



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.

LARRY McMURRAN, dba LAR'S
PLUMBING, INC.,
Respondent.

OSHRC Docket No. 14-1806

APPEARANCES:

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

Larry McMurrans; Shannon Kent; Lar's Plumbing, Inc., Park Ridge, IL
For the Respondent

DIRECTION FOR REVIEW AND REMAND ORDER

Before: ATTWOOD, Acting Chairman and MACDOUGALL, Commissioner.

BY THE COMMISSION:

On May 6, 2015, Administrative Law Judge John H. Schumacher issued a default judgment against Larry McMurrans, dba Lar's Plumbing, Inc., based on its failure to respond to a show cause order. For the reasons that follow, we direct this case for review, set aside the judge's decision, and remand this case for further proceedings in a manner consistent with this opinion.

BACKGROUND

Following an inspection, the Occupational Safety and Health Administration issued Respondent a nine-item serious citation. Respondent, appearing pro se, timely filed a notice of contest ("NOC"). On December 9, 2014, the Secretary requested an extension of time to file his complaint to allow the parties additional time to explore settlement. On December 18, 2014, the

Secretary's counsel sent Respondent copies of a Stipulation and Settlement Agreement, with instructions to sign, then return the agreement to the Solicitor of Labor's Chicago office. According to the Secretary's correspondence, the agreement reduced the citation's total proposed penalty amount from \$12,400 to \$3,640. Upon receiving notification of the pending settlement, the judge issued an order on December 30, 2014, cancelling a previously scheduled teleconference and giving the parties until January 30, 2015, to file the signed agreement.

On March 24, 2015, after the Secretary advised the judge that Respondent had not yet finalized the agreement and could not be reached by phone, the judge issued Respondent an Order to Show Cause for Failure to File Settlement Agreement requiring a response within ten days of the issuance of the order. In the show cause order, which was sent by certified mail with return receipt requested, the judge directed Respondent to explain its failure to: (1) "participate with the [Secretary's counsel] in finalizing a previously-agreed to settlement agreement," (2) respond to the Secretary's counsel's telephone messages, and (3) advise the judge of any changes to its business telephone number. *See* 29 C.F.R. § 2200.6 (requiring any change in contact information be communicated to the Commission); 29 C.F.R. § 2200.101(a) and 101(d) (setting forth default procedure for a party's failure to proceed and requirement that show cause order be served by certified mail, return receipt requested). The judge received the signed return receipt for the show cause order on April 3, 2015, showing a March 30, 2015, delivery date and an illegible signature.

On May 6, 2015, having received no response to the show cause order from the Respondent, the judge issued a decision vacating the NOC and affirming the citation together with the \$12,400 total proposed penalty. The case was docketed with the Commission and on May 23, 2015, Shannon Kent, the daughter of Respondent's owner, sent the Commission a letter along with copies of two cancelled checks made payable to and stamped received by OSHA. In the letter, which she addresses to the "OSHA Review Board," Ms. Kent thanks the Commission for "taking a look at this [case] and . . . plea[ds] for you to mak[e] the amount owed back to \$3640.00." *See* 29 C.F.R. § 2200.91(b) (procedures for filing petition for discretionary review).

DISCUSSION

"Whether dismissal is appropriate in any situation depends on whether a party's behavior demonstrates contumacy, whether the other party was prejudiced, and whether other aggravating circumstances were present." *Caterpillar, Inc.*, 17 BNA OSHC 1507, 1509, 1995-97 CCH

OSHD ¶ 30,972, p. 43,156 (No. 94-347, 1996) (citations omitted). Here, the judge found that Respondent's actions "demonstrate either that it has abandoned this case or that it treats the Commission's Rules . . . with disdain." In her letter to the Commission, however, Ms. Kent asserts that: (1) she "followed everything that [she] was instructed to do and sent all the required documents that OSHA requested"; (2) "we have been faithful in making payments totaling \$2000.00 up to this point"; and (3) the owner of the company has specified medical conditions, which she suggests have impeded his ability to attend to administrative matters, such as those at issue here.

Ms. Kent does not indicate to which OSHA office she sent "the required documents." It is therefore possible that rather than sending them to the Solicitor of Labor's Chicago office in accordance with the Secretary's instructions, she may have erroneously sent them to the OSHA office in Des Plaines, Illinois, where she submitted the two checks. These checks reflect payments to OSHA of \$1,000 each on January 13, 2015, and April 20, 2015, which suggests Respondent was complying with the terms of the pending settlement agreement and thus did not intend to abandon this case. Although Respondent failed to avail itself of the opportunity afforded by the show cause order to present this information to the judge prior to his default decision, we are mindful of Ms. Kent's assertions regarding the owner's medical conditions. In addition, we note that the Secretary has never claimed he was prejudiced by Respondent's alleged failure to timely file the settlement documents or respond to the show cause order.

Under these circumstances, of which the judge was not aware when he issued his decision, we conclude that a sanction of dismissal is not appropriate. *See WR Exterior Design Construction, Inc.*, 22 BNA OSHC 1391, 1392, 2004-09 CCH OSHD ¶ 33,006, p. 54,232 (No. 08-0474, 2008) (citing *Samuel Filisko*, 20 BNA OSHC 2204, 2206, 2005 CCH OSHD ¶ 32,855, p. 52,962-63 (No. 04-1465, 2005) ("[L]ate filing alone without evidence of prejudice, contumacious conduct and/or a pattern of disregard for Commission rules would not be a basis for dismissing this case.")); *see also Merchant's Masonry Inc.*, 18 BNA OSHC 1936, 1937, 1999 CCH OSHD ¶ 31,931, p. 47,369 (No. 99-0189, 1999) (stating that the Commission has allowed remand where a small pro se employer makes some factual claims that might justify remand).

Accordingly, we direct this case for review, set aside the judge's decision, and remand this case to the judge for further proceedings. *See* 29 C.F.R. § 2200.90(b)(3) (relief from default); 29 C.F.R. § 2200.101(b) (motion to set aside sanctions). On remand, we instruct the

judge to allow the parties an opportunity to present any relevant evidence regarding the claims in Ms. Kent's May 23, 2015 letter to the Commission, including evidence that a signed copy of the settlement agreement was among those documents that Respondent asserts were signed and "sent."¹

SO ORDERED.

/s/
Cynthia L. Attwood
Acting Chairman

/s/
Heather L. MacDougall
Commissioner

Dated: June 5, 2015

¹ If the judge determines that the settlement documents were either not sent to the Secretary or are no longer in Respondent's possession, he may choose to instruct the Secretary to provide another copy of the agreement to Respondent, and afford the parties an opportunity to finalize the agreement and submit it (along with any other required documents) to the judge for approval. The judge may also consider verifying with the Secretary that the two payments purportedly made by Respondent were received and accepted by OSHA and if so, reflect that fact in any order approving the settlement.



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SECRETARY OF LABOR,
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v.

LARRY MCMURRAN, dba LAR'S PLUMBING,
INC.,
Respondent.

OSHRC Docket No.: 14-1806

DECISION AND ORDER OF DEFAULT FOR FAILURE TO SHOW CAUSE

On March 24, 2015, the undersigned issued an Order to Show Cause and ordered Respondent to show cause within 10 days of the date of the order, (1) why it had failed to participate with the Solicitor of Labor in finalizing a previously-agreed to settlement agreement in the above-styled case; (2) why it failed to return multiple phone calls from Complainant's representative, and (3) why it failed to keep the Court advised of any changes to its business telephone number.

Respondent was advised that failure to comply with the Order to Show Cause would result in the dismissal of its Notice of Contest, the affirming of the citation, and the assessing of the proposed penalties without a hearing. The Order to Show Cause was sent by first class certified mail, return receipt requested. The return receipt card that accompanied the certified mail was returned to the Commission on April 3, 2015, with a signature and receipt date of March 30, 2015.

The record in this case reveals that Respondent has failed to reply to the Order to Show Cause. Respondent's actions demonstrate either that it has abandoned this case or that it treats the Commission's Rules of Procedure ("Rules") with disdain. This cannot be countenanced, as it seriously impedes the administration of justice.

Rule 101(a) of the Commission's Rules, 29 C.F.R. 2200.101(a), provides in pertinent part as follows:

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 ... on the initiative of the ... Judge, after having been afforded an opportunity to show cause why

he should not be declared to be in default....Thereafter, the ... Judge, in [his or her] discretion, may enter a decision against the defaulting party.

There is clear evidence in the record that Respondent has received a copy of the Order to Show Cause. A judge has very broad discretion in imposing sanctions for noncompliance with the Commission's Rules or the judge's orders. *See Sealite Corp.*, 15 BNA OSHC 1130, 1134 (No. 88-1431, 1991). In view of the record before me, the undersigned finds that Respondent has been given proper notice of the administrative proceedings in this matter and that it had been advised of its opportunity to respond to the Order to Show Cause.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Respondent is declared in DEFAULT, its Notice of Contest is DISMISSED, and the citation items issued in this matter are AFFIRMED, and that all proposed penalties are hereby assessed.

/s/

JOHN H. SCHUMACHER

Judge, OSHRC

Dated: May 6, 2015
Denver, CO