

Mr. Harrigan-Ferro argued that the default judgment entered against him personally on January 11, 2013 should be vacated because of excusable neglect, a meritorious defense, and there is no substantial prejudice to Claimant. Mr. Harrigan-Ferro argues that he suffered “a myriad of personal crises during the last half of 2012” and that many of the documents requested to be produced were accidentally destroyed as of at least October 1, 2012, which equate to excusable neglect for not abiding by the Board’s Orders to respond to Claimant’s production requests by November 30, 2012 and then by December 28, 2012. He also argued that he has a meritorious defense that Claimant was not an employee of Mr. Harrigan-Ferro and that Mr. Harrigan-Ferro never even met Claimant. Furthermore, Mr. Harrigan-Ferro argues that the Motion to Vacate was made in a timely fashion and that there is no substantial prejudice to Claimant, as Claimant has been aware of Mr. Harrigan-Ferro’s defenses since the initial response

was filed on September 5, 2012 and that Claimant now has all of the discovery responses from Mr. Harrigan-Ferro.

Claimant argues that Mr. Harrigan-Ferro's excuses are not excusable neglect and are not newly discovered evidence and, therefore, should have been presented at the January 9, 2013 hearing prior to the Board entering the default judgment order. Mr. Harrigan-Ferro's counsel appeared at the January 9, 2013 hearing on behalf of Mr. Harrigan-Ferro, but Mr. Harrigan-Ferro did not appear at that hearing and, therefore, did not present any testimony regarding his failure to respond to the discovery requests despite the Board's November 28 and December 19, 2012 Orders. Mr. Harrigan-Ferro's attorney, on behalf of Mr. Harrigan-Ferro, consented to the language contained in the December 19, 2012 Order, which indicated that a default judgment would be entered against Allserve, LLC and Mr. Harrigan-Ferro if the discovery responses were not provided by December 28, 2012. Since Mr. Harrigan-Ferro did not present any evidence or arguments before the default judgment was entered on January 9th, there is no reason to allow it now, since it is not newly discovered evidence. Mr. Harrigan-Ferro's failure to communicate with his attorney is not excusable neglect.

Claimant also argues that Mr. Harrigan-Ferro's daughter's illness in early December 2012 occurred after the first Board Order compelling production by November 30, 2012. Her illness was addressed at the December 19, 2012 hearing and the Board gave Mr. Harrigan-Ferro extra time to respond to the discovery request due to her illness. Mr. Harrigan-Ferro's response that many of the documents were accidentally destroyed by October 1, 2012 is also not excusable neglect, because October 1st was well-before the Board's hearings and Orders to Compel Production and that "excuse" should have been communicated to Claimant and the Board much earlier than at the July 17, 2013 hearing; it is not newly discovered evidence, since Mr. Harrigan-

Ferro was aware of the destruction by October 1st. Furthermore, Mr. Harrigan-Ferro indicated in his affidavit that he had his family Christmas vacation planned for a year in advance and he went on the vacation following his daughter's illness because her doctors said it would be good for her; however, if the vacation was planned a year in advance, then Mr. Harrigan-Ferro should have communicated that information to his attorney prior to the December 19, 2012 hearing when his attorney consented to the December 28, 2012 discovery deadline. Mr. Harrigan-Ferro knew about the Board's Order and the discovery deadline before he went away on vacation and he chose to ignore the Order and, therefore, the vacation is not excusable neglect.

Given the Affidavit of Mr. Harrigan-Ferro, the Board finds that Mr. Harrigan-Ferro could have responded to the production requests regarding the destruction of the documents in a timely manner, but chose to ignore the production request and concentrate on creating a new LLC. Mr. Harrigan-Ferro chose to ignore the production request and the Board's Orders in November and December 2012 requiring production of the documents and discovery responses. A simple telephone call to his attorney regarding the destruction of the documents in a timely manner would have resolved the issue. Mr. Harrigan-Ferro's family issues arose after the deadline for the document production and after the deadline provided in the Board's first Order in November 2012. All of Mr. Harrigan-Ferro's family issues arose before the December 19, 2012 hearing; however, only the issue of his daughter's illness was raised at that hearing as an excuse for failing to comply with the first Order to Compel, which contained a response deadline of November 30, 2012. The Board finds that all of the excuses that Mr. Harrigan-Ferro presented in his affidavit were known to him at the time of the December 19th hearing and are not newly discovered evidence and, therefore, they should have been raised at that time or at the January 9,

2013 hearing when the Board entered the default judgment. The Board finds that Mr. Harrigan-Ferro's failure to raise these issues at either hearing is not excusable neglect that would warrant vacating the default judgment.

Furthermore, the Board finds that Mr. Harrigan-Ferro knew of his vacation plans a year in advance of his trip that took place on December 25, 2012 according to his affidavit; therefore, at the December 19, 2012 hearing, Mr. Harrigan-Ferro should have informed the Board that he was going on vacation and could not meet the December 28, 2012 deadline rather than ignore the Board's Order again. Such flagrant disregard for the Board's Orders is not excusable neglect. "Excusable neglect" has been defined as "that neglect which might have been the act of a reasonably prudent person under the circumstances." *Lee v. Charter Communications VI, LLC*, 2008 Del. Super. Lexis 5 at *4, quoting *Battaglia v. Wilmington Sav. Fund Soc'y*, 379 A.2d 1132, 1135 (Del. 1979). "A Defendant cannot have the judgment vacated where it has simply ignored the process." *Id.*, quoting *Cummings v. Jimmy's Grille, Inc.*, 2000 Del. Super. Lexis 252 at *3; see also *Begatto v. Sutton*, 2008 Del. Super. Lexis 495; *Baily's Constr. Co. v. Clark*, 2001 Del. Super. Lexis 353; *Gilbert v. Nicholson*, 2006 Del. C.P. Lexis 22. The Board finds that Claimant simply ignored the process repeatedly when he failed to provide the discovery responses in accordance with the Board's two Orders.


Furthermore, Mr. Harrigan-Ferro's attorney reviewed and had no objection to the proposed language in the form of order prepared by Claimant's attorney and presented to the Board on December 19, 2012. The Order contained the language that if Mr. Harrigan-Ferro and/or Allserve, LLC failed to produce the requested documents and responses by December 28, 2012, the Board would enter a default judgment order against Allserve, LLC and Mr. Harrigan-Ferro. At the December 19, 2012 hearing, the Board gave Mr. Harrigan-Ferro and Allserve,


LLC a few extra days to produce the documents in light of his daughter's illness and in light of the holiday; however, the vacation plans were never mentioned as a potential impediment to compliance with the Order and there was no objection made to the language of the default judgment being entered if Allserve, LLC and Mr. Harrigan-Ferro failed to respond to the production request by December 28, 2012.

The Board finds that Mr. Harrigan-Ferro did not meet his burden of proving excusable neglect and the Board will not vacate its prior Default Judgment Order entered against Mr. Harrigan-Ferro. As the Default Judgment Order is not vacated, the Board finds that a bond is appropriate in this case. Claimant requested a bond in the amount of \$182,000.00, which the Board believes is appropriate in this case given Claimant's medical expenses, total disability and partial disability benefits, and potential permanent impairment and disfigurement benefits. Mr. Harrigan-Ferro and/or Allserve, LLC should post the bond by August 30, 2013. The Board also awards Claimant an attorney's fee in the amount of \$4,000.00 based on the Cox factors addressed in Claimant's attorney's fee affidavit.

IT IS SO ORDERED this 31st day of JULY 2013.


INDUSTRIAL ACCIDENT BOARD


Victor R. Epolito, Jr.


Mary Dantzer

Mailed Date: 8.1.13

JGB:HO



OWC Staff

cc: David A. Boswell, Attorney for the Claimant
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