

***Order***

We find that Byrd's notice of contest was untimely and that the citations have become a final order of the Commission under section 10(a) of the Act. The Secretary may proceed accordingly.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: June 18, 1993

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[4] This case is distinguishable from *P & A Constr.* In both cases, the attorney's conduct was solely responsible for the late notice of conduct, but here, that conduct was not excusable.

[5] Respondent's remedy in this case, if any, would lie with its attorney.

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## NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on June 18, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

June 18, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket Nos. 91-0823 & 91-0824

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
BYRD PRODUCE COMPANY
Respondent.

OSHRC DOCKET
NO. 91-0823

## NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on February 4, 1992. The decision of the Judge will become a final order of the Commission on March 5, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before February 24, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: February 4, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-0823

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SECRETARY OF LABOR,

Complainant,

v.

BYRD PRODUCE COMPANY,

Respondent.

OSHRC DOCKET
NO. 91-0823

# FINAL ORDER

On February 14, 1991, Respondent Byrd Produce Company (Byrd), was issued two citations containing three items alleging "serious" violations of the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, et. seq, hereafter referred to as the Act) together with proposed penalties. Respondent, through its attorney, filed a notice of contest, contesting the violations, the characterization of the violations as "serious" and the amounts of the penalties.

In lieu of filing a complaint the Secretary filed a motion to dismiss the notice of contest as untimely. Byrd responded, requesting that the undersigned consider the substantive issues raised by its "contest of the proposed penalties." Byrd's request was treated as a request for relief under F.R.C.P. 60(b) and an evidentiary hearing in support thereof was held in Santa Maria, California on December 5, 1991.

The facts, as adduced at the hearing, are not seriously disputed.

The return receipt demonstrates that Respondent received the citations on February 19, 1991. Respondent provided the citations to its attorney on February 22, 1991 (Tr. 12). The notice of contest should have been filed by March 12, 1991. The notice of contest filed

by Byrd's attorney is dated March 18, 1991 and bears a postmark of March 19, 1991. Respondent's attorney offers no justification for the delay. Complainant does not claim prejudice. The Commission's docket was not affected.

At the hearing it was found that the notice of contest was untimely filed and that the citations and proposed penalties had become final orders of the Commission. It was further found, however, that Byrd had acted diligently in providing the citations to its attorney in ample time for a timely notice of contest to be filed, and that the late filing was due solely to the attorney's lack of diligence. Relief under F.R.C.P 60(b) was granted and the Secretary was given thirty (30) days to file her complaint.

The Secretary has filed a statement of position which requests reconsideration of the order granting respondent relief, and sets forth the Secretary's election not to file a complaint and accept a default judgment in the event of an adverse decision.

In reconsidering, this judge notes that the Ninth Circuit has set forth a three pronged standard for evaluating Rule 60(b) motions: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default." *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1449 (9th Cir. 1991).

1. By the Secretary's own reckoning only four (4) working days elapsed between the due date for Byrd's notice of contest and the date it was filed. The Secretary did not and does not cite any prejudice to its case resulting from the brief delay.

2. In its June 28, 1991 motion, Byrd set forth a number of objections, or defenses, to the Secretary's penalty calculations. Byrd stated that the Secretary failed to adequately consider the statutory penalty criteria by not taking into account the respondent's small size, its good faith in correcting the violations, and its lack of prior citations in its entire 25 years of operation. Byrd further argues that the violations, which allege a failure to provide single use drinking cups and hand washing water to field hands, are relatively minor and not "serious" as contemplated by the Act.

Byrd's allegations, which this judge must accept as true (*See, Cassidy v. Tenorio*, 856 F.2d 1412 (9th Cir. 1988)), are sufficient to justify a reduction in the assessed penalty, and so constitute a "meritorious defense" in the context of an OSHA action.

(3) The Commission, in a recent case discussing a party's "culpability" for the purposes of F.R.C.P 60(b), stated that "[r]elief may be justified 'if the party offers a credible explanation for the delay that does not exhibit disregard for the judicial proceedings,' revealing no 'intent to thwart' or 'reckless disregard for the effect of its conduct.'" *Secretary of Labor v. Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192, 1991 CCH OSHD ¶29,277, p. 39,270 (No. 88-2521, 1991).

In the case at bar, Respondent Byrd acted diligently entrusting the citations to its attorney, intending that the attorney would comply with the statutory filing requirement. Its notice of contest was untimely due to the lack of the attorney's diligence, conduct it did not control, acquiesce in or have knowledge of. Moreover, the late filing, four working days after the notice of contest was due, had no effect on either the Commission's docket or the Secretary's ability to present its case. Later filings suggest a meritorious defense. If relief under F.R.C.R. 60(b) is not available under these facts, it is difficult to postulate when such relief would be available.

This judge finds that the result in this matter is dictated by Commission precedent, as established in *P & A Construction Company, Inc.*, 10 BNA OSHC 1185, 1981 CCH OSHD ¶25,783 (No. 80-3848, 1981). In that case the Commission granted F.R.C.P. 60(b) relief to an employer who intended to contest an OSHA citation and diligently conveyed such instruction to its attorney, where the late filing of its notice of contest was due solely to the mistake of its retained counsel and his staff.

The cases cited by the Secretary reaching contrary results all involved dilatory conduct by the affected party itself, or a continued or repeated pattern of disregard for procedures or orders of the court by counsel, which were imputable to the party, and so are easily distinguishable. *See, e.g.; Secretary of Labor v. Penrod's Palace*, 14 BNA OSHC 1974, 1991 CCH OSHD ¶29,210 (No. 88-1078, 1991)(Employer's failure to convey show cause order to its counsel insufficient ground for relief); *Toth v. Transworld Airlines, Inc.*, 862 F.2d 1381 (9th Cir. 1988)(dismissal justified based on the appellant's "continued refusal" to comply with the rules of procedure and court orders, resulting in "long and unjustified delays.")

Having reconsidered the matter, it is found that relief under F.R.C.P 60(b) is appropriate. Mindful of the Secretary's decision not to file a complaint, the Secretary is declared in default pursuant to Commission Rule 41(a) for failure to plead.

Accordingly, it is

ORDERED:

The citations and proposed penalties issued to respondent dated February 14, 1991 are hereby vacated.

James H. Barkley
Judge, OSHRC

Dated: January 28, 1992

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NO. 91-0824

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FOR THE COMMISSION

Ray H. Darling, Jr.

Date: February 4, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-0824

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OSHRC DOCKET
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In lieu of filing a complaint the Secretary filed a motion to dismiss the notice of contest as untimely. Byrd responded, requesting that the undersigned consider the substantive issues raised by its "contest of the proposed penalties." Byrd's request was treated as a request for relief under F.R.C.P. 60(b) and an evidentiary hearing in support thereof was held in Santa Maria, California on December 5, 1991.

The facts, as adduced at the hearing, are not seriously disputed.

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At the hearing it was found that the notice of contest was untimely filed and that the citations and proposed penalties had become final orders of the Commission. It was further found, however, that Byrd had acted diligently in providing the citations to its attorney in ample time for a timely notice of contest to be filed, and that the late filing was due solely to the attorney's lack of diligence. Relief under F.R.C.P 60(b) was granted and the Secretary was given thirty (30) days to file her complaint.

The Secretary has filed a statement of position which requests reconsideration of the order granting respondent relief, and sets forth the Secretary's election not to file a complaint and accept a default judgment in the event of an adverse decision.

In reconsidering, this judge notes that the Ninth Circuit has set forth a three pronged standard for evaluating Rule 60(b) motions: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default." *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1449 (9th Cir. 1991).

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2. In its June 28, 1991 motion, Byrd set forth a number of objections, or defenses, to the Secretary's penalty calculations. Byrd stated that the Secretary failed to adequately consider the statutory penalty criteria by not taking into account the respondent's small size, its good faith in correcting the violations, and its lack of prior citations in its entire 25 years of operation. Byrd further argues that the violations, which allege a failure to provide single use drinking cups and hand washing water to field hands, are relatively minor and not "serious" as contemplated by the Act.

Byrd's allegations, which this judge must accept as true (*See, Cassidy v. Tenorio*, 856 F.2d 1412 (9th Cir. 1988)), are sufficient to justify a reduction in the assessed penalty, and so constitute a "meritorious defense" in the context of an OSHA action.

(3) The Commission, in a recent case discussing a party's "culpability" for the purposes of F.R.C.P 60(b), stated that "[r]elief may be justified 'if the party offers a credible explanation for the delay that does not exhibit disregard for the judicial proceedings,' revealing no 'intent to thwart' or 'reckless disregard for the effect of its conduct.'" *Secretary of Labor v. Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192, 1991 CCH OSHD ¶29,277, p. 39,270 (No. 88-2521, 1991).

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This judge finds that the result in this matter is dictated by Commission precedent, as established in *P & A Construction Company, Inc.*, 10 BNA OSHC 1185, 1981 CCH OSHD ¶25,783 (No. 80-3848, 1981). In that case the Commission granted F.R.C.P. 60(b) relief to an employer who intended to contest an OSHA citation and diligently conveyed such instruction to its attorney, where the late filing of its notice of contest was due solely to the mistake of its retained counsel and his staff.

The cases cited by the Secretary reaching contrary results all involved dilatory conduct by the affected party itself, or a continued or repeated pattern of disregard for procedures or orders of the court by counsel, which were imputable to the party, and so are easily distinguishable. *See, e.g.; Secretary of Labor v. Penrod's Palace*, 14 BNA OSHC 1974, 1991 CCH OSHD ¶29,210 (No. 88-1078, 1991)(Employer's failure to convey show cause order to its counsel insufficient ground for relief); *Toth v. Transworld Airlines, Inc.*, 862 F.2d 1381 (9th Cir. 1988)(dismissal justified based on the appellant's "continued refusal" to comply with the rules of procedure and court orders, resulting in "long and unjustified delays.")

Having reconsidered the matter, it is found that relief under F.R.C.P 60(b) is appropriate. Mindful of the Secretary's decision not to file a complaint, the Secretary is declared in default pursuant to Commission Rule 41(a) for failure to plead.

Accordingly, it is

ORDERED:

The citations and proposed penalties issued to respondent dated February 14, 1991 are hereby vacated.

James H. Barkley
Judge, OSHRC

Dated: January 28, 1992