



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.

DHL EXPRESS, INC.,
Respondent.

OSHRC Docket No. 07-0478

APPEARANCES:

Stanley E. Keen, Regional Solicitor; Michael P. Doyle, Counsel for Appellate Litigation, Charles F. James, Counsel for Appellate Litigation; U.S. Department of Labor, Washington, DC

For the Complainant

John C. Artz, Esq., and David E. Jones, Esq.; Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Atlanta, GA

For the Respondent

DIRECTION FOR REVIEW AND REMAND ORDER

Before: THOMPSON, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

In an order dated June 14, 2007, Chief Administrative Law Judge Irving Sommer entered a default judgment against DHL Express, Inc. ("DHL") for failing to file an answer and failing to respond to an order to show cause. DHL has now filed a petition for discretionary review requesting that the Commission remand the case for reinstatement and proceedings on the merits of the citations. For the following reasons, we hereby direct review of this case, vacate the default judgment, and remand the case to the judge, ordering him to reinstate the case for further proceedings on the merits of the citation allegations.

Procedural Background

The Occupational Safety and Health Administration issued DHL a thirteen-item serious citation and a one-item other-than-serious citation, alleging violations of the safety standards in 29 C.F.R. Part 1910, following a January 17, 2007 inspection of DHL's Miami Gateway facility. The Secretary proposed a total penalty of \$25,500 for the serious citation and no penalty for the other-than-serious citation.

On February 27, 2007, after settlement negotiations failed, DHL's non-attorney site manager filed a timely notice of contest. On April 2, the judge issued an order granting the Secretary's Motion for Leave to File Complaint Instanter, and directing DHL to file an answer within twenty days of the date of the order. DHL did not file an answer, and on May 18 the judge issued an order requiring DHL to show cause why its notice of contest should not be dismissed. DHL again filed no response and on June 14, the judge issued an order affirming the Secretary's citations and proposed penalties.

In its petition for discretionary review, DHL claims that the company's failure to respond to the judge's orders was a result of an internal miscommunication. The site manager, after filing the notice of contest, contacted the company's legal department for assistance and forwarded both the complaint and the judge's order to show cause to the legal department, believing the company's attorney would respond to the judge. According to DHL, the attorney was unaware he was expected to address the forwarded documents and, therefore, the company filed no response.

Discussion

Commission precedent follows the policy in law that favors deciding cases on their merits. *See Duquesne Light Co.*, 8 BNA OSHC 1218, 1222, 1980 CCH OSHD ¶ 24,384, p. 29,719 (No. 78-5112, 1980). Accordingly, the Commission has held that a default judgment 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," or "where a party displays a 'pattern of disregard' for Commission proceedings." *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547, 2001 CCH OSHD ¶ 32,424, p. 49,975 (No. 00-0389, 2001) (citations omitted). Sanctions will be set aside where the sanctioned party missed pre-hearing conferences or filings as a result of "excusable neglect," that is, where the party's noncompliance was due to negligence, inadvertence, mistake, or carelessness. *See Amsco, Inc.*,

19 BNA OSHC 2189, 2191 (No. 02-0220, 2003) (setting aside dismissal sanction and remanding case where attorney was unavailable for pre-hearing teleconference and did not respond to phone message; these actions “[t]hough troubling . . . without more, fall[] short of contumacious conduct warranting a default sanction”). Sanctions, however, are an appropriate tool to ensure compliance where the sanctioned party has engaged in a pattern of disregard for Commission rules, or where the party’s conduct was contumacious. *See, e.g., Phila. Constr. Equip. Inc.*, 16 BNA OSHC 1128, 1130-31, 1993-95 CCH OSHD ¶ 39,051, p. 41,295 (No. 92-899, 1993) (pattern of disregard for Commission proceedings found where respondent was late for hearings twice, failed to certify posting of the citation and failed to file an answer until threatened with dismissal, failed to respond to a discovery request, and failed to respond to a pre-hearing order); *Sealtite Corp.*, 15 BNA OSHC 1130, 1134, 1991-93 CCH OSHD ¶ 29,398, p. 39,582 (No. 88-1431, 1991) (judge correctly found respondent’s behavior “contumacious” where respondent failed to make a timely response to the judge’s order and continued to raise irrelevant issues even after the judge’s warnings).

Here, we find that DHL’s failure to respond to the judge’s orders, while clearly problematic, was the result of “excusable neglect” and not “contumacious conduct.” At the start of the case, DHL’s non-attorney site manager diligently pursued the matter by engaging in settlement negotiations with the Secretary and filing a timely notice of contest. DHL’s noncompliance began only as a result of the miscommunication between the site manager and the legal department. This miscommunication was not the result of conscious disregard of Commission rules, but was the type of negligence, inadvertence, mistake, or carelessness for which the Commission has vacated sanctions in the past. *See Amsco, Inc.*, 19 BNA OSHC at 2191 (describing “excusable neglect”). Finally, there is nothing to suggest that DHL’s failure to comply prejudiced the Secretary, nor is there information in the record to support a prejudice claim.

Accordingly, we direct this case for review, set aside the judge's order, and remand the matter to the judge for further proceedings on the merits of the citations. *See* Commission Rule 101(b), 29 C.F.R. § 2200.101(b).

SO ORDERED.

/s/
Horace A. Thompson III
Chairman

/s/
Thomasina V. Rogers
Commissioner

Dated: July 16, 2007

Secretary of Labor,

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Respondent.

OSHRC DOCKET 07-0478

ORDER

On 5/18/07 the undersigned issued an **ORDER TO SHOW CAUSE** to the Respondent as to why his Notice of Contest should not be dismissed for failure to file an answer to the complaint as required by the Commission Rules of Procedure. The Respondent failed to reply to the ORDER. His actions demonstrate either that he has abandoned the case or treats the Rules of Procedure of the Commission with disdain. This cannot be countenanced as it seriously impedes the administration of justice.

Accordingly, the Notice of Contest filed by the Respondent is dismissed. The Secretary's citation(s) and proposed penalties are **AFFIRMED** in all respects.

/s/
IRVING SOMMER
Chief Judge

Date: June 14, 2007
Washington, DC