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. HEAVE HO CRANE COMPANY, Respondent.	OSHRC Docket No. 14-0250

DIRECTION FOR REVIEW AND REMAND ORDER

Before: ROGERS, Chairman; ATTWOOD and MACDOUGALL, Commissioners.

BY THE COMMISSION:

In an order dated August 13, 2014, Administrative Law Judge John B. Gatto found Respondent, appearing pro se, to be in default, and accordingly affirmed a one-item serious citation with a total penalty of $2,000. On September 2, 2014, Respondent filed a petition seeking review of the judge's default order. For the following reasons, we direct this case for review, set aside the judge's decision, and remand this case for further proceedings consistent with this opinion.

Procedural Background

On February 11, 2014, Respondent timely contested the citation, and the case was designated for simplified proceedings pursuant to Commission Rule 203(a), 29 U.S.C. § 2200.203(a). On April 11, 2014, the Secretary notified the judge by email that the parties "ha[d] settled this matter." That same day, the judge entered an order directing the parties to file the settlement for approval within 30 days. On May 23, 2014, the Secretary sought an extension of time to file what he identified as a "Joint Notice of Withdrawal of Citation and Complaint." According to the Secretary, Respondent was sent this document for signature but subsequently "indicated that [the owner] may have inadvertently thrown [it] away," so the Secretary sent Respondent a second copy. The judge granted the Secretary's motion and directed the Secretary

to file the Joint Notice by June 18, 2014.

As of June 30, 2014, the parties had yet to file the document, so the judge issued a scheduling order setting the matter for hearing, and directing the parties to confer and discuss several issues.[1] He also ordered the parties to file "position statements" by July 18, 2014, which the Secretary did, but Respondent did not. In his response, the Secretary asserted that "[o]n multiple occasions, representatives for the Secretary have attempted to contact Respondent . . . and Respondent has refused to discuss the matter and/or cooperate." The Secretary also represented that while "[t]he parties had engaged in settlement negotiations and reached a settlement in principle," Respondent "ha[d] repeatedly refused to execute the agreement."

On July 29, 2014, the judge issued Respondent a show cause order in which he found, based on the Secretary's prior assertions, as well as the company's failure to file its position statement and confer with the Secretary as ordered, that "Respondent's conduct was contumacious conduct and established a pattern of disregard for Commission proceedings." The judge directed Respondent to show cause by August 12, 2014, in affidavit form, why it should not be declared to be in default for these failures. On August 12, 2014, Respondent filed its response with the judge by facsimile. Respondent stated that the company should not be held in default because "[t]he matter was settled on April 11, 2014." Respondent also stated that:

> By your order I was instructed to send this in affidavit form, however, my internet service is temporarily out of service. Therefore I can not [sic] use my internet to locate said form. If after my service is restored you still require this information to be placed in a different format then I will resubmit it.

The judge issued his default order the next day. He found that Respondent did not submit its response in affidavit form, nor had the response been served on the Secretary. The judge concluded that "[e]ven if the Court accepts Respondent's unsworn statement, the Court finds the response to be insufficient to overcome a default." The judge accordingly dismissed Respondent's notice of contest, affirmed the citation, and assessed the $2,000 proposed penalty.

[1] A July 3, 2014 letter from the Secretary to the judge memorializes "recent communications" with the judge's staff, and "confirm[s] that this matter . . . should be placed back on the active docket and scheduled for a hearing . . . ." The Secretary asserts that "the representative for Respondent . . . has declined to sign the necessary documents that would jointly be filed to achieve closure of this case."

In its Petition for Discretionary Review, Respondent asserts that the parties had "mutually settled" the matter, and it had "received written notification that all actions by OSHA had been suspended [and] the matter closed, and specifically advising [Respondent] that no further action on [its] part was required." While Respondent acknowledges that "[t]his was followed by sporadic . . . communications indicating that subsequent actions (form signatures, etc.) were required," Respondent maintains that "this stood in direct contravention to [the company] having been advised that the matter was completely resolved and closed, [and therefore] no further action was taken." Respondent also challenges the judge's reliance on its failure to respond to the show cause order in affidavit form and reiterates the offer it made in its response to resubmit its submission in any form the judge might require if it had time to prepare.[2]

Discussion

Commission Rule 101(a), 29 C.F.R. § 2200.101(a), permits the sanction of default for failure to plead or otherwise proceed as required by the Commission's rules or by the Commission or judge.[3] The Commission has held that a default sanction may be appropriate "where a party displays a 'pattern of disregard' for Commission proceedings." *Bilodeau Homes*, 21 BNA OSHC 1292, 1293, 2004-09 CCH OSHD ¶ 32,805, p. 52,531 (No. 05-0231, 2005) (citations omitted); *Samuel Filisko d/b/a Associated Contractors Group*, 20 BNA OSHC 2204, 2206, 2004-09 CCH OSHD ¶ 32,855, p. 52,963 (No. 04-1465, 2005); *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547, 2001 CCH OSHD ¶ 32,424, p. 49,975 (No. 00-0389, 2001). As the Commission has recognized, however, "dismissal of a citation is too harsh a sanction for failure to comply with certain prehearing orders unless the record shows contumacious conduct by the noncomplying party or prejudice to the opposing party." *Bilodeau*, 21 BNA OSHC at 1293, 2004-09 CCH OSHD at p. 52,531; *Samuel Filisko*, 20 BNA OSHC at

[2] Respondent also argues that certain "court-served documents and communications" were not received by it, but does not identify the documents.

[3] This rule, formerly Commission Rule 41(a), 29 C.F.R. § 2200.41(a), states:

> § **2200.101 Failure to obey rules**. (a) Sanctions. When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or Judge, he may be declared to be in default either on the initiative of the Commission or Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default, or on the motion of a party. Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.

2206, 2004-09 CCH OSHD at p. 52,963; *Architectural Glass & Metal Co.*, 19 BNA OSHC at 1547, 2001 CCH OSHD at p. 49,975. *See also* Commission Rule 101(b), 29 C.F.R. § 2200.101(b) (a default sanction may be set aside "[f]or reasons deemed sufficient by the Commission or Judge").

We conclude that the shortcomings identified by the judge in his default order do not support a finding of contumacy or a pattern of disregard for Commission proceedings. Respondent filed a response to the show cause order within the time mandated by the judge, explaining its previous inaction and offering to resubmit the response in a different format if necessary.[4] Because Respondent offered an explanation in its timely response as to why the company thought no further action on its part was required, we find no basis for contumacy. *See Sealtite Corp.*, 15 BNA OSHC 1130, 1133, 1991 CCH OSHD ¶ 29,398, p. 39,581 (No. 88-1431, 1991) ("[T]he Commission has attempted to make allowances for pro se employers who have failed, through ignorance of our rules and of legal procedures, to comply with its procedural requirements. . . . [T]he ultimate sanction of dismissal should be imposed on a party only when that party has been guilty of contumacious conduct or the other party has been prejudiced in preparing or presenting its case by the conduct of the noncomplying party.") (citations omitted).

Moreover, it appears from the record that both parties believed they had reached resolution in this case, although no settlement agreement or notice of withdrawal has been submitted to the judge. The Secretary's description of this document as a "Joint Notice of Withdrawal of Citation and Complaint" is inconsistent with other references throughout the record identifying the document as a "settlement," so we cannot be certain whether the nature or terms of the document are appropriately labeled a settlement, a withdrawal of citation, or both. Indeed, a withdrawal would presumably not require Respondent's signature, nor would it require approval by the judge. *See Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3 (1985) (holding that Secretary's discretion to withdraw citation is unreviewable). In this regard,

[4] We note that Commission Rule 101(a) does not require a show cause response to be in affidavit form, and we find no compelling reason to have required one in this case. Such a requirement seems to be at odds with long-standing Commission practice of making reasonable procedural accommodations for pro se parties, particularly when the matter has been assigned—as this case was—to simplified proceedings. *See, e.g., Sealtite Corp.*, 15 BNA OSHC 1130, 1133, 1991 CCH OSHD ¶ 29,398, p. 39,581 (No. 88-1431, 1991). In addition, we note that contrary to the judge's finding, Respondent's show cause response indicates that it was sent by facsimile to the Secretary as well as the judge.

Respondent might have been confused by the communications from the Secretary about the case's resolution, particularly an April 25, 2014 letter sent to the company but with a salutation to the judge.[5]

Under these circumstances, we find that the record lacks evidence sufficient to support a finding of contumacy, and we therefore set aside the default order. On remand, the judge is directed to determine the status of the case and proceed accordingly. We also alert Respondent that any failure to respond, or to comply with the judge's orders, could result in sanctions, including a default order if such conduct amounts to a pattern of disregard for Commission proceedings. *See Imageries*, 15 BNA OSHC 1545, 1547, 1991-93 CCH OSHD ¶ 29,639, p. 40,130 (No. 90-378, 1992) (while parties appearing pro se may "require additional consideration of their circumstances[,]" such litigants "are not exempt from following Commission rules and procedures . . . .").

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Heather L. MacDougall
Commissioner

Dated: September 18, 2014

[5] The record contains two cover letters addressed to Respondent from the Secretary that purport to include the Joint Notice for signature; both letters, but not the attachments, were copied to the judge. The first, dated April 25, 2014, is addressed to Respondent, but its salutation states "Dear Judge Gatto[.]" The second, dated April 30, 2014, has the correct salutation.

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THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Complainant, v. HEAVE HO CRANE COMPANY, Respondent.	OSHRC DOCKET No. 14-0250

DEFAULT JUDGMENT

On July 28, 2014, the Court issued a Show Cause Order to Respondent, which found that based upon Respondent's failure to file a position paper as previously ordered by the Court, that Respondent was in default of the Court's order and further, that Respondent's conduct was contumacious conduct and established a pattern of disregard for Commission proceedings. Thus, the Court directed Respondent to show cause on or before August 12, 2014, by filing with the Court and serving on the Secretary in affidavit form a statement as to the reason(s) the Respondent should not be declared to be in default for failing to confer and discuss with the Secretary's Counsel, and for failing to file a position paper with this Court.

The Court's Show Cause Order also gave notice to Respondent that if it failed to timely file a response in affidavit form, Respondent would be held in default, the notice of contest would be dismissed, all of the alleged violations set out in the OSHA citation would be affirmed, and that the Secretary's proposed penalties would be assessed in full. Respondent did not file a response in affidavit form as directed by the Court in its Show Cause Order. Instead, on the date the response in affidavit form was due, the Respondent filed by facsimile transmission as statement, which was not served on the Secretary, that simply stated that "On April 11, 2014 the Secretary's Counsel notified the court by email that the parties had settled the matter."

As the Court noted in the Show Cause Order, the Respondent was in default for failing to confer with the Secretary regarding the submission of a settlement agreement, for failing to sign the settlement agreement, and thereafter, failing to confer and discuss with the Secretary's Counsel regarding the filing of a joint position paper with this Court, which the Court required as a result of Respondent's refusal to sign the settlement agreement or confer at all with the Secretary and the placement of the action back on the trial calendar. Even if the Court accepts Respondent's unsworn statement, the Court finds the response to be insufficient to overcome a default. Accordingly,

IT IS HEREBY ORDERED THAT Respondent is in default, Respondent's notice of contest is dismissed, all of the alleged violations set out in the OSHA citation are affirmed, and the Secretary's proposed penalties are assessed in full.

SO ORDERED THIS 13th day of **August, 2014**.

/s/
JOHN B. GATTO, Judge
U.S. Occupational Safety and
Health Review Commission