

SECRETARY OF LABOR,

Complainant,

v.

NORTHWEST CONDUIT CORP.,

Respondent.

OSHRC Docket No. 97-851

ORDER OF REMAND

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

At issue is whether the Secretary of Labor should be given the opportunity for a hearing on the merits of her citation to Northwest Conduit Corp. in the particular circumstances here. We find that sufficient reasons exist to give her that opportunity.

Northwest filed its notice of contest to that citation one day late. However, Chief Administrative Law Judge Irving Sommer granted Northwest relief, under Rule 60(b) of the Federal Rules of Civil Procedure, from the final order that resulted from that lateness. The Secretary then declined to file a complaint, after which the judge ordered the citation dismissed, and the Secretary then petitioned for Commission review of the judge's grant of relief to Northwest. Her petition was directed for review, and the Commission affirmed the judge's ruling granting Rule 60(b) relief to Northwest. *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1999 CCH OSHD ¶ 31,949 (No. 97-851, 1999). In its earlier decision, the Commission specifically affirmed "the judge's action in granting relief from the final order." 18 BNA OSHC at 1952, 1999 CCH OSHD at p. 47,459. It remanded the case "for further proceedings consistent with this decision." *Id.*

On remand, the judge initially gave the Secretary 20 days to file her complaint, and she did so. Northwest objected to giving her that opportunity, however, and upon reconsideration the judge granted Northwest's motion to dismiss the complaint. Order of December 7, 1999. The Secretary filed her petition for discretionary review of that order and review was granted.

The Commission's previous decision affirmed the judge's decision granting Rule 60(b) relief, not his subsequent dismissal of the citation as he stated in his December 7, 1999, order. It was the intention of the two Commissioners who participated in that decision (Chairman Rogers and Commissioner Visscher) that the case should be remanded for proceedings on the merits of the citation. The judge's order dismissing the case is inconsistent with the Commission's decision.

"[A]ny party who fails to comply with a Commission order, does so at its peril." *Trinity Indus., Inc.*, 15 BNA OSHC 1579, 1582, 1583 note 6, 1991-93 CCH OSHD ¶ 29,662, pp. 40,184, 40,185 note 6 (No. 88-1547, 1992), *rev'd in part on other grounds*, 16 F.3d 1149 (11th Cir. 1994). Notwithstanding this proposition, however, the Commission has the authority to relieve a party of dismissal in appropriate circumstances, even where the party has declined to comply with a Commission order. *E.g.*, *Donald Braasch Constr., Inc.*, 17 BNA OSHC 2082, 1997 CCH OSHD ¶ 31,259 (No. 94-2615, 1997) (Secretary's refusal to comply with numerous discovery orders by judge did not warrant dismissal of citation); *Trinity* (same).

In *Trinity*, the Commission stated: "counterbalancing the Commission's obligation to enforce its orders is the principle that the public interest requires that cases be decided on their merits." 15 BNA OSHC at 1583, 1999 CCH OSHD at p. 40,185 (citing authorities). Having reviewed the record thoroughly, we think this is an appropriate case to apply that principle. Doing so is an exercise of the Commission's discretion under Commission Rule 41(b), 29 C.F.R. § 2200.41(b). That rule provides: "For reasons deemed sufficient by the Commission or Judge and upon motion expeditiously made, the Commission or Judge may set aside a sanction imposed under paragraph (a) of this rule." The judge's dismissal of the

complaint, which we review here, was such a sanction -- based on the Secretary's earlier failure to proceed.

We do not believe that the Secretary's action in declining to file a complaint prior to the Commission's ruling on the merits of Rule 60(b) relief precludes having this case heard on its merits. The only alternative means for her to seek prompt review of the judge's decision granting Rule 60(b) relief to Northwest, without first having to litigate the merits of the citation before the judge, would have been to seek interlocutory review. We note, however, that because of two vacancies on the Commission, interlocutory review could not have been granted at that time. Interlocutory review may be granted only by a vote of two Commissioners. *See* 29 C.F.R. § 2200.73. Further, interlocutory review is discretionary with the Commission and there is a "general policy of discouraging interlocutory appeals." *Oneida Indian Nation v. County of Oneida*, 622 F.2d 624, 628 (2d Cir. 1980). *See generally* 16 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3920, p. 8 (2d ed. 1996).¹

¹With respect to the due process argument raised in the dissent, Northwest has had a full opportunity to be heard, and due process has been fully observed. Northwest received the judge's first order on remand, giving the Secretary 20 days to file a complaint, and Northwest filed a motion to dismiss the complaint, along with a brief ("memorandum") stating its reasons. There is no due process requirement that every issue that previously has been briefed be subject to further briefing when the issue is on administrative appeal. *E.g.*, *J. A. Jones Constr. Co.*, 16 BNA OSHC 1497, 1498 note 3, 1993-95 CCH OSHD ¶ 30,301, p. 41,752 note 3 (No. 87-2059, 1993) ("the Commission retains discretion not to solicit briefs from the parties" on review; party adversely affected had stated grounds for its motion in memorandum with judge below).

Considering the unusual circumstances of this case, we hereby vacate the judge's ruling dismissing the Secretary's complaint, and we remand this case to the judge to provide each party an opportunity for a hearing on the merits of the citation.

IT IS SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

Dated: February 24, 2000

WEISBERG, Commissioner dissenting:

I respectfully dissent from my colleagues' action in this case, both on procedural due process grounds and substantively.

A brief procedural history of this case is in order. On February 11, 1997, the employer, Northwest Conduit, received a citation and proposed penalties from the OSHA area office. Northwest Conduit hand-delivered its notice of contest to the OSHA office one day late, on March 6, 1997. When OSHA refused to send the notice to the Review Commission and attempted to collect the penalty, Northwest Conduit filed a motion for relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

On September 30, 1997, Chief Administrative Law Judge Irving Sommer held a hearing on the facts and circumstances relating to the late filing of the notice of contest. On January 26, 1998 the judge issued an order finding that Northwest Conduit had established justification for its late filed notice of contest. He granted relief under Rule 60(b) and directed the Secretary to file a complaint in the case. On February 13, 1998, the Secretary filed a statement of position in which she disagreed with the judge's decision, arguing that Rule 60(b) does not apply to Section 10(a) final orders. The Secretary declined to file a complaint and stated that "the judge after consideration of this statement of position, may issue an order of dismissal, which the Secretary reserves the right to appeal."

On March 6, 1998, as a result of the Secretary's refusal to file a complaint, the judge issued an order vacating and setting aside the Secretary's citation "for want of prosecution." On March 9, 1998, the Secretary filed a petition for discretionary review with the Commission. Review was directed on April 6, 1998.

In a decision dated September 30, 1999, the Commission, then consisting of only two members, Chairman Rogers and Commissioner Visscher, specifically upheld the judge's action in granting relief to the employer under Rule 60(b) for its late filed notice of contest. It remanded the case "for further proceedings consistent with this decision."*Northwest*

Conduit Corp., 18 BNA OSHC 1948, 1952, 1999 CCH OSHD ¶ 31,949, p. 47,459 (No. 97-851, 1999).

The Commission's remand contemplated a continuation of the contested case proceedings. In conformity with the remand order, on October 8, 1999, the judge issued an order directing the Secretary to file a complaint, and she did so on October 22. However, on November 5, the employer filed a motion to dismiss *that complaint*. On November 30, the judge granted the employer's motion, stating that the Secretary had already had one opportunity to file a complaint, and not having prevailed before the Review Commission is not entitled to a second opportunity. The Secretary filed a petition for discretionary review and review was granted.

The issue now before the Commission is not as simplistic as my colleagues state, whether the Secretary should be given the opportunity for a hearing on the merits. The real issue is the propriety and the ramifications of the Secretary's action on February 13, 1998 -- whether the Secretary acted at her peril by refusing to comply with the judge's order to issue a complaint. That issue was not directed for review in April 1998. I make that claim with some degree of assurance since it was I who directed review in the case and I was the agency's only commissioner at the time. That claim is supported by the briefing order which issued on May 15, 1998, also during my "home alone" days at the Commission, and requested briefs solely on the issues of (1) whether the Commission has jurisdiction to apply Rule 60(b) to a final order arising under section 10(a) of the Act; and (2) whether the employer established excusable neglect for purposes of Rule 60(b) relief. While the Commission is free to decide issues not directed for review, the Commission in its earlier decision failed to discuss or even mention any issue relating to the Secretary's action in refusing to issue a complaint in February 1998.

If this was simply a matter of the Commission clarifying its language or its intent with respect to an issue clearly decided in its earlier decision, I would readily defer to my

colleagues. Similarly, if this was just a case of a judge misreading a Commission order, I would defer to my colleagues. At a minimum, however, my colleagues in the case now before us should have issued a briefing order on the question newly raised by the employer's motion to dismiss, whether the Secretary acted at her peril by disobeying the judge and refusing to issue a complaint in early 1998. By summarily issuing its order in this case, by acting in a cursory fashion,² and by reversing the judge's order granting the employer's motion to dismiss *without affording the employer an opportunity to be heard* (i.e. without any briefs on this issue),³ I believe that my colleagues have denied the employer fundamental

²In the opening paragraph of the Order of Remand my colleagues "find that sufficient reasons exist to give [the Secretary] that opportunity [for a hearing on the merits]." In the concluding paragraph my colleagues apparently rely on "the unusual circumstances of this case" to vacate the judge's ruling dismissing the Secretary's complaint. However, nowhere in between does the majority explain what these reasons are or what these unusual circumstances may be. Rather, my colleagues rely solely on the general principle noted in *Trinity Industries Inc.*, 15 BNA OSHC 1579, 1583 n.6, 1991-93 CCH OSHD ¶ 29,662, p. 40,185 n.6 (No. 88-1547, 1992), *rev'd in part on other grounds and remanded*, 16 F.3d 1149 (11th Cir. 1994), "that the public interest requires that cases be decided on their merits," and conclude that "[h]aving reviewed the record thoroughly, we think this is an appropriate case to apply that principle." The record, however, is devoid of any explanation or justification by the Secretary for her refusal to file a complaint as ordered by the judge in early 1998. In the absence of an explanation by the Secretary, my colleagues justify their action as "an exercise of the Commission's discretion." In my view, such an exercise of discretion still requires a reasoned explanation by the Commission majority.

³My colleagues note that there is no due process requirement that every issue that previously has been briefed be subject to further briefing when the issue is on administrative appeal. Citing *J.A. Jones Constr. Co.*, 16 BNA OSHC 1497, 1498 n.3, 1993-95 CCH OSHD ¶ 30,301, p. 41,752 n.3 (No. 87-2059, 1993), my colleagues take the position that since Northwest Conduit filed with the judge a memorandum in support of its motion to dismiss that is all that due process requires. This concept of "due process lite" advanced by my colleagues is even less filling than the cited footnote in *J.A. Jones*. In *J.A. Jones* the Commission noted that the Secretary had stated the grounds for its motion to amend in a supporting memorandum filed with the judge *and* had another opportunity to present its position through its petition for review. However, unlike the Secretary in *J.A. Jones*, Northwest Conduit's motion was granted by the judge and it therefore had no reason to file a petition for review.

(continued...)

due process. Moreover, by not requiring the Secretary to explain and justify her actions, my colleagues are *sua sponte* relieving the Secretary of responsibility for her actions.

In his order of November 30, 1999 granting Northwest Conduit's motion and dismissing the Secretary's complaint, the judge apparently assumed that the Commission had affirmed that part of his decision vacating and setting aside the citation for want of prosecution, and reasoned that the Secretary had already had one opportunity to file a complaint and "is not entitled to a second opportunity now that she has not prevailed in her position before the Commission." I agree with my colleagues that the judge was mistaken in his belief that the Commission specifically affirmed his decision to vacate and set aside the citation for want of prosecution. The Commission clearly did not deal with that specific issue. However, I agree with the judge that the Secretary acted at her peril by refusing to file a complaint in early 1998 and is not entitled to a second opportunity. For that reason, I would affirm the judge's order dismissing the Secretary's complaint.

In early 1998, after the judge had granted relief to Northwest Conduit under Rule 60(b) and directed the Secretary to file a complaint, the Secretary had several options. She could have filed the complaint and later raised the issue of the propriety of 60(b) relief before the Commission. The Secretary also could have filed a petition for interlocutory review of the 60(b) issue with the Commission. My colleagues point to the fact that the Commission did not have a quorum at the time and thus was incapable of granting interlocutory review. However, it should be noted that in the Secretary's statement of position filed with the judge on February 13, 1998, there is no suggestion that the Secretary would have filed a petition for interlocutory review *but for* the absence of a quorum at the Commission. Indeed if that was the Secretary's concern the Secretary could have filed a motion asking the judge to stay the proceeding until the Commission gained a quorum necessary to act on an interlocutory petition. The Secretary did none of this. Rather, the Secretary *refused* to file a complaint as

³(...continued)

In any event, the merits of the employer's motion to dismiss the Secretary's complaint have not been addressed by the Commission majority.

ordered by the judge and as a result the judge dismissed the citation for want of prosecution. The Secretary then filed a petition for *discretionary* review with the Commission.

Of course, the Secretary has the prosecutorial discretion to withdraw a citation at any time. She does not, however, enjoy any special privilege to disregard a judge's order. Any party, including the Secretary, who fails to comply with a Commission order, even when based on a sincere belief that its position is legally justified, "must be prepared to accept the consequences of noncompliance if its argument does not ultimately prevail." *Donald Braasch Construction, Inc.*, 17 BNA OSHC 2082, 2085, 1997 CCH OSHD ¶ 31,259, p. 43,868 (No. 94-2615, 1997) (Commission found that judge erred in dismissing citation as a result of Secretary's refusal to comply with judge's discovery order *where Secretary ultimately prevailed on her assertion of informer's privilege*). "To put it directly, any party who fails to comply with a Commission order, does so at its peril." *Trinity Industries Inc.*, 15 BNA OSHC at 1583 n.6, 1991-93 CCH OSHD at p. 40,185 n.6 (Commission upheld judge's refusal to dismiss case where Secretary had refused to obey judge's discovery order pertaining to inspection plan because warrant matter was before the Federal courts and the Commission *agreed with the Secretary* on review that the Commission was not a proper forum for conducting a collateral attack on the warrant).

Any reliance by the Secretary on *Jackson Assoc. of Nassau*, 16 BNA OSHC 1261, 1993-95 CCH OSHD ¶ 30,140 (No. 91-0438, 1993) is misplaced. There are some procedural similarities between the two cases in that the judge held that Jackson was entitled to 60(b) relief in a late notice of contest case, the judge directed the Secretary to file a complaint, the Secretary declined to file a complaint and as a result the judge issued an order dismissing the citation, and the Secretary petitioned for review. The Commission in *Jackson* reaffirmed its jurisdiction to grant Rule 60(b) relief in late notice of contest cases but found, contrary to the judge, nothing in the record rising to the level of excusable neglect required under Rule 60(b)(1). The Commission remanded the case to the judge for a hearing to determine whether factually Jackson was entitled to relief under principles of equitable tolling or under Rule 60(b)(3). In its order the Commission stated that if the judge on remand finds that Jackson is not entitled to relief, he should dismiss the notice of contest and

affirm the citations [and] "[o]therwise, the case shall proceed as if the notice of contest had been timely filed." 16 BNA OSHC at 1267, 1993-95 CCH OSHD at p. 41,455.

Thus, in *Jackson* the Secretary prevailed *in part* before the Commission in that the Commission found that the factual record did not support the judge's finding of excusable neglect under Rule 60(b)(1) and reversed the judge on that basis. Moreover, the Commission in *Jackson* did not consider or deal with the issue of the Secretary's refusal, contrary to the judge's order, to file a complaint and its ramifications. That issue was not raised by the employer.

That issue was raised in the instant case by Northwest Conduit in its motion to dismiss the complaint, a motion which the judge granted. The question of whether the Secretary acts at her peril by refusing to obey a judge's order is a recurring⁴ and important issue and should be dealt with on its merits.

Stuart E. Weisberg
Commissioner

Dated: February 24, 2000

⁴In *Russell B. Le Frois Builder Inc.*, 18 BNA OSHC 1978, 1999 CCH OSHD ¶ 31,950 (No. 98-1099, 1999), a case decided by my colleagues on September 30, 1999, the same day as *Northwest Conduit Corp.*, the Commission reversed the judge's order denying Rule 60(b)(1) relief and remanded the case "for further proceedings consistent with this decision." On October 22, 1999 the judge issued an order requiring the Secretary to file a complaint. By letter dated November 17, the Secretary refused to file a complaint in the case, noting in the letter her disagreement with the Commission's decision in the case and her continuing belief that Rule 60(b) does not apply to Section 10(a) final orders. As a result, on December 1 the judge issued an order vacating the citation. The Secretary filed a petition for discretionary review. The judge's order became a final order of the Commission on January 14, 2000 when no Commission member directed review within 30 days.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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Complainant,	:	
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v.	:	OSHRC DOCKET NO. 97-0851
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NORTHWEST CONDUIT CORP.,	:	
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Respondent.	:	
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ORDER

In an opinion dated February 5, 1998, the undersigned found that Respondent's late notice of contest was due to excusable neglect and consequently granted Respondent's motion for Rule 60(b) relief and directed the Secretary to file her complaint in this matter. On February 13, 1998, the Secretary filed a statement of position in which she disagreed with my decision and declined to file her complaint. On March 6, 1998, as a result of the Secretary's failure to file her complaint, the undersigned issued an order vacating and setting aside the citation for want of prosecution. The Secretary then filed a petition for review, and the Commission, in a decision dated September 30, 1999, affirmed my decision and remanded the case "for further proceedings consistent with this decision." By order of October 8, 1999, the undersigned again directed the Secretary to file her complaint, and on October 18, 1999, Respondent filed a motion for reconsideration, based upon my earlier vacating of the citation. The Secretary filed her complaint on October 22, 1999, and Respondent, on November 5, 1999, filed a motion to dismiss the complaint.

After careful consideration of the record and the submissions of the parties, it is my conclusion that my order of October 8, 1999, was in error. The Secretary declined to file her complaint when directed to do so on February 5, 1998, my order of March 8, 1998, vacated and set aside the citation for want of prosecution, and the Commission affirmed my decision on September 30, 1999. Although the Secretary urges that the Commission's remanding of

the case supports her filing of the complaint at this juncture, I disagree. The Secretary had the opportunity to file her complaint previously, and while it was certainly within her discretion to decline to do so, she is not entitled to a second opportunity now that she has not prevailed in her position before the Commission. Based upon the record, and as Respondent contends, I find that the appropriate resolution of this matter is to dismiss the complaint. Respondent's motion to dismiss is accordingly GRANTED, and the Secretary's complaint is DISMISSED. So ORDERED.

Irving Sommer
Chief Judge

Date: