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. DIAMOND INDUSTRIES, INC., Respondent.	OSHRC Docket No. 13-0680

APPEARANCES:

Suzanne F. Dunne, Trial Attorney; Christine Z. Heri, Regional Solicitor; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC and Chicago, IL
For the Complainant

William Tandetzke, *pro se*; Milwaukee, WI
For the Respondent

ORDER

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

This case involves an Order of Default issued by Chief Administrative Law Judge Covette Rooney dismissing the notice of contest filed by Diamond Industries, Inc., affirming the two citations issued to Diamond, and assessing the total proposed penalty of $9,200. Pursuant to section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(j), this became a final order of the Commission on January 22, 2014. The Commission subsequently received a letter from Diamond dated February 4, 2014, regarding the case. For the following reasons, we refer this matter to the judge for further proceedings consistent with this order.

BACKGROUND

This case was docketed with the Commission on April 29, 2013. On May 29, 2013, the Secretary filed a motion for extension of time to file a complaint, which Diamond, appearing *pro se*, did not oppose. The Secretary stated that the extension would "allow [the parties] additional time to fully explore Settlement." The judge granted the motion, and the Secretary filed a timely complaint on June 28, 2013. Diamond, however, failed to file an answer to the complaint, and

on September 12, 2013, the judge issued an Order to Show Cause, in which she gave Diamond until September 26, 2013, to show why it should not be held in default for failing to do so. Commission Rule 34(b)(1), 29 C.F.R. § 2200.34(b)(1) (answer shall be filed within 20 days after service of complaint). The judge sent the show cause order to Diamond via certified mail, return receipt requested, as required by Commission Rule 101(d), 29 C.F.R. § 2200.101(d). The return receipt shows that Diamond received the order on September 16, 2013.

On November 22, 2013, the judge dismissed Diamond's notice of contest based on its failure to respond to the show cause order or otherwise communicate with her office, citing Commission Rule 101(a), 29 C.F.R. § 2200.101(a), which provides that a party "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 . . . ." She found that Diamond's failure to comply with Commission rules and respond to the Order to Show Cause constituted contumacious conduct. The judge's order was docketed with the Commission on December 23, 2013, and Diamond did not file a petition for discretionary review before the order became final on January 22, 2014. *See* Commission Rule 92(b), 29 C.F.R. § 2200.92(b) (review of judge's decision may be directed at any time within 30 days of docketing date; in absence of petition for discretionary review, case normally not directed); 29 U.S.C. § 661(j) (judge's decision becomes final order of Commission within 30 days unless directed for review).

Diamond subsequently sent a letter to the judge dated February 4, 2014 ("February letter"). In this letter, Diamond states that it was notified "today" that it "owe[s] the U.S. Department of [L]abor $9,210.00 to settle this case," but that it had hired a safety consulting company that performed a workplace audit, which "was supposed to be our settlement with OSHA for this case." Enclosed with the letter was an invoice from the consulting company, which indicates that the audit was performed on August 28, 2013, along with a receipt indicating that Diamond had paid the company on October 10, 2013. Diamond claims that with this audit, it "complied with everything that was asked of us from the informal meeting." Diamond also enclosed a letter that it claims to have sent the judge on October 14, 2013 ("October 2013 letter"). That letter, addressed to Judge Rooney, purports to have been sent along with a copy of the safety audit invoice, and states "[w]e agreed to have an outside safety audit done at our company as the settlement at the informal hearing with Christine Zortman. I hope that this will

be sufficient proof that we have complied with OSHA to get this matter resolved."[1] Diamond asserts in its February letter that the October 2013 letter and accompanying information about the safety audit were either never received, or that "OSHA changed the agreement and is now demanding payment as well."

DISCUSSION

We construe Diamond's February letter as a motion to set aside the final order under Rule 60(b) of the Federal Rules of Civil Procedure.[2] Commission Rule 2(b), 29 C.F.R. § 2200.2(b) (Federal Rules of Civil Procedure applicable in absence of specific Commission rule); *Bywater Sales & Serv., Byco-MCS Div.*, 13 BNA OSHC 1268, 1269, 1986-1987 CCH OSHD ¶ 27,896, p. 36,597 (No. 86-1214, 1987) (treating *pro se* employer's unsworn letter as a request for a formal motion). The party seeking relief under Federal Rule 60(b) has the burden of demonstrating that it is entitled to relief. *Burrows Paper Co*., 23 BNA OSHC 1131, 1132, 2009-2012 CCH OSHD ¶ 33,064, p. 54,574 (No. 09-1559, 2010).

Here, the judge's finding of contumacy was based, in part, on her belief that the company failed to communicate at all with her office before she issued the default order in November 2013. But the company claims in its February letter that it did attempt to communicate with the judge during that period by mailing her the October 2013 letter and the audit documentation. Although Diamond does not explain in the February letter why it failed to timely respond to the show cause order, the company's assertions raise questions as to whether it, in fact, sent a letter to the judge prior to the default order, and whether it mistakenly believed its case had been settled when it completed the audit.[3] Consequently, the October 2013 letter and Diamond's

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[1] Although this letter was correctly addressed, it was never received by the Commission. Diamond's November 5, 2012, notice of contest was also correctly addressed to the Commission, but apparently was sent only to the Secretary.

[2] Federal Rule 60(b) provides in pertinent part as follows:

> On motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud . . . ,misrepresentation, or misconduct by an opposing party; . . . or (6) any other reason that justifies relief.

[3] We note that Diamond appeared previously before the Commission in a contested case involving two OSHA citations issued to the company in March 2011. This prior case, also before Judge Rooney, was settled by the parties in an agreement approved by the judge on October 28, 2011.

assertion in the February letter that it was mailed prior to the issuance of the default order—neither of which were before the judge when she issued the default order—may have a bearing on the issue of contumacy. *Compare Duquesne Light Co*., 8 BNA OSHC 1218, 1222, 1980 CCH OSHD ¶ 24,384, p. 29,719 (No. 78-5303, 1980) (finding conduct did not warrant dismissal) and *Waterford Aluminum Co.*, 23 BNA OSHC 1438, 1439, 2009-2012 CCH OSHD ¶ 33,138, p. 55,197 (No. 10-1163, 2011) (finding limited record did not establish contumacy) *with Sealtite Corp*., 15 BNA OSHC 1130, 1134, 1991-1993 CCH OSHD ¶ 29,398, p. 39,582 (No. 88-1431, 1991) (finding conduct contumacious and affirming dismissal).

We therefore refer this matter to the judge to conduct further proceedings as appropriate and determine whether Diamond is entitled to relief under Federal Rule 60(b).[4] *See Dore & Assocs. Contr. Inc*., 19 BNA OSHC 1438, 1439, 2001 CCH OSHD ¶ 32,369, p. 49,698 (No. 01-0067, 2001) (remanding to judge to conduct appropriate evidentiary proceeding on Rule 60(b) request); *cf. Waterford Aluminum*, 23 BNA OSHC at 1440, 2009-2012 CCH OSHD at p. 55,198 (remanding to give employer opportunity to explain conduct). If she determines that Diamond is entitled to relief, the judge shall take further appropriate action. If she determines that Diamond is not entitled to relief, she shall issue an order setting forth the reasons for her ruling and submit it to the Executive Secretary. At that time, Diamond may file a petition for discretionary review of the judge's ruling. Commission Rule 91(b), 29 C.F.R. § 2200.91(b).

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: March 26, 2014

[4] Relief under Federal Rule 60(b)(1) and (b)(3) is only available where the moving party has demonstrated reasonable diligence. *Keefe Earth Boring Co, Inc.*, 14 BNA OSHC 2187, 2192, 1991-1993 CCH OSHD ¶ 29,277, p. 39,270 (No. 88-2521, 1991); *Craig Mech., Inc.*, 16 BNA OSHC 1763, 1766, 1993-1995 CCH OSHD ¶ 30,442, p. 42,031 (No. 92-0372-S, 1994). And to secure relief under Federal Rule 60(b)(6), the party seeking relief must demonstrate grounds other than those included in (1) through (5). *Rebco Steel Corp.*, 8 BNA OSHC 1235, 1237, 1980 CCH OSHD ¶ 24,334, p. 29,646 (No. 77-2040, 1980) (consolidated).