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SECRETARY OF LABOR, Complainant, v. JACKSON ASSOCIATES OF NASSAU, Respondent.	OSHRC Docket No. 91-0438

DECISION

BEFORE: FOULKE, Chairman, and MONTOYA, Commissioner.

BY THE COMMISSION:

The Occupational Safety and Health Administration ("OSHA") conducted an August 17, 1990 inspection of the Jackson Hotel which was owned and operated by Jackson Associates of Nassau ("Jackson"). The hotel, which the judge described as a "mom and pop" business, was run by Yolanda and Abraham Fischer. Yolanda Fischer and Shari Morse, Fischer's administrative assistant of eleven years, as well as George Mitchell, the maintenance supervisor, were present at the time of the initial inspection, a follow-up inspection and the closing conference. On November 14, 1990, OSHA issued citations, alleging eleven serious violations and one willful violation, bearing a total penalty of $11,230. Morse signed for the certified mail packet on November 18, 1990. After she opened the citations, she discussed them with the maintenance supervisor and took pictures of the newly abated conditions. She spoke with Fischer about the citations two or three days later, once the photographs were developed, and put the materials on Fischer's desk.

During this entire period, Fischer was often away from the hotel, taking care of her husband whose illness lasted from July 1990 until January 10, 1991, when he died. She

would come in only two or three times a week for a few hours at a time. Morse, whose duties normally involved answering the phone, sorting and filing mail, and some payroll work, had taken on more responsibility in Fischer's absence, to the extent that Fischer agreed that Morse was handling the business.

Jackson did not file a notice of contest within the statutory fifteen-day period.[1] In January 1991, Jackson received a penalty collection letter from OSHA. Morse contacted the OSHA regional office, discussed the matter with two representatives from that office, and sent a letter to the Review Commission asking for permission to file a late notice of contest. The letter, which did not mention Mr. Fischer's illness or Mrs. Fischer's caregiving responsibilities, stated in part: "We were not advised at the time of the informal conference that if we did not contest the citations for violations that we were responsible for penalties due." It was about this time that Jackson retained counsel, who wrote to the Commission that the physical and emotional demands on Fischer during her husband's last illness had prevented her from filing a timely notice of contest. Counsel's letter said nothing about misrepresentations or deception by the compliance officers.

The Secretary moved for dismissal of Jackson's untimely notice of contest. He argued that the citations had been deemed final orders under section 10(a) of the Act or, in the alternative, that the circumstances did not warrant relief under Fed. R. Civ. P. 60(b).[2] A hearing was held solely on the preliminary question of the validity of the late-filed notice of contest.

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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 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 judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[;] . . . (3) fraud . . . misrepresentation, or other misconduct of an adverse party[;] . . . or (6) any other reason justifying relief from the operation of the judgment.

Judge's Decision

The judge found, over the Secretary's objections, that Jackson was entitled to relief under *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 1981 CCH OSHD ¶ 25,591 (No. 80-1920, 1981) (Commission has jurisdiction to entertain a late notice of contest under Fed. R. Civ. P. 60(b)), citing *J.I. Hass Co. v. OSHRC*, 648 F.2d 190 (3rd Cir. 1981) (same). As the judge noted, "[a]pplying rule 60(b)(6), courts have set aside a final judgment or order when circumstances such as absence, illness, or a similar disability prevent a party from acting to protect its interests." *Branciforte*, 9 BNA OSHC at 2117, 1981 CCH OSHD at p. 31,922.

Conceding that "[i]f this was a larger office with more persons I would decide the case differently," the judge found that *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1991 CCH OSHD ¶ 29,412 (No. 90-2460, 1991) (prolonged illness of person assigned to handle NOC does not constitute grounds for relief), had not disavowed *Branciforte*. The judge ordered that Jackson be allowed to file its notice of contest and that the Secretary be given thirty days to file a complaint. Since the Secretary declined to file a complaint, the judge issued a decision dismissing the citations and penalties for failure to file a complaint under Commission Rule 34. The Secretary petitioned for review.

Secretary's Section 10(a) Arguments

Acknowledging that the Commission has not departed from its precedent holding that it does have jurisdiction to grant Rule 60(b) relief in late notice of contest cases, *e.g., Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 1989 CCH OSHD ¶ 28,937 (No. 86-1266, 1989), 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]

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[3] Rule 60(b) applies by way of Section 12(g) of the Act which provides that "[u]nless the commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure."

The Secretary claims that the Act plainly states that section 10(c) final orders *are* subject to judicial review,[4] but that section 10(a) final orders are *not* subject either to judicial review or to review by any agency, arguably including the Secretary and the Commission. Moreover, the Secretary contends, final orders produced by operation of law pursuant to section 10(a) are not identical to the final orders produced by means of a section 10(c) adjudication. Although both are labeled a "final order of the Commission" under the terms of the Act, the Secretary argues that the phrase is used in section 10(a) so that an uncontested citation may be enforced in an appeals court under the provisions of section 11(b) of the Act, which uses the phrase "final order of the Commission."

The Secretary further maintains that section 12(g) of the Act, *see supra* note 4, does not enable the Commission to apply Rule 60(b) here. According to the Secretary, there is nothing to apply Rule 60(b) to in late notice of contest cases, since no Commission "proceedings" ever commence when, by operation of law pursuant to section 10(a), a citation is deemed a final order. The Secretary refuses to treat all Commission activities as "proceedings" referred to in section 12(g). He contends that Rule 60(b) contemplates reconsideration of judicial action and therefore covers only situations in which a tribunal has initially obtained jurisdiction and acted upon the case. He cites two Sixth Circuit cases, *Capital City Excav. Co. v. OSHRC*, 679 F.2d 105 (6th Cir. 1982) and *Marshall v. Monroe & Sons*, 615 F.2d 1156 (6th Cir. 1980) in support. The Secretary notes that in *Capital City*, a late notice of contest case, the court applied not Rule 60(b) but rather equitable tolling principles, whereas in *Monroe & Sons*, a case involving a default for failure to file an answer where the Commission had already acquired jurisdiction, the court applied Rule 60(b).[5]

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[4] Section 10(c) of the Act provides in part that "[i]f an employer notifies the Secretary that he intends to contest a citation . . . the Commission shall afford an opportunity for a hearing . . . [and] shall thereafter issue an order . . . and such order shall become final thirty days after its issuance." Section 11(a) permits any person adversely affected or aggrieved by a section 10(c) final order to seek judicial review.

[5] While it is true that the court did not ultimately apply Rule 60(b) in the *Capital City* case, it did not hold that Rule 60(b) does not apply to late notice of contest cases. To the contrary, after recalling its holding in *Monroe & Sons* that "an OSHRC order is no less subject to consideration under [Rule 60(b)] than is any final court judgment," the court added simply that "[s]ince Capital City did not file a Rule 60(b) motion before the Commission, that rule is not involved in this case." *Capital City*, 679 F.2d at 111. Thus, the court leaves open

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Finally, the Secretary argues that his position is supported by Fed. R. Civ. P. 54(a) which defines "judgment" as including "a decree and any order from which an appeal lies." The Secretary claims that since a section 10(a) final order is specifically "not subject to review by any court or agency," there is no "order from which an appeal lies" for Rule 60(b) to reach.[6]

Analysis

Although we can find some initial appeal in the Secretary's reading of section 10(a), his interpretation presumes that the Act creates two types of final orders. To the contrary, the Act recognizes only one type of final order, although there are a number of methods by which an enforceable final order may be obtained. In the absence of a consensual settlement or an uncontested citation, however, *whenever* there is a dispute between the parties, the matter is resolved via a section 10(c) adjudication, even if the merits are not reached. The Secretary himself has acknowledged the Commission's jurisdiction and participated in a variety of adjudicatory proceedings the very subject of which was whether the employer or the Secretary proceeded in accordance with the Act so as to be entitled to benefits thereunder. *See, e.g., Atlantic Marine, Inc. v. OSHRC*, 524 F.2d 476 (5th Cir. 1975) (untimely notice of contest attributed to government misconduct); *General Electric Co. v. OSHRC*, 583 F.2d 61, 68 n. 10 (2d Cir. 1978) (timeliness of issuance of citation); *Buckley & Co.*, 1 BNA OSHC 1535 (No. 1342, 1974), *rev'd on other grounds*, 507 F.2d 78 (3d Cir. 1975) (sufficiency of service of process); *Acrom Constr. Servs., Inc.*, 15 BNA OSHC 1123 (No. 88-2291, 1991) (legitimacy of an oral or written notice of contest) and cases cited.

Certainly nothing in the language of the Act, either section 10(a), Rule 60(b) as incorporated by section 12(g), or any other provision, suggests the existence of an

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[5](...continued)
the possibility that it would apply Rule 60(b) to a late notice of contest case if presented with the proper motion.

[6] This argument presumes that a late-contested citation, like an uncontested citation, instantly, on the sixteenth working day, becomes a final order from which no appeal lies. To the contrary, as explained in the balance of this decision, once the employer raises an issue with respect to the nature, form or timeliness of its notice of contest, the citation is extracted from section 10(a). At that point, the Commission examines the citation *qua* contested citation (not citation *qua* final order) and, regardless of whether the Commission finds in the employer's favor, the result is a section 10(c) order from which an appeal lies.

"irreconcilable conflict" from which we may infer that section 10(a) was intended to preclude the applicability of any of the Federal Rules of Civil Procedure to Commission proceedings. *See Rodriguez v. United States*, 480 U.S. 522, 524 (1987). Instead, it appears to us that the pertinent provisions of the Act can be read in harmony with ease. *See* 2A Sutherland, Statutory Construction §§ 46.05, 46.06 (5th Ed., 1992 Rev.). Under section 10(a), an uncontested citation is "deemed a final order of the Commission and not subject to review by any court or agency." The vast majority of uncontested citations fall, without further ado, into this category. However, under section 12(g) of the Act, our proceedings shall be in accordance with the Federal Rules of Civil Procedure unless the Commission has adopted a different rule. This includes Rule 60(b) which, in certain cirumstances, permits the Commission to relieve parties or their representatives from final orders.

The Secretary insists that section 10(a) obviously precludes relief or review under Rule 60(b) because section 10(c) so clearly affords relief and review where citations are timely contested. We believe that the only way to plausibly read Rule 60(b) in the context of section 10(a) is to recognize that the federal judiciary system fashioned this remedy to address those circumstances in which a party's blameless failure to comply with an order or meet a deadline would effectively force it to forfeit its substantive rights in the matter at issue. Where the Federal Rules of Civil Procedure apply, this remedy is universally available. We find nothing in the language of the Act or its legislative history to indicate that Congress intended to take the Draconian step of completely eliminating even the possibility of Rule 60(b) relief in situations in which a citation is contested in an untimely or unorthodox manner.

Although Congress undoubtedly envisioned a tribunal of limited jurisdiction when it created the Commission, it never wrote into the Act a specific, restrictive jurisdictional grant; rather, the Commission was created as a forum in which to resolve disputes arising in connection with enforcement under the Act.[7] In assuming jurisdiction over this case and

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[7] *See, e.g.*, section 12(d) of the Act: "Whenever the commission deems [appropriate], it may *hold hearings or conduct other proceedings* at any other place." Similarly, section 12(j) provides that in the first instance, an administrative law judge "shall hear, and make a determination upon, *any proceeding instituted before the Commission and any motion in connection therewith* . . . ." (Emphases added.)

other late notice of contest cases, we are simply carrying out our statutory purpose: to "carry[] out adjudicatory functions under the Act." Sec. 2(b)(3) of the Act. "The Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced over . . . objections." *See Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 7 (1985).

The Secretary's claim that the Commission has no jurisdiction over these kinds of cases is belied by his apparent recognition of at least one exception to his own rule. The Secretary's regulation on point, 29 C.F.R. § 1903.17, provides that an employer's notice of contest "shall be postmarked within 15 working days of the receipt by the employer of the notice of proposed penalty." No exceptions are recognized in the text of the regulation, but a common law exception has developed over time. *See Atlantic Marine*) (section 10(a) ought not pose an "impenetrable barrier" to an employer who can show its untimely notice of contest was the result of being prejudiced by the Secretary's deception or irregular procedures). The Secretary appears to have acquiesced in the Commission's review of cases in which it is alleged that untimeliness of a notice of contest was due to misrepresentation on the Secretary's part. *E.g.*, *Henry C. Beck Co.*, 8 BNA OSHC 1395, 1980 CCH OSHD ¶ 24,484 (No. 11864, 1980); *Merritt Elec. Co.*, 9 BNA OSHC 2089, 1981 CCH OSHD ¶ 25,556 (No. 77-3772, 1981); *Elmer Constr. Co.*, 12 BNA OSHC 1002, 1984-85 CCH OSHD ¶ 27,050 (No. 83-40, 1984). The principles expressed in *Atlantic Marine* are essentially embodied in Fed. R. Civ. P. 60(b)(3), which allows relief on grounds of "fraud . . . misrepresentation, or other misconduct of an adverse party." *See Branciforte*, 9 BNA OSHC at 2117, 1981 CCH OSHD at p. 31,922 ("The Commission's holding in *B.J. Hughes* [*B.J. Hughes, Inc.*, 7 BNA OSHC 1471, 1979 CCH OSHD ¶ 23,675 (No. 76-2165, 1979)] was implicitly grounded on the same equitable principles embodied in Rule 60(b)(3)"). The Secretary's seeming submission to Commission jurisdiction when his own conduct causes the delay persuades us that his position is founded not upon the language of section 10(a) but on which party's conduct caused the delay and whether employees should be made to suffer for that conduct.

In conclusion, the Secretary is correct when he argues that normally, when a citation remains uncontested, no Commission "proceedings" take place to which Rule 60(b) could apply. However, a late-contested citation, is still a contested citation, whether or not the merits are ever reached, and it is this procedural controversy to which Rule 60(b) applies. We therefore reaffirm that section 10(a) does not prevent the Commission from ruling on whether to grant relief from a final order under Rule 60(b).

Rule 60(b)(1) or (b)(6) Relief

Having established that the Commission has jurisdiction and that both equitable tolling under *Atlantic Marine* and Rule 60(b) relief may be available to employers who file late notices of contest, we turn to the particular facts of this case. For the following reasons, we find that Jackson is not entitled to relief under Rule 60(b)(1) or (b)(6), but may be entitled to relief under Rule 60(b)(3) or under the principles stated in *Atlantic Marine*.

The judge found that Fischer's distraction because of her husband's illness fell within the category of "any other reason[s] justifying relief from the operation of the judgment" under Rule 60(b)(6). We do not reach that issue and take no position on the judge's finding with respect to Fischer's role in causing the notice of contest to be late.

In our opinion, it is the conduct of Fischer's administrative assistant, Morse, not of Fischer herself, that is critical here. The standard to be applied is Rule 60(b)(1) covering inadvertence, mistake or excusable neglect. The judge, focusing solely on Fischer's conduct, made no finding as to why Morse, who had been actively involved in the business and in many respects acted as Mrs. Fischer's surrogate during Mr. Fischer's illness, failed to read the citations carefully and either act or advise Fischer to act accordingly. He found only that "[t]he only other employee in the office was Ms. Morse whose testimony revealed that she would not have the capacity to handle something such as the OSHA citation and notification of proposed penalties." However, our reading of the record suggests that except for timely contesting the OSHA citation, Morse handled the business quite well. Morse testified that the business was still functioning, admitting at the hearing in Fischer's presence, "not in the same manner because I'm not Mrs. Fischer and I don't have the ability that Mrs. Fischer does." However, both witnesses' testimony leaves no doubt that Fischer had entrusted Morse with running the business and that Morse was capable of obliging. We find it

somewhat odd that Morse, who had proven so adept at keeping the business running, nevertheless apparently failed to read the citations carefully enough to discover that further action was required to contest the citations. Morse testified that upon opening the citations, she did note the penalty amounts in the right column, but presumed that "it did not apply to us, because we had taken care of everything."

Courts in the Second Circuit have gone beyond the bare wording of Rule 60(b)(1) and have applied a three-factor test[8]: (1) whether the default is willful, (2) whether the movant has a meritorious defense, and (3) the level of prejudice to the other party if relief is granted. *SEC v. Hasho*, 134 F.R.D. 74 (S.D.N.Y. 1991), citing *Davis v. Musler*, 713 F.2d 907, 915 (2d Cir. 1983). The "willfulness" of the default under this test should not be confused with "willful" violations under the Act. Rather, whether the default was "willful" here refers to whether the party's own actions contributed to the default or whether it made good faith efforts to protect its legal interests. Courts in the Second Circuit find that a party's default was not willful only when the party has taken reasonable steps under the circumstances. *E.g.*, *Music Deli & Groceries, Inc. v. IRS*, 781 F. Supp. 992 (1991); *Salter v. Hooker Chem., Durez Plastic & Chem. Div.*, 119 F.R.D. 7 (W.D.N.Y. 1988). We find Morse's conduct was "willful" for purposes of Rule 60(b)(1), in the sense that she disregarded an opportunity to protect Jackson's interests by failing to read the OSHA materials carefully. *S.E.C. v. Hasho.*

Jackson's key people had the actual, physical notice in their hands well before the 15-day deadline approached. The excusable neglect standard can never be met by a showing of refusal to read and comprehend the plain language of the rules. *See In re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 515 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985). Similarly, under Commission precedent, a layperson must exercise reasonable diligence, and what is reasonable may vary depending on the information available to her or him. *Keefe Earth*

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[8] The same three-factor test is used in setting aside default judgments under Fed. R. Civ. P. 55(c), which permits a court to grant relief "for good cause shown." *See, e.g., Brock v. Unique Racquetball and Health Clubs, Inc.*, 786 F.2d 61 (2d Cir. 1986). Also, the meritorious-defense requirement is a common interpretation of Rule 60(b)(1) in other circuits. *E.g.*, *Marshall v. Monroe & Sons*, 615 F.2d 1156, 1160 (5th Cir. 1980) (citing cases from four other circuits).

Boring Co., 14 BNA OSHC 2187, 1991 CCH OSHD ¶ 29,277 (No. 88-2521, 1991). In light of the role that Morse had otherwise ably assumed, she may reasonably be expected to have apprised herself of the rules, especially with $11,230 at stake.

Jackson has established no basis for relief under the Second Circuit's three-pronged test. Thus we find that Morse's failure to read the citations and accompanying materials thoroughly does not constitute "mistake, inadvertence, surprise or excusable neglect" pursuant to Rule 60(b)(1). In the absence of misrepresentation by the Secretary as discussed below, the citations must be reinstated and affirmed.

Other Relief

Although we find nothing in the record rising to the level of excusable neglect required under Rule 60(b)(1), the possibility that Morse was misled into believing that a written notice of contest was not required would, if proven, provide a basis for relief under *Atlantic Marine*. At the hearing, at which both Morse and Fischer testified, Jackson pursued its claim, first raised in Morse's notice of contest letter, that the compliance officers had misled the responsible parties:

> Q: "Was there any discussion regarding possible penalties?"
> A: "They said if we did not fix what they found wrong, that there would be penalties."
> Q: "Was there any indication as to what the disposition might be, if you satisfactorily fixed it."
> A: "That there would be no penalties."
> . . . .
> A: At the end of the first inspection, the two inspectors came down with George Mitchell and they were talking about what they had found wrong with the building and at that time, I believe Mrs. Fischer asked them if this is all fixed, then they are not responsible for any penalties and that is when the whole thing about, 'no penalties if we fixed everything,' came about."

When asked which of the two inspectors made these statements, Morse replied, "I couldn't be one hundred percent. I think it was the young lady. She was doing most of the talking." Fischer's testimony was basically the same:

> Q: "Was there any discussion about possible penalties?"
> A: "No, they said, 'no penalties will be issued in case we fix everything we have to fix.'"

Attributing Morse's and Fischer's belief to a "misunderstanding . . . a lack of meeting of the minds," the judge found no deception on the Secretary's part. He based this conclusion not on the demeanor of the witnesses but on his experience: "I have never found an occasion in 20 years where OSHA compliance officers promised that someone would not get a penalty if they abated, inasmuch as the statute calls for first instance sanctions." However, in light of Jackson's allegations, we remand this case to the Chief Judge for reassignment to a judge for the purpose of determining whether Jackson's allegations can be substantiated.[9] For us to rule on these allegations on the basis of Morse's and Fischer's testimony alone at this stage would prejudice the Secretary, since he effectively waived cross-examination to accommodate the judge's rulings from the bench and also withdrew his request for a continuance to produce the compliance officers as rebuttal witnesses when that became unnecessary.

Considerations on Remand

As mentioned above, Rule 60(b)(3)--covering fraud, misrepresentation or other misconduct of an adverse party--embodies the same principle expressed in *Atlantic Marine*-type equitable tolling cases. Ordinarily, clause (3) is invoked where material information has been withheld or where incorrect or perjured evidence has been intentionally supplied. *In re Emergency Beacon Corp.*, 666 F.2d 754, 759 (2d Cir. 1981), citing 7 *Moore's Federal Practice*, ¶ 60.24[5] (2d Ed. 1979). However, it is not clear to us whether a Rule 60(b)(3) claimant must show evidence of a meritorious defense as part of her burden. We discern some slight indication that the Second Circuit may require evidence of a meritorious defense before relief under *any* subsection (other than one not material here) may be granted. *See Covington Indus., Inc. v. Resintex, A.G.*, 629 F.2d 730, 733 n. 3 (2d Cir. 1980). When confronted with a Rule 60(b)(3) case, the Second Circuit does not appear to rely on the

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[9] We note that although *Atlantic Marine* was decided in the Fifth Circuit and this case is appealable to the Second Circuit, the Second Circuit recognizes principles of equitable tolling similar to those expressed by the Fifth Circuit in *Atlantic Marine*. In *Canales v. Sullivan*, 936 F.2d 755, *aff'd on reh'g*, 947 F.2d 45 (2d Cir. 1991), the Second Circuit remanded for a further evidentiary hearing to determine whether a disability claimant's claim of mental impairment warranted equitable tolling of a statute of limitations. The court noted that government misconduct is an appropriate ground for equitable tolling, citing *DeBrunner v. Midway Equip. Co.*, 803 F.2d 950, 952 (8th Cir. 1986).

three-factor test as it does in Rule 60(b)(1) cases. *See, e.g., Fleming v. New York Univ.*, 865 F.2d 478 (2d Cir. 1989); *Madonna v. United States*, 878 F.2d 62 (2d Cir. 1989).

If we assume, *arguendo*, that the meritorious-defense factor does apply in Rule 60(b)(3) cases, Jackson would at the least have to offer evidence bearing out the lawyer's allegations in the pleadings, for instance, that no employees were exposed to any hazard from any locked doors. In that event, Jackson would in our view have alleged sufficient "underlying facts" supporting its general denials to qualify for relief. *See Sony Corp. v. Elm State Elec., Inc.*, 800 F.2d 317 (2d Cir. 1986).[10] The movant need not conclusively establish the validity of those defenses, but must make some showing of their existence other than mere allegations. *Kumar v. Ford*, 111 F.R.D. 34 (S.D.N.Y. 1986) citing *Davis v. Musler.*

In the past, the Commission has not reached the meritorious-defense requirement, primarily because it has rarely found that the party has shown excusable neglect, the first prong of the test. In *Monroe*, 615 F.2d at 1161-62, the Fifth Circuit concluded that OSHRC had not abused its discretion when it determined that the employer had made a sufficient showing of a meritorious defense. In that case, the court found that "Monroe's assertion that he did not create the violations, while not a full legal defense, raised a number of factual questions relating to his responsibility for the citations." *Id.* at 1162. Similarly, in *P & A Constr.*, 10 BNA OSHC 1185, 1186, 1981 CCH OSHD ¶ 25,783, p. 32,221 (No. 80-3848, 1981), the Commission was satisfied with minimal allegations that the employer could prove a defense if given the opportunity.[11]

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[10] This is assuming that it first proves government misconduct. A Rule 60(b)(3) motion cannot be granted absent clear and convincing evidence of material misrepresentations. *Fleming*, citing *Mastini v. American Tel. & Telegraph Co.*, 369 F.2d 378 (2d Cir. 1966).

[11] The Secretary argued that because the Commission has not reached the meritorious-defense issue in the Rule 60(b) cases it has decided over the years, the judges have been deprived of guidance in this area. That may be so, inasmuch as neither the judge in this case nor the judge in *Byrd Produce Co.* (No. 91-0823) (consolidated), also released today, made meritorious-defense findings. Judges should not grant relief under Rule 60(b) without making findings on all three prongs of the test: existence of excusable neglect or other grounds, some showing of a meritorious defense, and the degree of prejudice, if any, to the Secretary. At the same time, however, the judges should guard against any misguided attempts by the Secretary to block employers trying to make some showing of a meritorious defenses during the preliminary hearing, as happened in this case. By this we do not mean to imply that there is no difference between a full-blown hearing on the merits and a hearing designated as being limited to the validity of the notice of contest. But if, as the Secretary

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Jackson's assertions--if the evidence reflects Jackson's lawyer's statements--while not establishing a full legal defense to all the citation items, would raise a number of factual questions relating to citations accounting for the bulk of the penalties. We do not believe, as the Secretary suggests, that the Commission ought to require a complete defense against every citation item before granting 60(b) relief, or that it should grant relief in a piecemeal fashion, only with respect to those citations for which the proffered defense is found to be meritorious.

The existence of a meritorious defense will only become an issue in this case if the judge finds on remand that the Secretary's compliance officers did promise or knowingly leave the misimpression that violative conditions, once abated, carry no penalty. Commission precedent adopting and construing the equitable tolling principles in *Atlantic Marine*, together with the precedent in the Second Circuit, give the judge ample guideposts for adjudicating Jackson's misrepresentation claim on remand.

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[11](...continued)
argues, Rule 60(b) relief may be granted only if the employer can make some showing of a meritorious defense, then the employer must be allowed to make that showing without objections from the Secretary during the hearing.

Order

Should the judge find on remand that Jackson is not entitled to relief under principles of equitable tolling or under Rule 60(b)(3), he or she shall dismiss the notice of contest and affirm the citations. Otherwise, the case shall proceed as if the notice of contest had been timely filed.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: June 18, 1993

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SECRETARY OF LABOR,

Complainant,

v.

JACKSON ASSOCIATES OF NASSAU,

Respondent.

Docket No. 91-0438

NOTICE OF COMMISSION DECISION AND REMAND

The attached Decision and Remand by the Occupational Safety and Health Review Commission was issued on June 18, 1993. The case will be referred to the Office of the Chief Administrative Law Judge for further action.

FOR THE COMMISSION

Ray H. Darling, Jr.

June 18, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-438

NOTICE IS GIVEN TO THE FOLLOWING:

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Respondent.

OSHRC DOCKET
NO. 91-0438

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 January 17, 1992. The decision of the Judge will become a final order of the Commission on February 18, 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 6, 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.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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: January 17, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-0438

NOTICE IS GIVEN TO THE FOLLOWING:

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	
Complainant	OSHRC Docket No. 91-0438
v.	
JACKSON ASSOCIATES OF NASSAU	
Respondent.	

Appearances:

Alan Kammerman, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Arthur Welsher, Esq.
Long Beach, New York
For Respondent

Before: Administrative Law Judge David G. Oringer

DECISION AND DISMISSAL

On November 14, 1990, the Occupational Safety and Health Administration (OSHA) issued to this respondent, Jackson Associates of Nassau, (hereinafter referred to as "Jackson" or "respondent") three citations by certified mail and a notification proposing penalties in the aggregate of $11,230. I find that the date the citations were received by the respondent as reflected by the return receipt was November 18th. The fifteen working day period for contesting the citations expired on December 11, 1990.

After receiving a written request for payment in January from OSHA, the respondent, following a telephone conversation of January 16, 1991 with OSHA, requested the Review

Commission to allow it to file a "a late contesting" of the citations and penalties, admitting in the January 22nd letter that it did not timely contest the citation. It offered as reason for the failure to timely contest, that the principal, Yolanda Fischer, was disrupted due to the serious illness of her husband from August 1990 to January 10, 1991 when he passed away.

On March 13, 1991, the complainant moved for an order dismissing the respondent's notice of contest in lieu of filing a complaint. The respondent apparently then procured counsel who filed opposition to the complainant's motion for an order dismissing the respondent's notice of contest on or about March 19, 1991. He argued in his opposition that the failure to timely interpose a notice of contest was due to the distraction of the administrative head of respondent at the illness and death of her husband and believed that this situation constituted excusable neglect.

Respondent's counsel pointed out that this is a single "mom and pop" hotel business and that a penalty of $11,230 is very large to a business of this size. He alleged that the late notice of contest was due to the distraction of the principal, Mrs, Fischer, brought about by the serious illness and subsequent death of her husband, the other principal in this small business. In his reply brief counsel for the Secretary argued that a Commission case, to wit, *EK Construction Co., Inc.*, Docket Number 90-2460 decided July 17, 1991, was precedential in this case. It was my opinion that a preliminary hearing was necessary to determine whether or not the respondent came within the purview of Federal Rule of Civil Procedure 60(b) as was claimed by respondent's counsel. The preliminary hearing was held on October 21, 1991, in New York City pursuant to due notice.

THE EVIDENCE OF RECORD

The evidence reveals that this inspection was conducted by two compliance officers from the Long Island area, neither of whom who were brought in by the Secretary to testify. The Secretary's witness was an assistant area director for safety in the Long Island area, Mr. John L. Caldarelli. Despite the fact that the Secretary had objected to simplified proceedings, she failed to bring in the compliance officers who had cited the respondent nor did she bring in the person who did the mailing. At the close of the hearing the complainant asked to be able to resume the hearing so it could come in with its compliance officers to testify in this preliminary hearing. This was denied on the grounds that I did not believe that

there was a deceptive practice engaged in by the Secretary, however, in any case I would not allow the Secretary to bite the apple repeatedly and waste the Judge's time and the Commission's funds. If a party desires to litigate it must bring all of its necessary witnesses. Counsel should have known that to properly prove a mailing the person doing the mailing should have been present. In any case however, I balanced the equities. I allowed the Secretary to prove the mailing by adducing testimony of the usual conduct in the office, as testified to by Mr. Caldarelli, and to balance the equities I received in evidence an uncertified copy of the hospital record of the respondent's late husband, one of the two principals in this small corporation.

The evidence adduced reveals that the principals in this corporation had this hotel for a relatively short time. Both of them were Holocaust victims with limited English, however, sufficient to understand enough to get along. This was respondent's first encounter with the Occupational Safety and Health Administration and its first OSHA inspection.

Respondent attempted to prove that the compliance officers stated that if Jackson fixed everything they would not get a penalty. Based on 20 years of experience I think that such allegation is due to a misunderstanding. I have never found an occasion in 20 years where OSHA compliance officers promised that someone would not get a penalty if they abated, inasmuch as the statute calls for first instance sanctions. What I believe occurred was that OSHA stated to respondent that if they failed to file a notice of contest then and in such case they would have to pay all of the penalties however, if they contested it would hold up the penalty assessment until the Judge had decided the case. I believe there was a lack of meeting of the minds. In any case, the respondent alleged that it corrected everything except the doors which were on order but had not yet been delivered.

I do not find any deceptive practice by the Secretary despite the testimony of Mrs. Fischer and Ms. Morse. Again, to reiterate, I believe that it was a lack of meeting of the minds.

The evidence further revealed that this was a small company with three persons working, the husband, who had not been working in this business for most of 1990, particularly after July, when he became gravely ill, his wife, the other principal, and Ms. Morse, who was the subordinate clerk of all work in the office.

The testimony revealed that official mail, such as the citations were put on the desk of the principal. Mrs Fischer testified, and I find this testimony fully credible, that she was out of the office more than half of the time from July 1990, until her husband's death on January 10th from a multiplicity of illnesses. I find that Mr. and Mrs. Fischer who only had each other, with no children, were mutually dependent. I fully credit the testimony of both Ms. Morse and Mrs. Fischer that the husband insisted that the wife be there at his bedside and that he was not satisfied with just a nurse in attendance, after reading the hospital record.

The final diagnosis upon release from the hospital showed that the husband, Mr. Fischer, suffered from acute Pulmonary Edema, pleural Effusion secondary to hypertension, Arterial Sporadic Heart disease, essential Hypertension, Renal Insufficiency secondary to Nephrosclerosis and chronic Anemia, secondary to Uremia. While Mrs. Fischer testified that her husband was 79 years of age when he died, the hospital record reflects that he was 81 years of age on one page and 82 years of age on another. The hospital record further reflects that a bone marrow aspiration was taken and the x-rays revealed a compression fracture of L1, a fracture of the sternum, and old fracture of the ribs and pubic bones. The record further reveals diagnoses of Dementia, secondary to Cerebral Arterial Sclerosis and pain, essential Hypertension and Anemia, secondary to Renal Insufficiency.

The testimony also adduced which I fully credit was that Mr. Fischer insisted that his wife be present and that a nurse was not enough. The hospital record revealed that he was uncooperative because of aggravation and depression, Dementia and Cerebral A.S.. The respondent alleges that Mrs. Fischer's worry and care of her husband caused her to file a late notice of contest.

The evidence in this matter was solely that of a preliminary hearing to decide whether or not the late notice of contest could be excused under 60(b) under the Federal Rules of Civil Procedure. There was no trial whatsoever on the merits inasmuch as the complainant argued that this was not simplified proceedings and would only try the matter on whether or not the untimely notice of contest could be excused, despite the fact that if simplified proceedings were allowed one hearing could have disposed of the entire matter in the event that I decided a preliminary motion against the Secretary as pleadings are not

necessary in simplified proceedings.

DISCUSSION

The salient question before this tribunal is whether or not the illness of the husband and the distraction of the principal by such illness in this very small business came within the purview of section 60(b) of the Federal Rules of Civil Procedure so that the lateness of the notice of contest could be excused. The old 5th Circuit suggested that the finality provision of section 10 of the Act, 29 U.S.C. § 659, was not an "impenetrable barrier" to the Commission Review of a final order. *Atlantic Marine, Inc., v. OSHRC* 524 F.2d 476 (5th Cir. 1975). In that case the court further suggested that an employer should not be denied review for failure to file a notice of contest within the statutory 15 day period if the Secretary's deception or failure to follow proper procedures is responsible for the late filing. As previously related I do not find deception by the Secretary in this case.

Subsequent thereto, however, the 3rd Circuit in 1981 decided that the Commission had jurisdiction to entertain a late notice of contest under Federal Rule of Civil Procedure 60(b). *J.I. Hass Co., v. OSHRC* 648 F.2d 190 (3rd Cir. 1981). The Commission agreed with the 3rd Circuit holding in *J.I. Hass Co.*, supra, that in cases where an employer files a late notice of contest, the employer may be granted relief from the final order under the terms of rule 60(b). In *Branciforte Builders, Inc.*, 9 OSHC 2113 the Commission stated at 9 OSHC 2117....

> "Thus, a judgement may be vacated when it is shown that the party against whom a judgement was entered had no actual knowledge of the service of process on him due to a mistake of fact, inadvertence or excusable neglect. *Rooks v. American Brass Co.* 263 F.2d 166 (6th Cir. 1959)."

The Commission went on to state....

> "under Rule 60(b)(6), a final judgement may be vacated for "any other reason justifying relief from the operation of the judgement." Applying Rule 60(b)(6), courts have set aside a final judgement or order when circumstance such as absence, illness, or a similar disability prevent a party from acting to protect its interest."

The Commission cited *Rooks v. American Brass Co.,* supra; *Klaprott v. United States*, 335 U.S., 601 (1949); *Pierre V. Bernuth, Lembcke Co.*, 20 F.F.D. 116 (Southern District New York 1956). *Branciforte Builders, Inc.,* is still Commission law.

The Secretary as previously related cited a recent Commission decision *EK Construction Co., Inc.*, supra as precedential. I have reviewed *EK Construction Co., Inc.*, very carefully and I do not think it has disavowed *Branciforte Builder, Inc.*, and I do not think that the situation in *EK Construction Co., Inc.* was synonomous with that found in the instant cause.

I believe that illness, particularly a terminal illness, can be a reason for late filing in a small firm such as this one, particularly when encountering OSHA for the first time. The evidence adduced reveals that these two principals, Mr. and Mrs. Fischer, were mutually dependent people. Both were persons who went through the Holocaust, lost their families, married, did not have any children and were mutually dependent upon each other. The only other employee in the office was Ms. Morse whose testimony revealed that she would not have the capacity to handle something such as the OSHA citation and notification of proposed penalties. Both Mrs. Fischer and Ms. Morse testified that Mr. Fisher insisted that his wife be at his bedside and that a nurse in attendance was not enough to satisfy him. The discrepancy concerning age found in the hospital record is understandable. Many immigrants from Europe had problems knowing their exact age, but, in any case, Mr. Fischer was very elderly, as is his wife, and the gentlemen who is now deceased was very ill suffering at the time of hospitalization among other things, congestive heart failure. The hospital record also revealed Dementia secondary to Cerebral Arterial Sclerosis, pain, aggravation and depression. In my opinion the worry for her husband was of such a nature that the failure to file timely was excusable neglect rather than simple negligence. If this was a larger office with more persons I would decide the case differently but, given the facts of this case I think that this is a classic example of excusable neglect coming within the parameters of 60(b)(6) as contemplated in *Branciforte Builders, Inc.*, supra. This was an illness of a principal that brought the only other principal to his side and took her away from her normal duties. In my opinion this is the classic example of the utility of section 60(b)(6) of

the Federal Rules of Civil Procedure and I so found in my Ruling and Order of December 3, 1991. In that order I allowed the respondent to file its notice of contest *nunc pro tunc*. I denied the Secretary's motion to dismiss the respondent's notice of contest and gave the complainant 30 days to file her complaint.

Subsequent to the issuance of my Ruling and Order, the Secretary sent a letter to the undersigned dated December 6, 1991, respectfully declining to proceed with the filing of a complaint. The Secretary's counsel stated that he continues to believe that the Commission lacks jurisdiction to consider respondent's late filed notice of contest for the following reasons. (sic)

1. "The Secretary does not agree that Rule 60(b) may be applied to late filed notices of contest. We Acknowledge, however, that the Commission has not departed from its precedent on this point and that the Judge must follow Commission precedent."[1]

Despite the decision in *J.I. Hass Co.*, supra and *Branciforte Builders Inc.*, the Secretary in this case takes a contrary position. I do not agree and I find that the Commission is correct in hearing cases such as this one. Further, Commission Judges must follow Commission precedent. *Continental Steel Co., 1* BNA OSHC 1726.

The Secretary's counsel's second paragraph reads as follows:

2. "Even assuming that Rule 60(b) applies, a basis for relief has not been shown. Respondent's claim now is that it did not contest the penalties because it had believed that the penalties would be forgiven if the violations were promptly abated. As in Keefe Earth Boring Company, Inc., 14 BNA OSHC 2187 (No. 88-2521, 1991), respondent has not demonstrated that it was "justified in failing to avoid its error" in view of the extensive instructions it had received. Those written instructions plainly indicated that the penalties would become final orders if not contested."

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[1]The complainant had the right and the duty to appeal the decision in *Branciforte Builders, Inc.*, supra, if it did not agree with the result. Failure so to do results in acquiescence and it ill behooves complainant to now disagree with a Commission Decision enunciating an important principal that complainant did not appeal and with which it appeared to acquiesce.

I do not believe that that case is on point. I did not base my decision on that issue specifically pointing out that I did not find deception on the part of the Secretary. In this case it was the illness of one of the principals that was the direct reason for the late filing. If the Secretary's argument was accurate then there would be no necessity for Federal Rule of Civil Procedure 60(b) and in in particular 60(b)(6). Accordingly, I do not find this a valid argument.

The Secretary's counsel in his third paragraph states as follows:

> 3. "A meritorious defense has not been established with respect to each citation item. Respondent's testimony as to the locking of kitchen doors because of religious practice is irrelevant because the citation items alleging a locked and obstructed exit refer to a laundry door in the basement. See Tr. 63. In any event, the testimony is insufficient to establish each element of the impossibility defense, i.e., impossibility of compliance, cf. Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872 (1990) (enforcement of general regulatory law does not necessarily violate free exercise clause), and lack of alternatives to literal compliance."

The last argument was totally without merit and is ludicrous. It was the Secretary's counsel who insisted that the hearing be solely on the preliminary question of the lateness of the notice of contest. The allegations of violation contained in the citations were not tried on the merits. As a matter of fact neither compliance officer was present and the Secretary has adduced no proof whatsoever that there were any violations. All it has are naked allegations. All the respondent is asking for is an opportunity to prove that it does have a meritorious defense, which it alleges.

The Secretary's counsel in his paragraph numbered 4 states as follows:

> 4. "Rule 60(b)(6) is not an independent basis for relief in this case since relief may not be granted under Rule 60(b)(6) if another, more specific ground listed in the rule is applicable. Maduakolam v. Columbia Univ., 866 F.2d 53, 55-56 (2d Cir. 1989); Rebco Steel Corp., 1980 CCH OSHD par. 24.334 (Nos. 77-2040 & 77-2947, 1980). Respondent's claim for relief is essentially based on an assertion of mistake or excusable neglect, matters to be considered under clause (b)(1)."

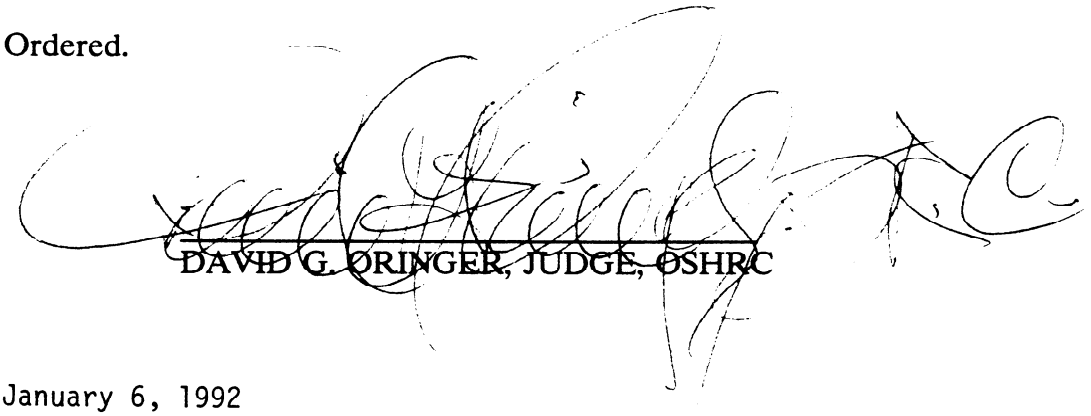
The fourth argument is not a viable one. As pointed out specifically in *Branciforte Builders, Inc.*, 60(b)(6) provides for relief in the event of, *inter alia*, illness. This was the Commission's decision and I agree with it. In any case, if complainant's counsel prefers section 60(b)(1) he is welcome to use it. I agree with the Commission's logic in *Branciforte*, supra.

The last statement by Counsel for the Secretary appears to be an implied threat of appeal. It reads:

> "Our decision not to file a complaint has been made only after consultation with the Solicitor's National Office, and the Secretary reserves the right to appeal any dismissal order entered by your Honor in light of this statement of position."

Whether or not this is an implied threat I do not know but certainly the complainant has the right to appeal any decision or dismissal that is adverse to the position it espouses. In any case, inasmuch as it failed to plead and states unequivocally that it will not plead, it is in violation of Commission Rule 2200.34 and the failure to file a complaint mandates a default and dismissal. Accordingly, the citations and proposed penalties are dismissed in their entirety.

It Is So Ordered.



DAVID G. ORINGER, JUDGE, OSHRC

Dated: January 6, 1992
Boston, Massachusetts