



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

SECRETARY OF LABOR,

Complainant,

v.

Best Touch Tub & Tile, LLC,

Respondent.

OSHRC Docket No. 16-0296

REVISED ORDER OF DEFAULT¹

On January 19, 2016, the Occupational Safety and Health Administration (OSHA) issued a Citation and Notification of Penalty (“citation”) to Respondent for OSHA inspection number 1081517. The citation alleged serious violations of OSHA’s standards with a proposed total penalty of \$25,200. Respondent’s notice of contest, dated February 10, 2016, was filed by Respondent’s attorney, Robert J. Vecchio, Esq.² Respondent’s notice of contest was docketed and the Commission’s Notice of Docketing was sent to the Respondent on February 22, 2016. The Notice of Docketing return postcard³ was signed by Respondent’s attorney on March 10, 2016, and returned to the Commission.

On April 15, 2016, the Secretary filed the complaint in this matter. Respondent did not file an answer as required by Commission Rule 34(b), 29 C.F.R. § 2200.34(b). On June 30, 2016, the undersigned issued an Order to Show Cause Why Notice of Contest Should Not Be

¹ The previous Order is revised to state the reason for the Third Order and to ensure service of the Revised Order of Default to Respondent’s agent and Respondent’s attorney.

² On the same date, by separate letter, Respondent’s counsel noted that Respondent’s business had closed and the only person associated with the company at closure was its owner, Eric Howard.

³ The postcard is the Respondent’s means to certify that it has posted and served the notice of contest to affected employees as required by Commission Rule 7.

Dismissed (“First Order”). The First Order directed Respondent to show cause on or before July 14, 2016, as to why it should not be declared in default for not filing an answer to the complaint within the time permitted by the Commission’s Rules of Procedure. Respondent was advised that failure to respond to the First Order would result in all of the alleged violations set out in the OSHA citation being affirmed and the proposed penalties being assessed without a hearing.

The First Order was sent to the record address of the Respondent’s attorney⁴ through the United States Postal Service (“USPS”) by regular first class mail and by certified mail⁵ with return receipt requested. The mailing by regular first class mail was not returned. The USPS Product & Tracking information website shows the certified mailing was delivered on July 5, 2015; the certified mailing’s green receipt card that acknowledges receipt has not yet been returned to the Commission.

On July 26, 2016, my staff contacted the office of Respondent’s attorney, Mr. Vecchio, to inquire as to why an answer had not been filed and was informed his address had changed to 526 Superior Avenue, East, Suite 220, Cleveland OH 44114. On July 26, 2016, the undersigned issued a second Order to Show Cause Why Notice of Contest Should Not Be Dismissed (“Second Order”). The Second Order directed Respondent to show cause on or before August 9, 2016, as to why it should not be declared in default for not filing an answer to the complaint within the time permitted by the Commission’s Rules of Procedure. Respondent was advised that failure to respond would result in all of the alleged violations set out in the OSHA citation being affirmed and the proposed penalties being assessed without a hearing.

The Second Order was sent to the updated record address of the Respondent’s attorney⁶ through USPS regular first class mail and by certified mail⁷ with return receipt requested. The

⁴ The mailing was addressed to “Robert J. Vecchio, Esquire, Vecchio & Vegh LLC, 720 Leader Builder, 526 Superior Avenue, East, Cleveland, OH 44114.”

⁵ The certified mailing tracking number was 7007-3020-0001-9767-5934. USPS tracking information can be found at https://tools.usps.com/go/TrackConfirmAction_input.

⁶ The mailing was addressed to: “Robert J. Vecchio, Esquire, Vecchio & Vegh LLC, 720 Leader Builder, 526 Superior Avenue, East, *Suite 220*, Cleveland, OH 44114.”

⁷ The certified mailing tracking number was 7016-0910-0001-2491-0092. USPS tracking information can be found at https://tools.usps.com/go/TrackConfirmAction_input.

USPS Product & Tracking information website shows the certified mailing was delivered on July 29, 2015; the certified mailing's green receipt card that acknowledges receipt has not yet been returned to the Commission. The first class mailing was not returned by USPS and is presumed delivered. It is concluded that Respondent's attorney received the Second Order.

On October 12, 2016, the undersigned issued a third Order to Show Cause Why Notice of Contest Should Not Be Dismissed ("Third Order"). The Third Order was sent directly to the Respondent, rather than through Respondent's attorney, to provide an additional notice to Respondent.⁸

A search of the Ohio Secretary of State's website provided the address for Respondent's owner and agent, Eric L. Howard. This address matched the business address listed on the citation and the Secretary's complaint. The Third Order was sent to the Respondent's agent, Eric L. Howard, at 3930 Princeton Blvd., South Euclid, OH 44121, through USPS regular first class mail and certified mail⁹ with return receipt requested. The USPS Product & Tracking information website shows this mailing was delivered on October 18, 2016.

The Third Order directed Respondent to show cause on or before October 26, 2016, as to why it should not be declared in default for not filing an answer to the complaint within the time permitted by the Commission's Rules of Procedure. Respondent was advised that failure to respond would result in all of the alleged violations set out in the OSHA citation being affirmed and the proposed penalties being assessed without a hearing.

The certified mailing's green receipt card was signed and returned to the Commission.¹⁰ The first class mailing was not returned by USPS and is presumed delivered. It is concluded that Respondent received the Third Order.¹¹

⁸ Because the certified mailing cards were not returned to the Commission and Respondent's attorney did not respond to the first two show cause orders, a Third Order was issued directly to Respondent's owner and agent as an additional notice prior to a default action.

⁹ The certified mailing tracking number was 7016-0910-0001-2491-0245. USPS tracking information can be found at https://tools.usps.com/go/TrackConfirmAction_input.

¹⁰ The green certified mail return card was returned to the Commission with significant damage.

Neither the Respondent nor his attorney has responded with an answer to any Order.¹²

Commission Rule 101(a), 29 C.F.R. § 2200.101(a), provides in pertinent part that:

Sanctions. When any party has failed to plead or otherwise proceed as provided by these rules or as required by the . . . Judge, he may be declared to be in default . . . after having been afforded an opportunity to show cause why he should not be declared to be in default. . . . Thereafter, the . . . Judge, in [her] discretion, may enter a decision against the defaulting party. . . .

A judge has very broad discretion in imposing sanctions for noncompliance with the judge's orders or the Commission's Rules of Procedure. *Sealtite Corp.*, 15 BNA OSHC 1130, 1134 (No. 88-1431, 1991). The Commission has long held that dismissal is too harsh a sanction for failure to comply with certain prehearing orders unless the record shows contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of disregard for Commission proceedings. *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001). I find Respondent's conduct here to be contumacious in that, as set out above, the regular first class and certified mailings were received and Respondent failed to respond to multiple orders.

For these reasons, Respondent is found to be in DEFAULT, its notice of contest is DISMISSED, and the OSHA citation issued to Respondent on January 19, 2016, for inspection Number 1081517 is AFFIRMED in its entirety and penalties ASSESSED.

SO ORDERED.

/s/

Covette Rooney
Chief Judge

Dated: January 5, 2017
Washington, D.C.

¹¹ On December 20, 2016, my staff contacted the office of Respondent's attorney, Mr. Vecchio, to determine whether he still represented the Respondent. Mr. Vecchio stated that he had not withdrawn as counsel because Respondent had filed bankruptcy.

¹² The Commission expects a business to maintain "orderly procedures for handling important documents." *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (citations omitted).