



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

RICHARD KAPOSY d/b/a TREEMAN  
LANDSCAPING, and its successors,

Respondent.

OSHRC Docket No. 10-2333

APPEARANCES:

Michael P. Doyle, Esquire, U.S. Department of Labor, Office of the Solicitor, Philadelphia,  
Pennsylvania  
For the Complainant

Richard Kaposy, Jr., pro se, Aliquippa, Pennsylvania  
For the Respondent

**ORDER**

Before: ATTWOOD, Chairman; MACDOUGALL, Commissioner.

BY THE COMMISSION:

Before the Commission is a decision of Administrative Law Judge John H. Schumacher, following a remand from the U.S. Court of Appeals for the Third Circuit. In his decision pursuant to the court's remand, the judge denied Respondent relief from a final order under Federal Rule of Civil Procedure 60(b)(6). *Richard Kaposy d/b/a Treeman Landscaping*, Decision and Order on Remand, No. 10-2333, December 14, 2015 ("*Kaposy V*"). We directed review of this decision to address an issue the judge left unresolved.

The question of relief first arose from a letter that Richard Kaposy, appearing pro se for the Respondent, filed with the Commission on September 13, 2012, after he had participated, without the assistance of counsel, in a mandatory settlement conference convened by the judge. See Commission Rules 120(b)(2), 120(d), 29 C.F.R. §§ 2200.120(b)(2), 120(d). Following the conference, Mr. Kaposy withdrew his notice of contest. The judge then issued an order on February 11, 2011, approving Mr. Kaposy's withdrawal—resulting in the affirmance of two

willful and five serious violations and a penalty of \$119,700—and his decision became a final order of the Commission on April 7, 2011 (“*Kaposy I*”).

In the above-referenced letter to the Commission, Mr. Kaposy asked for the case to be reopened, asserting that he had withdrawn the notice of contest because:

I was told by Judge Schumacher that I had 2 choices. Plan (A) which was a trial, Plan (B) was to withdraw my [contest]. He assured me it would go away over a period of time. Meaning the fines against me . . . . He said not to open or look at any paper work that I got in the mail.

The Commission construed Mr. Kaposy’s letter as a motion for relief from a final order under Federal Rule of Civil Procedure 60(b)(6), and in a March 6, 2014 Order (“*Kaposy II*”), remanded the matter to the judge to consider whether Respondent was entitled to such relief. In his subsequent decision, the judge determined that Respondent was entitled to relief on the grounds that Mr. Kaposy had been “mistaken as to the effect of the ultimate consequences of his Withdrawal of Notice of Contest . . . .” *Richard Kaposy d/b/a Treeman Landscaping*, Decision on Evidentiary Review, No. 10-2333, May 6, 2014 (“*Kaposy III*”). Accordingly, the judge granted the motion and vacated the withdrawal. *Id.*

On interlocutory review of the judge’s *Kaposy III* decision, the Third Circuit determined that Respondent was time-barred from obtaining relief based on “mistake,” which is a basis for relief under Federal Rule of Civil Procedure 60(b)(1), and remanded the matter for the judge to determine if Respondent had shown the “extraordinary circumstances” required for relief under Federal Rule of Civil Procedure 60(b)(6).<sup>1</sup> *Secretary of Labor v. Kaposy*, 607 F.App’x 230, 25 BNA OSHC 1469 (3d Cir. 2015) (“*Kaposy IV*”). Upon the court’s remand, in *Kaposy V*, the judge held that Respondent had failed to establish extraordinary circumstances and denied relief.

With respect to Respondent’s request for relief that was the basis of the Commission’s March 6, 2014 Order in *Kaposy II*, the judge stated in his *Kaposy III* decision that in addition to considering affidavits filed by the parties, he relied on his “personal recollections of the events that transpired that day.” However, to date he has *never* detailed those recollections, nor has he

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<sup>1</sup> Federal Rule of Civil Procedure 60(b)(1) allows for relief from final judgment based upon “mistake; inadvertence; surprise; or excusable neglect.” Motions for relief under this rule must be brought within one year after the final judgment was entered. Fed. R. Civ. P. 60(c)(1). Because Mr. Kaposy’s letter was filed seventeen months after the *Kaposy I* decision became final, relief is only available under Federal Rule of Civil Procedure 60(b)(6), which does not have a one-year limitation and permits relief “for any other reason that justifies” it. *Id.*

addressed whether the specific assertions in Mr. Kaposy’s letter—as quoted above—are true or have any basis in fact.

In these circumstances, we direct the judge to submit an affidavit to the Commission stating: (1) whether these assertions are accurate; and (2) his specific recollections as to what he said to Mr. Kaposy during the settlement conference that relate to these assertions, including what statements he made to Mr. Kaposy in this regard (if any) in private (i.e., in the absence of any representatives of the Secretary).<sup>2</sup> The judge’s statements may be extremely probative and crucial to both ensuring the Commission’s integrity and resolving the Respondent’s underlying claim, as it will provide the Commission with the facts necessary to review the judge’s determination that Respondent has not shown the “extraordinary circumstances” required for relief under Federal Rule of Civil Procedure 60(b)(6). Accordingly, the judge is to submit his affidavit to the Commission no later than May 16, 2016.

SO ORDERED.

/s/  
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Cynthia L. Attwood  
Chairman

/s/  
\_\_\_\_\_  
Heather L. MacDougall  
Commissioner

Dated: April 22, 2016

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<sup>2</sup> The success of settlement conferences is in no small part attributable to the confidentiality requirements imposed on the settlement process, and we would normally be reluctant to waive confidentiality. However, we find that any harm to the settlement process would be even greater were the judge’s statements not obtained. *Cf. Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999). Commissioner MacDougall notes that in *Olam*, the court observed that the full potential of court-sponsored mediation is not realized unless the litigants and lawyers believe the proceedings are confidential, but the court nonetheless compelled testimony of a mediator “where it became clear that [his] testimony was essential to doing justice.” Pursuant to Rule 107, 29 C.F.R. § 2200.107, the Commission waives—to the degree necessary—the confidentiality requirements of Commission Rule 120(d)(3), 29 C.F.R. § 2200.120(d)(3), to permit the judge to respond to this Order.